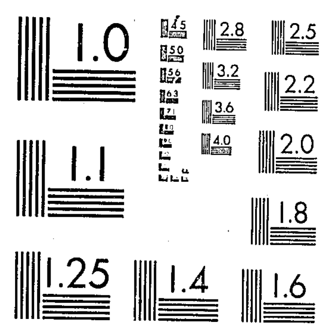

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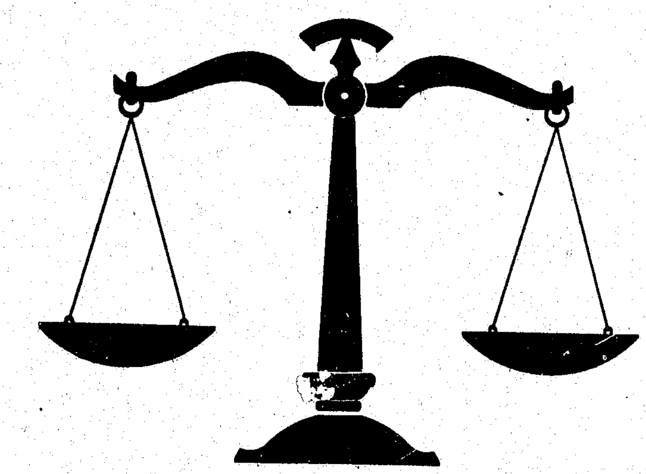

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Virginia Department of Transportation Safety

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Report Prepared by the Virginia Highway and Transportation
Research Council Under the Sponsorship of the
Virginia Department of Transportation Safety

(The opinions, findings, and conclusions expressed in this report are those of the authors and not necessarily those of the sponsoring agencies.)

Virginia Highway and Transportation Research Council
(A Cooperative Organization Sponsored Jointly by the Virginia
Department of Highways & Transportation and
the University of Virginia)

Charlottesville, Virginia

December 1978

VHTRC 79-R28

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ABSTRACT

The purpose of this report is to evaluate the need for alternative court procedures in Virginia for handling cases involving persons charged with driving under the influence of alcohol (DUI), with particular focus on the referral of DUI offenders to the Virginia Alcohol Safety Action Program (VASAP). In February 1978, the Virginia General Assembly passed House Joint Resolution No. 102, which created a Commission to study all aspects of Virginia's drunk driving laws. This report, designed to aid the Commission in its inquiry, discusses four issues specifically raised by House Joint Resolution No. 102:

1. Whether the law should limit the discretion presently given the trial judge;

2. whether convictions for DUI should be required prior to entry into rehabilitation programs;

3. whether work privileges to operate a motor vehicle should be issued instead of allowing an offender to retain his full driving privilege; and

4. whether second offenders should be given another opportunity to enter a rehabilitation program.

In order to evaluate these issues, questionnaires were mailed to all the general district court, circuit court and juvenile court judges, all commonwealth's attorneys and local VASAP directors, and a random sample of state and local police. The questionnaires were designed to discover the present court procedures being used in DUI cases and to elicit the participants' opinions on possible alternatives to the present procedures. Overall, 78% of the questionnaires were answered.

The report presents an analysis of the questionnaire results along with a brief review of the literature evaluating the effectiveness of rehabilitation programs and hardship licenses as highway safety countermeasures. On the basis of this analysis, the authors recommend several revisions to the existing statutes and practices.

SUMMARY OF FINDINGS AND CONCLUSIONS

In the following paragraphs, "First Offenders" are defined as persons who have never been referred to the VASAP; "Second Offenders" as persons who have been given one prior opportunity to participate in the VASAP; and "Multiple Offenders" as persons who have been given two or more prior opportunities to participate.

1. This study was not designed to be an in-depth evaluation of the effectiveness of the VASAP. The authors did not collect any new data other than the questionnaire results, and analyzed only those statistics contained in reports published by the VASAP administrative office. It is virtually impossible to evaluate the effectiveness of the VASAP given the limited information now available. Data which do presently exist fail to conclusively prove that the program has been successful in improving highway safety. Certain trends, such as a reduction in the average BAC level of persons arrested for DUI and low recidivism rates in local programs, suggest possible effectiveness, but these data are by no means definitive. It has not been shown that the VASAP has significantly reduced the rates of alcohol-related traffic fatalities and crashes.

   Regardless of whether highway safety statistics will verify the effectiveness of the VASAP after a longer period of operation, most judges and prosecutors generally support the program and its approach to the DUI offender. Less than 5% of the court officials believe that rehabilitation should never be used in DUI cases, and 92% of the general district court judges presently use the VASAP. However, it is clear that many judges and prosecutors disagree with one or more aspects of Virginia's DUI law.

2. A review of the literature available on the impact of the federal ASAP projects outside of Virginia yielded no conclusive evidence that the ASAPs as a group have improved highway safety. It is reasonable to infer that the programs have not had a substantial impact in reducing the number of alcohol-related crashes and fatalities. However, they have had positive side effects in improving the administration of DUI cases and in helping to detect and assist individuals with drinking problems. Studies conducted on the effectiveness of rehabilitation of the drinking driver have shown that this approach has not been proven consistently effective in reducing DUI recidivism or improving driving behavior. While some of the rehabilitation programs established outside of Virginia have been successful in reducing DUI recidivism, others have not shown a positive impact.

3. Judges are making wide use of their discretion under §18.2-271.1 to determine what is required of an offender prior to referral to the VASAP. Less than 20% of the judges convict a first offender prior to entry into the VASAP; most require only a guilty plea or evidence sufficient to support a finding of guilt. This flexibility in the present statute leads to wider judicial acceptance of the program than would be the case if the statute either required a conviction for all first offenders prior to referral or removed the option to convict prior to referral.

4. The VASAP is being used extensively in the courts. More than 80% of general district court judges in VASAP areas refer to the program three-quarters or more of the first offenders who appear in their courts. A prior DUI conviction or the offender's involvement in a fatal accident are the primary reasons why a first offender who desires to enter the program may not be referred to it.

Nearly one-half of the judges do not agree with the principle that every DUI offender should have one opportunity to enter a rehabilitation program. Over 75% of the judges and prosecutors oppose a change in the law to require mandatory referral to the VASAP of all first offenders. These statistics indicate that the judges want continued discretion to determine whether a first offender should be allowed to enter the program.

5. Many officials who presently do not receive a report based on a pre-referral investigation into the DUI offender's personal and social background indicated that the court should receive such a report. The courts and local VASAP offices should cooperate in a study of the feasibility of conducting such an investigation. It may be that the costs in time and resources of an investigation outweigh the potential value. Also, judges and prosecutors sometimes fail to receive information indicating that a person is a second offender, or that he is enrolled in rehabilitation in another VASAP area. Lines of communication between the VASAP and the courts must be strengthened to ensure that all officials receive at least this information. The driving records of all DUI offenders should contain a notation indicating the ultimate disposition of any DUI offense and VASAP participation, if any.

6. Although a majority (60%) of judges waive the required fee for entering the program for offenders who are indigent, there is serious need for revision of §18.2-271.1 to provide that no persons are denied the opportunity for rehabilitation because of inability to pay. Requiring the offender in such cases to file an affidavit of indigency would relieve some of the administrative burdens on the courts which might result from this change.

7. The great majority of offenders who are referred to the VASAP successfully complete the program, and over 90% of the judges never impose a DUI conviction on these defendants. Instead, judges prefer to amend the warrant and convict the offender of a lesser offense, usually reckless driving. About 25% to 30% of the judges often accept completion of the program "in lieu" of a conviction for DUI. Because the circumstances surrounding DUI cases vary, it is advisable to continue to allow the judge discretion to either convict the defendant for DUI or amend the warrant if the VASAP is successfully completed. However, the present discretion might be limited by eliminating the VASAP "in lieu" option, a revision which would ensure that all DUI offenders are convicted of some offense and have at least minimum action (demerit points) taken against their licenses.

8. Less than 20% of the judges generally refer DUI recidivists to the VASAP a second time. The trial judge should continue to have the option to refer second offenders because a second chance may be justifiable in certain circumstances. The vast majority of court officials believe that §18.2-271.1 should be amended to require that all second offenders be convicted of DUI prior to referral to the VASAP.

It is rare that a DUI offender is referred to the program a third time. Over 90% of the judges would not refer the multiple offender to the VASAP, and an equal number of judges support requiring a DUI conviction for multiple offenders. The law should require a DUI conviction for all multiple offenders, and allow the judge to refer such persons to the VASAP only in extreme and unusual circumstances. Most court officials believe that requiring a conviction for second and multiple offenders would not have adverse effects on court administration.

9. Some type of incentive is necessary to induce the offender to successfully complete the VASAP. The most powerful tool would be action taken against the offender's driving license. Presently, persons who are referred to the VASAP without a prior conviction for DUI usually retain a full license. Over 60% of the judges and prosecutors favor this practice for first offenders, while only 20% support retention of the full license for second offenders. In addition, 68% of the judges thought that allowing the offender to keep his license while in the VASAP induces him to complete the program.

One possible alternative would be to offer a restricted license to first offenders entering the VASAP, coupled with the threat of mandatory suspension of the license if the offender fails to successfully complete the program. Over 65% of the judges favor a restricted license for first offenders, and nearly 75% believe that a restricted license would act as an incentive for the offender to complete the VASAP. Although a review of the literature revealed that restricted licenses may be more effective than license suspension in improving driving behavior, no study indicated that a restricted license, when used in the context of a DUI offense, would effectively reduce DUI recidivism. In addition, no study has examined the effectiveness of restricted licenses when issued in conjunction with referral to a rehabilitation program. A restricted license would also be difficult to enforce.

A second alternative would be to amend §18.2-271 (mandatory suspension of the license) to create a licensing system which uses judicial discretion to reduce the period of suspension as an incentive for persons referred to the VASAP to successfully complete the program. The questionnaire results suggest that a majority of judges would support this alternative. The specifics of this revision in §18.2-271 are noted in the "Recommendations" section and begin on page 63 of the report. Discretionary suspension of the license will take place prior to an offender's entry into VASAP; thus first offenders may, and second offenders certainly will, have no license while in the program. Because the discretionary period of suspension will be shorter than under the alternative of mandatory suspension, the offender will have an incentive to successfully complete the VASAP and suffer the initial discretionary suspension, rather than face the longer period without a license which would result from his failure to successfully complete the program.

RECOMMENDATIONS

1. Permit the judge to retain the discretion under Va. Code Ann. §18.2-271.1(a) to refer first offenders to the VASAP upon a plea of guilty or after hearing evidence sufficient in law to give rise to a finding of guilt with or without a finding of guilt. Also, the judge should retain the discretion to refer or not refer first offenders to the VASAP.

2. Amend Va. Code Ann. §18.2-271.1(a) to provide that the court shall require a conviction for DUI before referring second and multiple offenders to the VASAP. In addition, the judge should be permitted to retain the discretion to refer second offenders to the program if the circumstances of the case warrant referral. Multiple offenders should either not be referred at all or be referred only under extreme and unusual circumstances.

3. Amend Va. Code Ann. §18.2-271 to provide that —
   (a) first offenders who are referred to the VASAP upon a conviction for DUI or who are convicted of DUI after successfully completing the program be deprived of the right to drive for a period of not more than 3 months in the discretion of the court;

   (b) first offenders who drop out of the VASAP or who otherwise fail to successfully complete the program after receiving a reduced licensing sanction under subsection (a) be subject to a loss of license for 6-12 months;

   (c) first offenders who successfully complete the VASAP after a conviction for DUI remain subject to the initial licensing sanction of 0-3 months;

   (d) the mandatory licensing sanction be reduced by as much as one-half for those second offenders who are referred to the VASAP and be retained if the offender successfully completes the program; and

   (e) second offenders who drop out of the VASAP or otherwise fail to successfully complete the program after receiving a reduced licensing sanction under subsection (d) be subject to a mandatory loss of license under the present terms of §18.2-271.

The licensing provisions for multiple offenders and offenders not referred to the VASAP should remain the same.

4. Amend Va. Code Ann. §18.2-271.1(a1) to provide for waiver of part or all of the required fee for entrance into the VASAP for persons determined to be indigent by the court.

5. Amend Va. Code Ann. §18.2-271.1(b) to delete that portion which permits the court to accept completion of the VASAP in lieu of a conviction for DUI or a lesser offense.

6. Adopt legislation requiring the court to note on the offender's record his participation or nonparticipation in the VASAP along with the final disposition of the case. Notice of these facts should be forwarded to the Division of Motor Vehicles to be included on the offender's driving record.

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INTRODUCTION

General Background

The combination of alcohol and driving is one of the most destructive forces in our society. Nationwide, alcohol abuse on the highway contributes to some 24,000 deaths, at least 700,000 vehicle crashes, (1) and several billion dollars lost in damage to persons and property each year. (2) Although Virginia's record of highway safety is better than average, the state is by no means exempt from the impact of the drinking driver. More than a third of all drivers involved in fatal crashes in Virginia during the past year had been drinking. (3)

An innovative approach to the drunk driving problem was begun in 1972, when the National Highway Traffic Safety Administration (NHTSA) of the U. S. Department of Transportation established 35 experimental Alcohol Safety Action Programs (ASAPs) across the country. Although each individual ASAP used different techniques, all were founded on the belief that traditional criminal penalties such as fines and jail sentences had been ineffective in deterring drinking while driving. Instead, the ASAPs applied a mixture of traditional penalties with noncriminal sanctions such as driver education and rehabilitation. Generally, each person arrested for driving under the influence of alcohol (DUI) in an ASAP area would be classified according to his individual drinking problem. Criminal sanctions were then to be used not as punishment, but only to coerce attendance and good behavior at the appropriate educational agency. An offender who cooperated in the rehabilitation program would either have the normal penalties for a DUI conviction suspended or have his DUI charge reduced to a lesser criminal offense. The ASAPs sought to eliminate costly and time-consuming backlogs of DUI cases present in many areas by shifting the emphasis away from trial and conviction, focusing instead on charge bargaining and reduction of sentences. (4)

One of the federally-funded ASAPs was established in Northern Virginia in early 1972. The Fairfax ASAP study area included the cities of Fairfax and Falls Church, the towns of Herndon and Vienna, and the county of Fairfax, which included a total study population of nearly 590,000 residents. Extensive evaluations made during the ASAP period revealed a definite reduction in the number of personal injuries, fatal injuries and fatal crashes in the Fairfax area from what would have been predicted based upon trends established over the previous 15 years. (5) DUI arrest rates in the Fairfax area rose dramatically, from about 130 per year prior to the ASAP to almost 3,500 per year during the ASAP years. (6) Studies also indicated that the rate of repeat DUI offenders was higher for those persons not referred to the program than for ASAP participants, (7) and that the ASAP had increased public awareness of the drinking-driving problem. (8)

In response to these results in Fairfax, the 1974 General Assembly passed a resolution directing the Committee on Health, Welfare and Institutions to determine the feasibility of using the ASAP approach on a statewide basis. The Committee concluded that the ASAP was worthwhile in reducing alcohol-related highway accidents and recommended statewide implementation. This took place following the passage of House Bill 1662 in March of 1975. (9)

The statewide Virginia Alcohol Safety Action Program (VASAP) has grown steadily since 1975 and now covers more than 80% of the state's population, with several more VASAP areas in the planning stage. (10) The Virginia Department of Transportation Safety (formerly the Highway Safety Division) has been assigned the task of statewide administration and evaluation of programs. (11) Although each locality in the state is free to vary its specific program according to local needs, the general approach is modeled upon that of the Fairfax project — each DUI offender referred to the VASAP by the court is interviewed and classified according to drinker type, and is then assigned to education or treatment commensurate with his drinking problem.

Present Virginia DUI Law

Section 18.2-270 of the Virginia Code authorizes traditional criminal penalties for persons convicted of DUI. The sanction for first offenders is either a jail term of not more than 6 months, a fine of not more than $500, or both; persons convicted of a second or subsequent offense within 10 years of the first DUI conviction face a fine of $200 to $1,000 and a 1-month to 1-year jail term. (12) Virginia law also requires mandatory suspension of the driver's license upon conviction for DUI. First offenders must forfeit the driving privilege for 6 months to 1 year, while second offenders lose the license for a period of 3 years. (13)

The statute which created a statewide VASAP in 1975, now section 18.2-271.1 of the Virginia Code, allows for great flexibility in court procedures dealing with the drinking driver. Subsections (a) and (a1) provide that persons arrested for a first, second or subsequent DUI offense may, with leave of court or upon court order, enter a local VASAP or other rehabilitation program. Persons entering a local VASAP are required to pay a fee of not more than $200. The trial judge may refer a DUI offender to the program following a plea of guilty or after presentation of evidence sufficient to give rise to a finding of guilt, but the statute does not require a conviction for DUI prior to referral. As a result, the mandatory license suspension provisions of the Code do not take effect when there is no DUI conviction, and these offenders who are referred are generally permitted to retain a full driving privilege. Courts are also given broad power to set conditions upon entry into the rehabilitation program. (14)

Subsection (b) of the VASAP authorizing statute gives the trial court further discretion as to final disposition of the DUI case. If the offender is refused entry into the VASAP, or following referral violates any condition set forth by the court, the judge is authorized to dispose of the case as if the VASAP did not exist. In such cases the traditional criminal penalties outlined above will apply to persons ultimately convicted of DUI. If the offender successfully completes the rehabilitation program and complies with all conditions, the trial judge has the freedom to apply any of three options. He may convict the offender for DUI despite successful completion of the VASAP and apply (or suspend) any of the traditional criminal penalties authorized under Section 18.2-270; he may accept completion of the program in lieu of a conviction for DUI and the resulting penalties; or he may amend the warrant and reduce the charges, ultimately convicting the offender for a lesser offense such as reckless or improper driving. (15)

Background to the Present Study

House Joint Resolution No. 102 (see Appendix A), passed by the Virginia General Assembly in February 1978, created a Commission to study all aspects of Virginia drunk driving laws. Believing that sufficient time had passed since the inception of the statewide VASAP for proper data to be available, the General Assembly directed its Commission to study the effectiveness of the statewide program and to examine whether Virginia law relating to DUI offenders should be changed. This study by the Virginia Highway and Transportation Research Council was requested by the Department of Transportation Safety and is independent of

the Commission's inquiry, but is designed to aid the Commission by providing information on present DUI court procedures and possible alternatives which the state might adopt.

PURPOSE AND SCOPE

The purpose of this report is to evaluate the need for alternative court procedures in Virginia for handling cases involving persons charged with driving under the influence of alcohol (DUI), with particular focus on the referral of DUI offenders to the VASAP. The report discusses four issues specifically raised by House Joint Resolution No. 102:

1. Whether the law should limit the discretion presently given the trial judge;

2. whether convictions should be required prior to entry into rehabilitation programs;

3. whether work privileges to operate a motor vehicle should be issued instead of allowing an offender to retain his full driving privilege ; and

4. whether second offenders should be given another opportunity to enter a rehabilitation program.

In order to evaluate the need for changing the present court procedures in drunk driving cases, a questionnaire was mailed to district court judges, circuit court judges, commonwealth's attorneys, local VASAP directors and a random sampling of state and local police. The major portion of the report presents the results of this survey. A brief review of the literature evaluating the effectiveness of rehabilitation programs is included with the questionnaire analysis. Also included is information from a literature review on the effectiveness of hardship or occupational licensing as a sanction in traffic cases.

METHODOLOGY

This study presents opinions of judges, prosecutors and police who regularly handle cases involving persons charged with DUI. Participants were mailed questionnaires designed to discover the present court procedures being used in drunk driving cases and to elicit their opinions on possible alternatives to the present procedures. Many alternatives involve the amendment of §18.2-271.1.

A total of 523 questionnaires were sent out as follows:

61 Juvenile and Domestic Relations

District Court Judges

103 General District Court Judges

107 Circuit Court Judges

121 Commonwealth's Attorneys

109 Police

22 Local VASAP Directors

Five different questionnaires were prepared. One was developed for juvenile and general district court judges, and the others for each of the four remaining groups. Many questions were common to all the questionnaires while other questions were directed only at certain occupational groups.

Questionnaires were mailed to all of the commonwealth's attorneys and all general district court, circuit court and juvenile court judges in Virginia. They were also sent to each local VASAP director, each state police area sergeant (42) and a random sample (selected by using a table of random numbers) of local police and sheriffs. The questionnaires were enclosed with a cover letter and a return addressed, stamped envelope. (A copy of one of the questionnaires along with the accompanying cover letter is in Appendix B.)

Approximately 55% of the questionnaires were returned by the deadline date set in the cover letter and the questionnaire. All persons who failed to respond to the questionnaire were contacted by telephone and asked to return it as soon as possible. Persons who indicated that they did not receive the questionnaire were mailed another copy. As a result of these efforts, 78% of the questionnaires were finally returned.

Thirty-one of the questionnaires were returned unanswered for the following reasons:

1. Respondents didn't handle DUI cases;

2. the position no longer existed;

3. respondents were new in the position and felt unqualified to answer; or

4. certain judges said only the chief judge answers questionnaires.

Once these presons were eliminated from the sample, the rates of response listed in Table 1 were noted.

Table 1

Rates of Response

Occupation	Number Returned-Sample Size	% Returned
General District Ct. Judges	75 of 87	86
Juvenile and Domestic Relations Ct. Judges	43 of 60	72
Circuit Ct. Judges	75 of 104	72
Commonwealth's Attorneys	89 of 120	74
Police	86 of 99	86
Total	368 of 470	78

Responses were then statistically accumulated so that comparisons could be made among the occupational groups. The responses of the local VASAP directors were accumulated separately and are not included in the tables in the text of the report (their responses can be found in Appendix C). The resulting data are presented with the discussion of each segment of the questionnaire. Statistical analysis was not performed since it was not thought to be particularly relevant to the intended audience. Relevant literature on the effectiveness of rehabilitation programs and occupational licenses is analyzed with the questionnaire results.

Data are presented in the following manner:

Response / Occupation	No	Yes
General District Court	X Y	
Juvenile Court		
Circuit Court		
Prosecutors		
Police		
Total		

X = The number of General District Court judges responding negatively to the question.

Y = The percentage of the General District Court judges who responded negatively to the question.

Finally, from the data revealed by the study, as well as other information available to the authors, recommendations were made regarding the revision of existing DUI laws and procedures.

QUESTIONNAIRE ANALYSIS

Background Information

Introductory Questions

Certain introductory questions were directed at each respondent to determine his familiarity with the VASAP and the present drinking-driving laws. Nearly 80% of the circuit court judges responding to the questionnaire indicated that they reviewed DUI cases on appeal "frequently" or "occasionally", and 72 of 73 Circuit Court judges (99%) believed themselves to be familiar with the VASAP and present DUI trial court procedures. All 89 of the responding commonwealth's attorneys either presently prosecute DUI offenders or have done so in the past, and 91% of the group prosecute in a jurisdiction with a currently operational VASAP. Eighty-four of the 86 state and local police (98%) who returned a questionnaire work in an area where the VASAP is used in dealing with DUI offenders.

Additionally, judges and prosecutors were asked whether or not they had ever attended a seminar on alcohol and highway safety sponsored by the Virginia Highway Safety Division (recently renamed the Department of Transportation Safety). Juvenile court (80%) and general district court (65%) judges showed the highest rates of participation in the seminar with the rates for circuit court judges (47%) and prosecuting attorneys (48%) being somewhat lower (see Table 2).

The responses to these introductory questions point to the conclusion that the overwhelming majority of those officials who responded to the questionnaires are experienced in dealing with DUI offenders, and are generally familiar with the VASAP and the present drinking-driving laws. All persons who did not feel themselves qualified to respond to the questionnaire were removed from the final sample.

Table 2

Have you ever attended a seminar on Alcohol and Highway Safety sponsored by the Highway Safety Division?

Response / Occupation	No	Yes
General District Court	26 34.7%	49 65.3%
Juvenile Court	8 20.5%	31 79.5%
Circuit Court	38 52.8%	34 47.2%
Prosecutors	46 52.3%	42 47.7%
Total	118 43.1%	156 56.9%

Evaluation of VASAP Effectiveness

A comprehensive evaluation of the effectiveness of the VASAP was clearly beyond the scope and resources of this study. The purpose of the next few pages must be much more limited. The first section analyzes the responses to parts of the questionnaire which give an indication as to how well state officials feel the VASAP is working. The second section draws upon the literature on the VASAP and studies made at the Fairfax project in examining whether any positive impact can be statistically verified. The final section offers the reader a brief review of some of the published studies which examine the effectiveness of the rehabilitation approach and the federal ASAP experiments outside of Virginia.

Questionnaire Results

Question 1, directed at all of the occupational groups, was designed to gauge statewide support for the use of rehabilitation in dealing with DUI offenders. As shown in Table 3, more than 93% of the respondents agree that rehabilitation should play some role in DUI cases, while less than 7% believe that

rehabilitation should never be used. Although there is inherent ambiguity in the phrases "as an alternative to" and "in conjunction with", the overwhelming preference for rehabilitation "in conjunction with" traditional criminal sanctions (79% vs. 14%) suggests that most judges and prosecutors do not believe that the VASAP should become a complete substitute for the imposition of licensing actions, fines and jail sentences on the drinking driver. Of all the occupational groups, police were the ones most opposed to the use of rehabilitation, with 15% indicating that rehabilitation and education should not be available for DUI offenders.

Question 3 sought to reveal the extent to which the VASAP is being used by courts. Table 4 shows that around 90% of Virginia judges and prosecutors make use of the program. Juvenile court judges (79%) were the most reluctant to use the program; several of these judges felt that it is applicable only to adults, and that juveniles should be dealt with differently. Persons who answered "no" to the question either work in a non-VASAP area and have no opportunity to use the program, or work in a VASAP area but nevertheless refuse to use the program. The police responded to a slightly different question — whether or not they "approve" of the use of VASAP. Table 4 shows that 34% of the sample group of police do not support the program, while 66% approve of the use of VASAP.

Table 3

In the handling of persons arrested for DUI, driver rehabilitation and education should be used —

_____a) as an alternative to traditional criminal sanctions

_____b) in conjunction with traditional criminal sanctions

_____c) not at all

Response / Occupation	A	B	C
General District Court	10 13.3%	61 81.3%	4 5.3%
Juvenile Court	6 15.4%	32 82.1%	1 2.6%
Circuit Court	13 19.1%	52 76.5%	3 4.4%
Commonwealth's Attorneys	12 13.6%	73 83.0%	3 3.4%
Police	9 10.5%	64 74.4%	13 15.1%
Total	50 14.0%	282 79.2%	24 6.7%

Table 4

Judges and Prosecutors
Do you use VASAP and its local programs in the disposition of cases involving individuals accused of DUI?

Police
Do you approve of using VASAP in the disposition of cases involving individuals accused of DUI?

Response / Occupation	No	Yes
General District Court	6 8.0%	69 92.0%
Juvenile Court	9 20.9%	34 79.1%
Circuit Court	11 14.9%	63 85.1%
Prosecutors	4 4.5%	85 95.5%
Police	29 33.7%	57 66.3%
Total	59 16.1%	208 83.9%

The responses shown in Tables 3 and 4 indicate wide use of the VASAP throughout the state and general agreement that rehabilitation is a proper tool for dealing with DUI offenders. The conclusion that the VASAP has gained support among court personnel is verified through other questionnaire surveys that have been conducted. A Highway Safety Division telephone survey noted in the Third VASAP Annual Report determined that only 13% of a sample group of judges and prosecutors disagreed with the statement that "VASAP will reduce the number of people who drive under the influence of alcohol." (10) Also, a questionnaire directed to general district court judges as part of a Washington and Lee University law review study revealed that 61% of the responding judges believed the VASAP to be successful, while only 9% said it was not. 35 Washington and Lee Law Review 573 (1978). Undoubtedly many court officials believe that it is still too early to tell whether the VASAP has been

effective. Still, it is fair to conclude that most judges and prosecutors support the use of rehabilitation and have some degree of confidence in the program. The responses in Tables 3 and 4 reveal that of the occupational groups, the police support the VASAP the least.

Many respondents used the additional space provided to voice their feelings about the VASAP. These general comments reveal a remarkably wide range of opinions about present DUI laws, and point to the controversial nature of the subject matter. Many favorable comments about the VASAP were received, and some state officials feel the law should remain as it presently exists. These judges and prosecutors praised effective VASAP programs in their localities, cited improved public information about drinking and driving, and pointed to the propriety of distinguishing between social and problem drinkers.

Other respondents were vehement in their denunciation of the VASAP, stating that criminal penalties are more effective in dealing with the drunken driver. Critics of the program recounted experiences with DUI offenders who "laugh about being placed on VASAP", branded the program as a "waste of time" and another instance of state bureaucracy with "unpredictable" administrators, and even went so far as to attribute the 1977 increase in state traffic fatalities to the VASAP.

The views of the vast majority of respondents fell somewhere between these two extremes. Most persons disagreed with at least one or more specific aspects of the present law, while at the same time approving of the presence of the VASAP. Much of the disagreement with present law is revealed in the responses to the "alternative court procedures" questions. The Commission's difficult task will be to reach compromises sufficient to satisfy some of the critics of the present DUI law without alienating support which already exists.

Review of VASAP Literature

It should be noted at the outset that evaluation of the effectiveness of a program such as the VASAP is a difficult process. The fundamental goal of the program is to improve highway safety by reducing crashes, injuries and fatalities related to alcohol and driving. However, serious difficulties in research lie in the way of proving the impact of any safety program on traffic fatalities and crashes. Because the rates of traffic deaths and accidents constantly fluctuate, success can be shown only by reductions which are statistically significant. More important, even if

reductions are found to exist, it is nearly impossible to demonstrate that a particular program such as the VASAP, rather than some other factor, is responsible.

The statewide VASAP, introduced in early 1975, now covers 80% of the state's population, with another 9% being covered by local programs presently in the planning stage which are expected to be operational in 1978. It is estimated that more than 13,000 DUI offenders were referred to local VASAP programs during 1977.(10) This extensive implementation of the statewide program has taken place in such a short period of time that a comprehensive evaluation of its impact has not yet been made.

Insufficient data exist at the present time to allow a proper analysis of the effectiveness of the VASAP. Statistics which are available indicate that the annual number of DUI arrests has increased by 22% since the introduction of the VASAP.(10) It cannot be stated with any certainty that the increase in the arrest rate is the result of VASAP activity, since other factors, including a rise in the number of drivers and in vehicle miles driven over the past 3 years, may have contributed to the increase. It has not been shown that the VASAP has had a significant impact on traffic safety statistics such as alcohol-related fatality and crash rates.(16) Two other indicators which might aid in measuring the program's success in improving highway safety are the rate of DUI recidivism and average BAC level. No information is available which compares the present statewide rate of DUI recidivism with the rates in years prior to the VASAP. Several of the local programs indicate about a 3% recidivism rate,(10) but this figure standing alone offers no measure of effectiveness without a comparison with the pre-VASAP rates. Also, the 3% figure may not include those recidivists who have been arrested in more than one VASAP area.

There is some indication that the average BAC level of persons arrested for DUI may be on the decline. The "VASAP Fact Sheet", a pamphlet published by the state VASAP office, reveals that the mean BAC level in 1977 (0.1765%) was slightly lower than the mean in 1976 (0.1798%). Also, the percentage of individuals with a BAC of 0.20% or above declined from about 40% in 1976 to 37% in 1977.(16) The statistics indicate a slight measure of improvement in highway safety. A lower mean BAC level implies that Virginia police are spotting and removing from the road drinking drivers who may have passed undetected in years past. Although the data suggest that the program is effective to some degree, they are by no means conclusive. The decline in the BAC level from 1976-77 may be merely the normal fluctuation over a year's period, and at any rate is not necessarily attributable to VASAP activity.

The only detailed studies of program effectiveness made thus far in the state were conducted in conjunction with the Fairfax ASAP during the years of federal funding (1972-76). The most important of these was an evaluation made in 1975 by Spencer and Ferguson of the Virginia Highway and Transportation Research Council.(5) This study found a significant reduction in the numbers of personal injuries, fatal injuries and fatal crashes in the Fairfax area from what would have been predicted by linear regression analysis based on trends established over the previous 15 years. The researchers then attempted to determine whether this reduction could be attributed to the presence of the ASAP project. Data on vehicle registration, vehicle miles traveled, and population changes were analyzed, and these variables were rejected as possible explanations of the improvement in highway safety. Also, injury and crash figures from a non-ASAP control site (Henrico County) revealed no change comparable to the reduction that occurred in Fairfax. Although these results indicate that the Fairfax ASAP had been successful, the researchers noted that the recently instated 55 mile per hour speed limit may have affected the reduction of crashes and fatalities. Spencer and Ferguson also hypothesized that the unusually high number of fatal crashes in Fairfax in 1971, the year prior to the initiation of the ASAP, may have upset the projections, so that reductions shown in fatalities and crashes in the years 1972-1974 might merely be a return to the norm rather that the result of ASAP activity. The study also sought to determine the impact of the Fairfax ASAP by examining the average BAC level of drivers arrested for DUI. The study found a slight reduction in the BAC level in the years 1972 through 1974, from 0.19% to 0.18%, which could not necessarily be attributed to the presence of the ASAP, because Virginia's presumptive BAC limit for DUI had been lowered from 0.15% to 0.10% during the period.

The results of the Spencer and Ferguson research, while not conclusive, suggest that the Fairfax ASAP had a positive impact on highway safety. This interpretation is supported by a 1975 study by Lynn, which found that DUI recidivism rates for persons not referred to Fairfax ASAP rehabilitation programs were significantly higher than rates for persons referred to such programs.(7) A related study by the same researcher indicated that the Fairfax ASAP's public information programs had been successful in increasing public knowledge about the drinking-driving problem.(17)

An analysis of DUI arrest rates in the Fairfax area revealed the dramatic impact on the misdemeanor court system. For many years arrest rates in Fairfax had been ridiculously low. Judges had felt that the mandatory suspension of the driver's license

and the possibility of a criminal sanction were too harsh a penalty for a person convicted of a DUI first offense. Judicial reluctance to apply the statutory sanctions in turn affected police, who realized that enforcement of the law would be a waste of time. However, under the ASAP approach, judges could circumvent the statutory requirements by referring offenders to rehabilitation without a conviction for DUI and then reducing charges following successful completion of the program. As a result, DUI arrests in Fairfax rose from 125 in 1971 to over 3,000 by the end of federal experiment. (10)

In general, no conclusion can be drawn from the available literature as to the effectiveness of the VASAP in improving highway safety. No statewide statistics exist which can definitely verify success of the program. While the Fairfax studies suggest that the ASAP had a positive impact in that locality, the Fairfax situation may have been so unique that the results there may not be applicable to the state as a whole.

Impact of the ASAP Approach Outside of Virginia: A Review of Available Literature

The nationwide ASAP experiment has proven even more difficult to evaluate than any state program. None of the studies examined by these reviewers offer conclusive statistical evidence which shows that the ASAPs as a group have effectively reduced alcohol-related traffic fatalities and accidents. A 1974 NHTSA study reviewed existing data from the eight ASAP localities where the program had been operational for at least two full years, and concluded that overall trends suggested the ASAPs had a positive impact in reducing fatalities, accidents and DUI recidivism. (18) Evidence that a proportionally greater reduction in nighttime accidents had occurred during the ASAP years supported this conclusion of program effectiveness, since most alcohol-related accidents occur at night.

However, the NHTSA study was severely criticized by Zador for failing to meet minimum requirements of scientific validity. (19) Zador pointed out that there could be no certainty as to the proof of the effectiveness of the ASAPs without the use of a non-ASAP control area to help eliminate rival hypotheses (such as the energy crisis or 55 mph speed limit) which might also explain a reduction in fatalities or accidents. Zador compared an ASAP area with what he considered to be a comparable non-ASAP locality, based upon population and geographic factors, and found no evidence of a decline in the fatality rate attributable to the ASAP alone. According to Zador, "it is only possible to conclude scientifically that ASAPs, as large-scale social programs, have been ineffective".

NHTSA researchers quickly jumped to the defense of the ASAPs. Johnson et al. criticized Zador's own methodology, statistical design, and choice of comparison group. (20) They argued that Zador's conclusion of program ineffectiveness was hasty and unfounded, and should more appropriately have been one of unproven effectiveness. Zador later published a rejoinder to the Johnson study in which he stood firm on his conclusion and sought to disarm the NHTSA critique. (21)

Two other studies which examined available data cast further doubt on the effectiveness of the ASAPs as a group in reducing accidents and fatalities. In response to a legislative resolution, the California Department of Motor Vehicles evaluated the ASAP approach to the DUI problem and found no evidence that the program had any impact on the accident fatality rates of the target communities. (22) McGuire and Peck were also not convinced that the ASAPs were effective in reducing accidents:

> Based on the reported evidence, these reviewers do not believe any definite inferences can be made regarding the impact (general effect) of ASAP systems on accident rates. If anything, the evidence in the direction of no impact seems stronger than the evidence supporting an impact. It therefore seems reasonable to conclude that the ASAPs did not have a substantial effect on the accident rate, ... on the assumption that truly substantial effects would have been more consistently and evidently demonstrated. (23)

A few statistical studies have compared subsequent driving records of rehabilitation program participants versus nonparticipants in an attempt to measure the effectiveness of a particular therapeutic program. While these studies did not attempt a comprehensive review of the ASAPs, their conclusions questioned the effectiveness of the rehabilitation-education approach to the drinking-driving problem.

Blumenthal and Ross examined the subsequent driving behavior of 495 persons convicted in Denver of a DUI first offense. (24) The sample group was subjected to various legal penalties and rehabilitation approaches ranging from fines to in-patient alcohol treatment. The researchers discovered that the subsequent driving records of persons assigned to rehabilitation programs were not significantly different from the records of persons

given a fine or placed on probation. Blumenthal and Ross advised the use of fines as the best DUI countermeasure, since none of the other more costly approaches produced superior results. In a related study, these same researchers evaluated the effects of a court appearance on the subsequent driving behavior of several thousand traffic violators.[25] They discovered that the driving records of the court-appearance group were not consistently superior to those of the non-appearance group. These results conflict with the commonly held assumption that face-to-face contact with a judge necessarily results in reduced recidivism and greater traffic safety benefits.

A 1972 California study compared subsequent accidents and convictions of DUI offenders referred to various rehabilitation programs with those of drivers given no such treatment.[26] The results showed no overall difference in driving records between the rehabilitation group and the control group. A similar study evaluated a rehabilitation program established at the Nassau County, New York, ASAP in which 2,805 DUI offenders were randomly invited to attend the program and those in a similar-sized control group were not invited.[27] Subsequent driving records of the two groups were analyzed to determine rates of accidents, DUI recidivism and convictions for nonalcohol-related traffic violations. The study revealed no difference in the rates of DUI recidivism or nonalcohol-related convictions between those DUI offenders who completed rehabilitation and those not invited to participate. Further, those offenders who completed the rehabilitation program had a higher rate of subsequent accident involvement than persons not invited to participate. Presumably, this resulted from more driving by the rehabilitation group, who unlike the control group were not subject to license suspension or revocation. The study concluded that the Nassau County ASAP rehabilitation program had failed to meet its objective of reducing DUI recidivism, but the researchers remained optimistic about the therapeutic approach in theory.

Other evaluations of DUI rehabilitation programs report more positive impacts in reducing the rate of recidivism. An analysis of the effectiveness of the New Hampshire ASAP driver retraining schools showed that convicted DUI offenders referred to the program had a lower rearrest rate than persons not referred.[28] Similar results emerged from a study of drivers completing a Phoenix, Arizona, DUI reeducation program.[29] However, the authors of both of these studies noted that the results should not be considered statistically conclusive, because the referral and non-referral groups did not have comparable prior driving records. The Massachusetts Driver Alcohol Education Program has apparently been very successful.[30] A statewide recidivism rate of 20% prior to the program has been

reduced to less than 5% in half of the state's probation offices, and to between 5% and 10% in another one-third.

The studies outlined above generally suggest that the ASAPs as a group have had no proven, substantial impact in improving highway safety, and that one must be skeptical about the merits of the rehabilitative approach in reducing DUI recidivism and improving driving behavior. However, it may be possible to evaluate the effectiveness of the ASAPs and the rehabilitative model from a different perspective. For example, Scrimgeour analyzed data from the various ASAPs and conceded that no significant impact on highway safety could be proven.[4] Nevertheless, he believes the ASAPs to be a valuable tool because of the positive impact the programs have had on the misdemeanor court systems of the target communities.

At the time the ASAP experiment was first introduced, many of the misdemeanor courts charged with enforcing DUI laws were plagued with backlogs and delays, and judges often viewed the penalty for a DUI conviction as too harsh. Administrative difficulties and reluctance to enforce the law resulted in a small number of DUI prosecutions. The ASAPs provided the innovative tactics necessary to deal with these problems in the courts, and Scrimgeour reports that judges in the more efficient ASAP areas were enthusiastic about the programs. For example, a plea bargaining program developed in the Phoenix ASAP eliminated a large backlog of cases by requiring that all DUI offenders successfully complete the driver rehabilitation program before pleading guilty to a reduced charge.[31] As a result, almost all offenders pleaded not guilty to DUI, and then enrolled in rehabilitation programs to have their charges reduced. DUI cases could be processed faster, and the backlog disappeared.

Scrimgeour notes that the ASAPs were also welcomed in areas where judges had been reluctant to convict for DUI. As indicated in the preceding section, this was the situation in Fairfax prior to the ASAP in 1972. The ASAPs gave judges who believed DUI penalties to be too harsh the alternative of rehabilitation or education as a means of dealing with the drinking driver.

Finally, the ASAPs may prove to be valuable in a way unrelated to either highway safety or the misdemeanor court system. DUI arrests are useful in identifying a sizeable portion of the country's alcohol abusers. Scrimgeous notes:

> Most arrested persons are reasonably respectable, functioning citizens, and a drinking-driving arrest tends to be an earlier identifier of the risk they pose to society than do their other problems. Drinking-driver arrests are the most frequent point of interaction between drinkers and the public's safety and the most legitimate point for government intervention in a drinker's private world. (4)

Supporters of the therapeutic approach would argue that education and rehabilitation provide a better opportunity to bring the DUI offender's drinking problems to light, with more hope of eliminating the cause rather than the symptoms of antisocial behavior than does traditional criminal punishment.

Present Court Procedures

Numerous problems in characterizing DUI offenders were encountered in preparing the questionnaires because of the varying circumstances under which an offender can enter court. Rather than presenting the respondents with a series of hypothetical situations, the authors decided to define the important terms and use the same definitions throughout the study. Although the definitions are departures from normal usage, they were adopted because the authors felt that the cases of DUI offenders should be judged with a view towards possible referral to a rehabilitation program. For these reasons, a "first offender" was defined as a person who had never been referred to the VASAP. It was intended that persons convicted of DUI before rehabilitation programs were available or persons convicted by judges who refused to use the VASAP be included in this category. "Second offenders" were defined as persons who had been given one prior opportunity to participate in the VASAP. Persons convicted of DUI who refused to enter the VASAP or persons who were refused entrance by a judge based on the weight of the evidence were intended to be included as second offenders. Finally, "multiple offenders" were defined as persons who had been given two or more prior opportunities to participate in the VASAP.

Following the questions seeking their views on the VASAP and rehabilitation programs in general, the juvenile court and general district court judges and commonwealth's attorneys were asked to indicate the procedures presently being used in handling

DUI offenders. Only those persons who use the VASAP in DUI cases were asked to answer the questions on present court procedures.

First, the respondents were asked about the general requirements of the court prior to referring a first offender to the VASAP. Table 5 shows that approximately 10% of the judges who answered the question require the first offender to be convicted of DUI prior to going into the program. This result was corroborated by the responses of the prosecutors. Additionally, 19% of the judges require the defendant to enter a guilty plea prior to participating in the VASAP. However, 38% of the prosecutors indicated that the court usually requires a guilty plea. The exact reasons for this discrepancy are uncertain but could be due to the differences in geographical location between the persons in each group who answered the questions, or to the fact that circuit court judges were not included in the sample for these questions. In any case, the judges' responses should be taken as being the most representative, since they are the persons regulating entrance into the program. Thirty-six percent of the general district court judges and 52% of the juvenile court judges indicated that the court need only hear evidence sufficient to support a finding of guilt before referring a first offender to the VASAP. The remaining 36% of the general district court judges and 15% of the juvenile court judges checked more than one response with most requiring either a guilty plea or the hearing of evidence sufficient to support a finding of guilt. Eight percent of the respondents indicated that in addition to these requirements, the defendant must request entry into the VASAP before he will be referred and that the court is reluctant to order a first offender to participate in the program. The wide disparity in the answers to this question indicates that judges are using the discretion permitted them under the present statute in determining what is required of a first offender before he can be referred to VASAP.

Next the respondents were asked to report the percentage of DUI first offenders they refer to the VASAP. Eighty-four percent of the general district court judges and 73% of the juvenile court judges refer over three-fourths of the first offenders. In addition, 36% of the general district court judges and 43% of the juvenile court judges refer over 95% of the first offenders (see Table 6). The prosecutors indicated that 91% of the courts refer more than three-fourths of the first offenders. These responses show that most of the judges who use the VASAP in handling DUI cases use it extensively.

Table 5

What do you generally require prior to referring a DUI "first offender" to VASAP? (Check any which apply)

_____a) the defendant must plead guilty to DUI

_____b) the court need only to hear evidence sufficient to support a finding of guilt

_____c) the defendant must be convicted of DUI

_____d) other (please specify)_____

Response / Occupation	Number of Respondents	Guilty Plea	Sufficient Evidence	DUI Conviction	Guilty Plea or Sufficient Evidence	Guilty Plea or DUI Conviction	Sufficient Evidence or DUI Conviction	Guilty Plea or Sufficient Evidence or DUI Conviction
General District Ct.	67	13 19.4%	24 35.8%	6 8.9%	16 23.9%	3 4.5%	1 1.5%	4 6.0%
Juvenile Ct.	29	5 17.2%	15 51.7%	4 13.8%	2 6.9%	1 3.4%	0 0%	2 6.9%
Prosecutors	74	28 37.8%	17 23.0%	8 10.8%	13 17.6%	3 4.1%	1 1.4%	4 5.4%
TOTAL	170	46 27.1%	56 32.9%	18 10.6%	31 18.2%	7 4.1%	2 1.2%	10 5.9%

Note: Additionally, 14 respondents required the DUI "first offender" to request entry into VASAP.

Table 6

What percentage of DUI "first offenders" does the court refer to VASAP?

Response / Occupation	Less Than 50%	50-75%	76-85%	86-95%	More Than 95%
General District Ct.	3 4.7%	7 10.9%	7 10.9%	24 37.5%	23 35.9%
Juvenile Ct.	5 16.7%	3 10.0%	2 6.7%	7 23.3%	13 43.3%
Prosecutors	1 1.3%	6 7.7%	11 14.1%	24 30.8%	36 46.2%
Total	9 5.2%	16 9.3%	20 11.6%	55 32.0%	72 41.9%

Knowing what percentage of first offenders were referred to the VASAP was not enough; it was important to know the reasons why first offenders were not being referred. For this reason, the juvenile court and general district court judges were asked to rate the importance of five factors in determining not to refer a first offender to the program. The factors were: (a) the offender's involvement in a fatal accident, (b) his involvement in an accident causing personal injury, (c) his involvement in an accident causing property damage, (d) the BAC level at the time of arrest, and (e) prior DUI convictions. The responses to this question are presented in Tables 7-11. Approximately 72% of the judges indicated that the offender's involvement in a fatal accident was either very important or important in determining not to refer him to the VASAP. Similarly, 82% of the judges indicated that prior DUI convictions were very important or important in that determination.

Table 7

How important is the Blood Alcohol Content (BAC) level at the time of arrest in determining that a "first offender" should not be referred to VASAP?

Response / Occupation	Very Important	Important	Somewhat Important	Not Important
General District Ct.	10 17.9%	13 23.2%	11 19.6%	22 39.3%
Juvenile Ct.	6 22.2%	10 37.0%	6 22.2%	5 18.5%
Total	16 19.3%	23 27.7%	17 20.5%	27 32.5%

Table 8

How important would the "first offender's" involvement in a fatal accident be in determining that he should not be referred to VASAP?

Response / Occupation	Very Important	Important	Somewhat Important	Not Important
General District Ct.	26 47.3%	12 21.8%	6 10.9%	11 20.0%
Juvenile Ct.	10 37.0%	11 40.7%	5 18.5%	1 3.7%
Total	36 43.9%	23 28.0%	11 13.4%	12 14.6%

Table 9

How important would a "first offender's" involvement in an accident causing personal injury be in determining that he should not be referred to VASAP?

Response / Occupation	Very Important	Important	Somewhat Important	Not Important
General District Ct.	12 21.4%	15 26.8%	16 28.6%	13 23.2%
Juvenile Ct.	4 14.8%	10 37.0%	10 37.0%	3 11.1%
Total	16 19.3%	25 30.1%	26 31.3%	16 19.3%

Table 10

How important would a "first offender's" involvement in an accident causing property damage be in determining that he should not be referred to VASAP?

Response / Occupation	Very Important	Important	Somewhat Important	Not Important
General District Ct.	3 5.5%	6 10.9%	21 38.2%	25 45.5%
Juvenile Ct.	2 7.7%	8 30.8%	8 30.8%	8 30.8%
Total	5 6.2%	14 17.3%	29 35.8%	33 40.7%

Table 11

How important would prior DUI convictions be in determining that a "first offender" should not be referred to VASAP?

Response / Occupation	Very Important	Important	Somewhat Important	Not Important
General District Ct.	36 63.2%	9 15.8%	7 12.3%	5 8.8%
Juvenile Ct.	21 75.0%	4 14.3%	3 10.7%	0 0%
Total	57 67.1%	13 15.3%	10 11.8%	5 5.9%

The remaining three factors were viewed as less important to the judges' decision. The answers were evenly spread across the four levels of importance for BAC level at the time of arrest and the offender's involvement in an accident causing personal injury. Some judges considered these factors very important while others considered them to be of no importance. Most of the judges (77%) felt that the offender's involvement in an accident causing property damage was of little importance in deciding not to refer him to the VASAP. Some judges also listed the attitude and cooperation of the defendant, the defendant's general traffic record and the importance of the driving privilege to the defendant as other important factors in deciding whether to refer a first offender. The responses to this question indicate that judges are generally looking very closely at the circumstances of the case before deciding whether an offender should be referred to the VASAP.

Next, the judges and prosecutors were asked whether they receive a report based on an investigation into the personal and social background of all DUI offenders (i.e., employment, drinking history, etc.) prior to referring them to the VASAP. Table 12 shows that 83% of the respondents said they did not receive such a report. In light of the fact that 55% of the judges and prosecutors and 65% of the local VASAP directors indicated that the court should receive an investigative report prior to referral (see Table 13), the courts and local VASAP offices should look into the possibility of marshalling enough resources to conduct such an investigation. However, the authors

do not feel that such an investigation and report should be required. In some cases, the costs of conducting an investigation into the offender's background will far exceed the benefits from such an investigation.

Table 12

Do you receive a report based on an investigation into the personal and social background of all DUI offenders (i.e., employment, drinking history, etc.) prior to referral to VASAP?

Response / Occupation	No	Yes
General District Ct.	54 80.6%	13 19.4%
Juvenile Ct.	26 81.3%	6 18.8%
Prosecutors	71 85.5%	12 14.5%
Total	151 83.0%	31 17.0%

Table 13

Should the trial court receive a report based on an investigation into the offender's background prior to referral to VASAP?

Response / Occupation	No	Yes
General District Ct.	37 49.3%	38 50.7%
Juvenile Ct.	11 30.6%	25 69.4%
Circuit Ct.	32 51.6%	30 48.4%
Prosecutors	35 40.7%	51 59.3%
Total	115 44.4%	144 55.6%

These considerations are exemplified by the comments of a number of respondents. Some respondents indicated that because resources do not exist for preparing a detailed personal history on each DUI offender, these pre-referral reports should be limited to essential information of prior DUI convictions and prior participation in the VASAP. It is important that at least this information reach the court and participating attorneys. Although additional information should assist the court in making its decision on referral, some persons thought otherwise. For example, one VASAP director said, "based on our experience, it would be quite difficult to determine who would or would not benefit from VASAP. Costs for such pre-trial investigations for multi-jurisdictional programs would be prohibitive."

Under §18.2-271.1(a1) the court shall require a DUI offender entering VASAP to pay a fee of not more than $200. The annual VASAP reports published by the Highway Safety Division (now the Department of Transportation Safety) state that the $200 fee may be partially or totally waived if the defendant is indigent, even though there is no mention of this in §18.2-271.1. The general district court and juvenile court judges were asked if they waive the $200 fee when the defendant is determined to be indigent. Table 14 shows that 60% of the judges do waive part or all of the fee for indigents while 40% do not. To add to these differing policies, an additional 7 judges indicated that the question of indigency was determined by the local VASAP office, not by the courts.

Table 14

Under §18.1-271.1(a1) the court shall require a DUI offender entering VASAP to pay a fee of not more than $200. Do you waive this fee if the defendant is determined to be indigent?

Response / Occupation	No	Yes
General District Ct.	22 36.1%	39 63.9%
Juvenile Ct.	14 50.0%	14 50.0%
Total	36 40.4%	53 59.6%

The responses to this question indicate a need for both clarification of policy and legislative change concerning indigents. No person should be denied the benefits from rehabilitation for inability to pay an entrance fee. The authors recommend that §18.2-271.1 be amended to permit the court to waive part or all of the fee if the offender is determined to be indigent. In addition, the question of indigency should be decided by the courts even though the entrance fee is generally not paid until the offender is enrolled in the program. To ease the burden on the courts in determining the offender's indigency, the offender should be required to file an affidavit of indigency or other documents (see Table 15) which will have to be verified by the court.

Table 15

Must a DUI offender file an affidavit of indigency or inability to pay which must then be approved by the court in order for the offender to be declared indigent?

Response / Occupation	No	Yes
General District Ct.	15 40.5%	22 59.5%
Juvenile Ct.	3 25.0%	9 75.0%
Total	18 36.7%	31 63.3%

Most judges continue the case at the time of referral to the VASAP and make a final disposition either when the offender drops out of the program or when he successfully completes it. In the final two questions dealing with the present court procedures for handling first offenders, the respondents were asked to indicate the percentage of first offenders completing the program and the manner in which the court finally disposes of these cases. Fifty-two percent of the juvenile court judges indicated that more than 95% of the first offenders referred to the VASAP complete the program, while only 14% of the general district court judges marked this choice. However, approximately 95% of the judges in each group pointed out that more than 75% of the first offenders referred to the program complete it (see Table 16).

Table 16

What percentage of "first offenders" that you refer to VASAP complete the program?

Response / Occupation	50-75%	76-85%	86-95%	More Than 95%
General District Ct.	4 6.3%	17 27.0%	33 52.4%	9 14.3%
Juvenile Ct.	1 3.7%	3 11.1%	9 33.3%	14 51.9%
Total	5 5.6%	20 22.2%	42 46.7%	23 25.6%

For the disposition of cases for offenders who successfully complete the rehabilitation program, §18.2-271.1(b) permits the judge to either amend the warrant and convict the offender of the amended charge or accept completion of the program in lieu of a conviction. To gain an understanding of how this discretion was being used, the judges were asked to indicate how often they use each form of disposition. The responses demonstrate that judges dispose of DUI cases in a variety of ways (see Tables 17-20).

Table 17

In dealing with "first offenders" who have completed a rehabilitation program, about how often does the court — convict the defendant for DUI?

Response / Occupation	Never	1-25%	26-50%	51-75%	76-99%	100%
General District Ct.	57 93.4%	3 4.9%	0 0%	0 0%	0 0%	1 1.6%
Juvenile Ct.	25 92.6%	2 7.4%	0 0%	0 0%	0 0%	0 0%
Prosecutors	61 87.1%	7 10.0%	0 0%	0 0%	1 1.4%	1 1.4%
Total	143 90.5%	12 7.6%	0 0%	0 0%	1 0.6%	2 1.3%

Table 18

In dealing with "first offenders" who have completed a rehabilitation program, about how often does the court — convict the defendant for reckless driving?

Response / Occupation	Never	1-25%	26-50%	51-75%	76-99%	100%
General District Ct.	16 26.2%	9 14.8%	4 6.6%	2 3.3%	20 32.8%	10 16.4%
Juvenile Ct.	11 40.7%	7 25.9%	1 3.7%	0 0%	5 18.5%	3 11.1%
Prosecutors	26 37.1%	13 18.6%	2 2.9%	2 2.9%	8 11.4%	19 27.1%
Totals	53 33.5%	29 18.4%	7 4.4%	4 2.5%	33 20.9%	32 20.3%

Table 19

In dealing with "first offenders" who have completed a rehabilitation program, about how often does the court — convict the defendant for improper driving?

Response / Occupation	Never	1-25%	26-50%	51-75%	76-99%	100%
General District Ct.	28 45.9%	21 34.4%	5 8.2%	0 0%	4 6.6%	3 4.9%
Juvenile Ct.	19 70.4%	5 18.5%	1 3.7%	0 0%	1 3.7%	1 3.7%
Prosecutors	46 65.7%	11 15.7%	2 2.9%	2 2.9%	8 11.4%	1 1.4%
Total	93 58.9%	37 23.4%	8 5.1%	2 1.3%	13 8.2%	5 3.2%

Table 20

In dealing with "first offenders" who have completed a rehabilitation program, about how often does the court — accept VASAP completion in lieu of a conviction?

Response / Occupation	Never	1-25%	26-50%	51-75%	76-99%	100%
General District Ct.	31 50.8%	10 16.4%	4 6.6%	0 0%	8 13.1%	8 13.1%
Juvenile Ct.	9 33.3%	2 7.4%	0 0%	3 11.1%	6 22.2%	7 25.9%
Prosecutors	34 48.6%	7 10.0%	3 4.3%	3 4.3%	10 14.3%	13 18.6%
Total	74 46.8%	19 12.0%	7 4.4%	6 3.8%	24 15.2%	28 17.7%

Ninety-three percent of the juvenile court and general district court judges never convict the first offender for DUI after he has successfully completed the rehabilitation program. In fact, only 1 out of 88 judges convicts first offenders of DUI more than 25% of the time and he convicts all first offenders. The responses of the prosecutors corroborated these results.

The judges' opinions on other forms of disposition are not as uniform. For example, 16% of the general district court judges and 11% of the juvenile court judges always amend the warrant and convict the defendant of reckless driving, while 5% and 4%, respectively, always convict the defendant of improper driving. In addition, 26% of the general district court judges and 41% of the juvenile court judges never convict the offender of reckless driving, while the figures for improper driving are 46% and 70%, respectively. These figures, plus the other figures in Tables 18 and 19, show that judges who amend the warrant and convict the defendant for a reduced charge are more likely to reduce the charge to reckless driving rather than improper driving. As a result, a defendant is likely to receive 6 demerit points (for reckless driving) on his license under the Virginia Driver Improvement Act (§46.1-514.1 et. seq.) rather than 3 points (for improper driving).

A number of first offenders are getting no license demerit points because their judges are accepting completion of the VASAP in lieu of a conviction. For example, 26% of the general district judges and 48% of the juvenile court judges accept successful completion in lieu of a conviction for more than 75% of the first offenders they see. However, an equal number of judges (51% of general district court and 33% of juvenile court) never use the "VASAP in lieu" option. The judges are granted wide discretion under the present statute for dealing with DUI offenders and the responses to those questions show that they are using this discretion, especially in dealing with first offenders.

The responses to the questions on first offenders show that judges are using the wide discretion permitted them under the present statute. Judges probably want to retain the discretion to determine what is required of a first offender before he can be referred to the VASAP, since some will prefer convicting the defendant of DUI before referral, while others will want to weigh the factor of the defendant's performance in the rehabilitation program before disposing of the case. The judge who chooses to continue the case should be able to amend the warrant after the defendant completes the program and convict him of the amended charge. To prevent the offender from entering the program solely to clear his record, the "VASAP in lieu" option presently given to the judge under §18.2-271.1(b) might be eliminated when the defendant is actually guilty of DUI. This would ensure that the defendant has at least some action taken against his license. Elimination of the option also will make it easier to include a notation on the defendant's driving record that he attended the VASAP.

The respondents were next asked a series of questions dealing with the treatment of second offenders. First, the participants were asked whether they usually request information in order to determine whether a person arrested for DUI is a second offender and also whether this information is usually received. Only 2 out of 99 (2%) general district court and juvenile court judges do not request such information and only 3 out of 95 (3%) judges do not receive sufficient information to indicate whether a particular DUI offender is a second offender (see Tables 21 and 22). However, prosecutors are having trouble getting this information. While 89% of the prosecutors said that they usually request information on DUI offenders in order to determine whether they are second offenders, only 75% receive such information. Obviously, prosecutors are not receiving the information they want to receive. If different sanctions are going to be imposed on first and second offenders, it is imperative that prosecutors be given sufficient information to determine whether a particular DUI defendant is a second offender.

Table 21

Do you usually request information to find out whether a person arrested for DUI is a "second offender"?

Response / Occupation	No	Yes
General District Ct.	1 1.5%	67 98.5%
Juvenile Ct.	1 3.2%	30 96.8%
Prosecutors	9 11.1%	72 88.9%
Total	11 6.1%	169 93.9%

Table 22

Do you usually receive sufficient information to indicate whether a particular DUI defendant is a "second offender"?

Response / Occupation	No	Yes
General District Ct.	2 3.1%	63 96.9%
Juvenile Ct.	1 3.3%	29 96.7%
Prosecutors	20 25.0%	60 75.0%
Total	23 13.1%	152 86.9%

It is also important that all interested parties be notified when a particular DUI offender is currently enrolled in a VASAP in another jurisdiction. While 88% of the general district court judges are currently receiving this information, only 62% of the juvenile court judges and 47% of the prosecutors are notified if a DUI offender is currently participating in a VASAP in another jurisdiction (see Table 23).

Table 23

Are you usually notified if a particular DUI offender is presently enrolled in VASAP in another jurisdiction?

Response / Occupation	No	Yes
General District Ct.	8 12.3%	57 87.7%
Juvenile Ct.	10 38.5%	16 61.5%
Prosecutors	42 53.2%	37 46.8%
Total	60 35.2%	110 64.8%

Next, the general district court and juvenile court judges were asked whether they would generally refer a DUI second offender to the VASAP again (see Table 24). Only 20% of these judges indicated that they would generally refer second offenders. An additional 10% of the judges said that they do refer less than 25% of second offenders, although they would not generally refer them (see Table 25). One judge (1%) who said he would not generally refer second offenders indicated that he refers close to 50% of second offenders to the VASAP. Among the 19 judges (20%) who would generally refer second offenders, 14 indicated the percentage of second offenders they do refer. Six of those 14 judges refer less than 50%; 7 judges refer 50%-99% and 1 judge (juvenile court) refers 100% of second offenders.*

* This 100% figure is probably due to the small number of second offenders this judge has dealt with. For example, if the judge heard only 2 cases involving second offenders and referred both to the VASAP, he would have a 100% referral rate. Many juvenile court judges indicated that they have heard only a handful of DUI cases.

Table 24

Judges

Would you generally refer a DUI "second offender" to VASAP again?

Prosecutors and Police

Should a DUI "second offender" be given an opportunity to enter VASAP again?

Response / Occupation	No	Yes
General District Ct.	53 80.3%	13 19.7%
Juvenile Ct.	24 80.0%	6 20.0%
Prosecutors	52 65.8%	27 34.2%
Police	80 93.0%	6 7.0%
Total	209 80.1%	52 19.9%

Table 25

Referral of Second Offenders

PERCENTAGE OF SECOND OFFENDERS REFERRED

GENERALLY REFER SECOND OFFENDERS		1-25%	26-50%	51-75%	76-99%	100%	Total
General District Court	YES	2	2	6	1	0	11
	No	7	1	0	0	0	8
	Total	9 47.4%	3 15.8%	6 31.6%	1 5.3%	0 0%	19
Juvenile Court	Yes	0	2	0	0	1	3
	No	3	0	0	0	0	3
	Total	3 50.0%	2 33.3%	0 0%	0 0%	1 16.7%	6

The reason why judges who actually refer less than 50% of second offenders to the VASAP answered the initial question differently has to do with the ambiguity in the word "generally." However, by combining the answers to these two questions, one can see that few judges (13* at most) refer more than 50% of DUI second offenders to the VASAP. Other judges refer a small percentage of second offenders if the circumstances of the case warrant referral. The feelings of these people are summarized in the comments of one of the respondents, who said that since "no program can reach everyone on its first attempt ..., it is possible the program can fail some first offenders. After strict reconsideration, some second offenders should be put into a higher level program." Other respondents felt that second offenders needed treatment the most because a second offense is indicative of a serious drinking problem.

* This number is the sum of the 8 judges who referred more than 50% and the 5 judges who generally referred second offenders but did not give specific percentages.

Most judges do not refer second offenders except under extreme circumstances. Many of these respondents felt that rehabilitation is not appropriate for second offenders and that giving someone a second chance jeopardizes public safety while wasting time and money. Seven respondents said that they would refer second offenders only after a specified length of time (mostly 1 year) has passed since the prior offense. Other participants said that second offenders should be referred only after being convicted for DUI.

Only 25 judges (20 general district court and 5 juvenile court) indicated the types of procedures they follow in disposing of cases involving second offenders. The judges were permitted to check more than one response. Forty percent of the judges convict the defendant of DUI prior to referral to VASAP, while 36% usually continue the case and convict him of DUI after completion of the program (see Table 26). In addition, 48% of the judges continue the case, amend the warrant, and convict the defendant for a lesser charge after completion of the program. Only 12% of the judges accept completion of the VASAP in lieu of a conviction.

Table 26

Which of the following procedures do you usually follow in disposing of cases involving "second offenders" you have referred to VASAP for a second time? (Check any which apply)

_____a) convict for DUI with VASAP participation as a condition of probation

_____b) continue the case and convict for DUI after completion of the program

_____c) continue the case and convict for a lesser charge after completion of the program

_____d) continue the case and accept VASAP participation in lieu of a conviction

Response / Occupation	Number of Respondents	Yes to A	Yes to B	Yes to C	Yes to D
General District Ct.	20	8 40.0%	7 35.0%	11 55.0%	2 10.0%
Juvenile Ct.	5	2 40.0%	2 40.0%	1 20.0%	1 20.0%
Total	25	10 40.0%	9 36.0%	12 48.0%	3 12.0%

The judges were split into rural-urban groups for comparison of these questions. Of the urban group, 25% indicated they would generally refer second offenders to VASAP compared to 18% of the rural group. Of the small number of judges who refer second offenders, 67% of the rural group indicated they would convict the defendant for DUI prior to referral compared to 15% of the urban group. In addition, 62% of the urban respondents said they would reduce charges of those second offenders completing the rehabilitation program compared to 33% of the rural group. These comparisons show significant rural-urban differences on the issue of final disposition of second offender cases. (A rural-urban analysis on other questions is contained in Appendix D.)

The prosecutors and police were asked a different question — whether a DUI second offender should be given an opportunity to enter the VASAP again. Only 7% of the police favored referral of second offenders, while 34% of the prosecutors think second offenders should be given another chance. In addition, 60% of the local VASAP directors favored referral of second offenders because of the possibility of misclassification the first time around and the possibility of "slips" by alcoholics. Ninety-three percent of the respondents indicated that a second offender should be placed in a higher level program (such as an alcohol treatment program) than that to which he was previously assigned (see Table 27).

In light of the responses of the judges, prosecutors, police, and local VASAP directors to these questions, the authors feel that judges should continue to have discretion in deciding when to refer a second offender to the VASAP. However, the analysis of additional questions below indicates that the court should be required to convict a second offender for DUI before referring him to a rehabilitation program.

Finally, the respondents were asked whether the court should refer "multiple offenders" to the VASAP. Less than 10% of the respondents for each occupational group who answered the question indicated that multiple offenders should be given another chance (see Table 28). Due to the high negative response to this question, the authors recommend that §18.2-271.1 be amended to provide that multiple offenders not be referred to the VASAP except in extreme and unusual circumstances. If such a situation does arise, the offender should be convicted of DUI before entering the program.

Table 27

Judges

Would you recommend that the "second offender" be placed in a higher level VASAP program (such as an alcohol treatment program) than that to which he was previously assigned?

Police

Should the "second offender" be placed in a higher level program (such as an alcohol treatment program) than that to which he was previously assigned?

Response / Occupation	No	Yes
General District Ct.	1 4.4%	22 95.6%
Juvenile Ct.	2 25.0%	6 75.0%
Police	0 0%	11 100%
Total	3 7.2%	39 92.8%

Table 28

Judges

Would you refer to VASAP a DUI offender who has been referred to VASAP at least twice previously?

Police and Prosecutors

Should the court refer to VASAP a DUI offender who has been referred to VASAP at least twice previously?

Response / Occupation	No	Yes
General District Ct.	60 90.9%	6 9.1%
Juvenile Ct.	29 93.5%	2 6.5%
Prosecutors	76. 93.8%	5. 6.2%
Police	85 100%	0 0%
Total	250 95.1%	13 4.9%

Alternative Court Procedures

A primary purpose of the questionnaire was to determine the opinions of the respondents about changes in the DUI law which might be adopted in Virginia. A series of questions were directed at state officials to discover their reactions to possible alternative court procedures. The responses to these questions are given under the succeeding subheadings. First, the opinions on requiring a conviction prior to referral to the VASAP are presented. Next is a discussion of various alternative actions which might be taken against the DUI offender's license, including a review of available literature on limited license. This is followed by a review of the responses to questions on mandatory

referral to the VASAP, providing one chance at the VASAP for all offenders, and a "per se" law. The final subsection contains conclusions and recommendations.

Conviction Prior to Referral

Section 18.2-271.1 presently gives the trial judge the option to refer a DUI offender to the VASAP with or without a prior conviction for DUI. Respondents were asked whether they would support changing the law to require a DUI conviction prior to referral. Table 29 shows that for first offenders, only 40% of general district court judges, 20% of juvenile court judges, and 32% of circuit court judges favor requiring a conviction prior to referral. Prosecutors (51%) and police (72%) are the two groups most in support of a requirement for a pre-referral DUI conviction for first offenders.

Table 29

Current law gives a judge the option to refer a DUI offender to VASAP (or another driver alcohol rehabilitation group) with or without a conviction. Would you support changing the law to require a conviction for DUI prior to referral to VASAP for

Response / Occupation	First Offenders? No	First Offenders? Yes	Second Offenders? No	Second Offenders? Yes	Multiple Offenders? No	Multiple Offenders? Yes
General District Ct.	44 60.3%	29 39.7%	25 37.3%	42 62.7%	21 31.8%	45 68.2%
Juvenile Ct.	28 80.0%	7 20.0%	10 29.4%	24 70.6%	7 20.6%	27 79.4%
Circuit Ct.	47 68.1%	22 31.9%	23 35.9%	41 64.1%	21 32.8%	43 67.2%
Prosecutors	42 48.8%	44 51.2%	20 25.6%	58 74.4%	17 21.5%	62 78.5%
Police	24 29.3%	58 71.7%	10 14.3%	60 85.7%	9 13.4%	58 86.6%
Total	185 53.6%	160 46.4%	88 28.1%	225 71.9%	75 24.2%	235 75.8%

A certain amount of ambiguity exists in the results for second and multiple offenders because of the wording of the question. Respondents could have one of two reasons for answering "no" to the question "Would you support changing the law to require a conviction for DUI prior to referral to VASAP for second and multiple offenders?" Persons who oppose a pre-referral conviction would certainly answer no, but a negative answer might also be provided by officials who generally oppose referring second and multiple offenders to the VASAP. This latter group should actually be included among those answering "yes" to the question, since they support requiring a conviction for repeat offenders with no chance for referral to rehabilitation.

Table 29 indicates that 72% of all respondents favor requiring a conviction prior to referral for second offenders. When adjusted to include those persons who oppose referring second offenders to the VASAP, this figure should climb even higher. Cross tabulations revealed that about one-half of those respondents opposing a conviction prior to referral for second offenders also said they would not generally refer second offenders. It is safe to assume that many of these officials were actually saying "no" to referral to the VASAP for second offenders, rather than not wanting to require a conviction. A fair estimate would be that more than 80% of all court officials, and perhaps 90% of police, support requiring a conviction for second offenders.

The same conclusion can be drawn from the results concerning multiple offenders. It can safely be assumed that the percentage of respondents supporting a pre-referral conviction (76%) would increase when those persons who oppose referring multiple offenders to the VASAP are included. Cross tabulations revealed that four-fifths of those judges who oppose a conviction also indicated that they would not refer multiple offenders. This would suggest that an overwhelming majority of these state officials support a change in the law to require a DUI conviction for multiple offenders.

Any requirement of a conviction prior to referral to the VASAP could have a substantial effect on the administration of DUI cases in Virginia courts. The questionnaires sought to gauge the effect of this possible change in the law on the number of DUI appeals, the number of cases involving plea bargaining, and the backlog (if any) of DUI cases at the trial court level. Circuit court judges were asked whether a pre-referral conviction requirement would increase the number of appeals. The responses show that 40% of the judges are unsure about the effect of this change in the law; 33% believe that appeals would increase; and 27% feel that the number of appeals would not increase. Commonwealth's attorneys were asked to consider whether the conviction requirement would increase the number of cases involving plea bargaining. The

responses show that 53% feel that plea bargaining would not increase; 26% believe that an increase would take place; and 21% are unsure about the effect.

Another ramification of a change in the law to require a conviction prior to referral might be an increase in the backlog of DUI cases in the trial courts. All respondents except circuit court judges were first asked whether current trial court procedures lead to a backlog of DUI cases. Table 30 reveals that officials differ widely in their opinions on whether a backlog presently exists. A high percentage of juvenile court judges (97%) and prosecutors (91%) do not face a backlog problem whereas a significant number of general district court judges (31%) and police (44%) believe there is a present backlog. The responses of police may result from possible perception in the eyes of the enforcement officer that a delay of a few months or even weeks from time of arrest to court appearance constitutes a "backlog," since the officer is called to testify as to events which are fading from his memory whereas judges and prosecutors view backlog differently. The difference in responses between general district court judges and prosecutors could also be caused by different conceptions of what constitutes a "backlog," as well as by the fact that the two samples consist of persons from different areas of the state (some prosecutors work in areas where the judges failed to answer the questionnaire, etc.).

Table 30

Judges

Do current procedures lead to a backlog of DUI cases in your court?

Prosecutors and Police

Do current trial court procedures lead to a backlog of DUI cases?

Response / Occupation	No	Yes
General District Ct.	52 69.3%	23 30.7%
Juvenile Ct.	35 97.2%	1 2.8%
Prosecutors	78 90.7%	8 9.3%
Police	44 55.7%	35 44.3%
Total	209 75.7%	67 24.3%

The results in Table 31 reveal opinions as to how a requirement of a conviction prior to referral would affect this backlog (or lack of it). Sixty percent of the respondents believe that the change in law would not create more backlog than at present; 14% believe that backlog would increase, and 26% are uncertain about the effect on backlog of requiring a conviction prior to referral. These results, in combination with the opinions of circuit court judges and prosecutors about the effect of the change on appeals and plea bargaining, suggest that the majority of officials do not believe that requiring a conviction prior to referral would seriously affect court administration of DUI cases.

Table 31

Do you think that requiring a conviction prior to referral to VASAP would create more backlog than at present?

Response / Occupation	No	Yes	Unsure
General District Ct.	44 61.1%	13 18.1%	15 20.8%
Juvenile Ct.	24 68.6%	2 5.7%	9 25.7%
Prosecutors	53 60.2%	17 19.3%	18 20.5%
Police	47 54.7%	8 9.3%	31 36.0%
Total	168 59.8%	40 14.2%	73 26.0%

As noted in Table 29, less than 35% of the judges support a change in the law to require a DUI conviction for first offenders prior to referral to the VASAP. Many judges may believe that mandatory suspension of the driver's license from 6 to 12 months which presently attaches to a DUI conviction is too harsh a penalty for the first offender.

To test this hypothesis, respondents were asked if they would favor requiring a conviction prior to referral to the VASAP, if the law were also changed to no longer require mandatory suspension of the license upon a conviction for DUI. As shown in

Table 32, a total of 62% of the respondents favor requiring a conviction for first offenders if no mandatory suspension is required. Only 43% of the juvenile court judges favor the proposition, possibly because of the blemish a DUI conviction would make on the juvenile's record, compared to 55% to 59% of the remaining judges. Prosecutors (66%) and police (72%) are the groups most in favor of requiring a conviction under these circumstances. Cross tabulations revealed that 20% to 25% of the respondents who oppose requiring a pre-referral conviction for first offenders support a conviction if mandatory suspension were no longer required. This finding reflects the concern of many court officials that a first offender be permitted to retain his driving privilege.

Table 32

Suppose the law were amended to no longer require mandatory suspension of the driver's license upon a conviction for DUI. Would you then favor requiring a conviction prior to referral to VASAP for

Response / Occupation	First Offenders? No	First Offenders? Yes	Second Offenders? No	Second Offenders? Yes	Multiple Offenders? No	Multiple Offenders? Yes
General District Ct.	29 40.8%	42 59.2%	18 27.3%	48 72.7%	16 25.0%	49 75.0%
Juvenile Ct.	20 57.1%	15 42.9%	8 22.9%	27 77.1%	5 14.3%	30 85.7%
Circuit Ct.	31 44.9%	38 55.1%	16 24.2%	50 75.8%	15 23.4%	49 76.6%
Prosecutors	27 33.7%	53 66.2%	11 14.3%	66 85.7%	10 13.0%	67 87.0%
Police	23 27.7%	60 72.3%	11 16.7%	55 83.3%	11 16.4%	56 83.6%
Total	130 38.5%	208 61.5%	64 20.6%	246 79.4%	57 18.5%	251 81.5%

The same ambiguities in the wording of the previous question also exist here with regard to whether a conviction should be required for second and multiple offenders if the mandatory suspension provision were removed. Table 32 shows that about 75% of the judges and 85% of prosecutors and police favor requiring a conviction for second offenders under these circumstances. These figures should be even higher, however. Cross tabulations show that three-fifths of those opposing a conviction here also said they would not generally refer second offenders. Again, it is safe to assume that in answering the question as worded, many of those opposing a pre-referral conviction for second offenders if mandatory suspension were not required actually were saying "no" to referral to the VASAP for second offenders, not to requiring a conviction for second offenders.

The results in Table 32 for multiple offenders should also be shifted because of the ambiguity in the wording of the question. Cross tabulations show that of the 19% of the respondents who oppose requiring a pre-referral conviction for multiple offenders if mandatory suspension were removed, four-fifths also indicated that they would not refer multiple offenders to VASAP. It therefore seems fair to estimate that at least 90% of the respondents would favor requiring a DUI conviction for multiple offenders prior to referral, if the law requiring mandatory suspension of the license upon a DUI conviction were also changed.

As before, respondents were asked about the effect of these changes on court administration of DUI cases. Seventy-six percent of the circuit court judges split evenly into those who feel appeals would not increase if a conviction were required with no mandatory suspension and those who are unsure about the effect. Only 24% believe that DUI appeals would increase. More than half (52%) of the commonwealth's attorneys believe that requiring a conviction prior to referral with no mandatory suspension would not increase the number of cases involving plea bargaining; 28% are unsure about the effect; and 20% feel that plea bargaining would increase if this change were made. Also, Table 33 shows that only 10% of the respondents believe that the court backlog would increase under these circumstances; 53% feel that the backlog would not increase; and 37% are uncertain about the impact on the backlog of requiring a conviction prior to referral with no mandatory suspension. It thus appears that the majority of officials do not believe that requiring a pre-referral conviction with no mandatory suspension of the driver's license would adversely affect court administration of DUI cases.

Table 33

Do you think that requiring a conviction prior to referral to VASAP would create more backlog than at present if there were no mandatory suspension of the driver's license?

Response / Occupation	No	Yes	Unsure
General District Ct.	37 50.7%	9 12.3%	27 37.0%
Juvenile Ct.	23 65.7%	1 2.9%	11 31.4%
Prosecutors	50 57.5%	9 10.3%	28 32.2%
Police	39 46.4%	8 9.5%	37 44.1%
Total	149 53.4%	27 9.7%	103 36.9%

Licensing Sanctions

Each respondent was next asked a series of questions dealing with actions taken against the offender's driver's license. First, each respondent was asked his opinion of the provision in present law which requires mandatory suspension of the driver's license of persons convicted for DUI (§18.2-271). Table 34 shows that state officials were in near-unanimous agreement that a second or subsequent DUI conviction should lead to mandatory suspension of the driver's license. This agreement broke down somewhat over the issue of whether a first conviction of DUI should result in a mandatory license suspension. Generally, about 60% of judges and prosecutors and over 85% of the police favored mandatory suspension for DUI first offenders.

Table 34

Under present law, a person convicted of DUI must have his driver's license suspended for a certain period of time. Do you approved of this mandate for

Response / Occupation	First Offenders?		Second Offenders?		Multiple Offenders?	
	No	Yes	No	Yes	No	Yes
General District Ct.	22 31.0%	49 69.0%	4 5.7%	66 94.3%	3 4.3%	66 95.7%
Juvenile Ct.	15 41.7%	21 58.3%	2 5.6%	34 94.4%	0 0%	36 100%
Circuit Ct.	31 43.1%	41 56.9%	3 4.2%	68 95.8%	2 2.8%	69 97.2%
Prosecutors	33 38.4%	53 61.6%	2 2.3%	84 97.7%	0 0%	86 100%
Police	12 14.6%	70 85.4%	1 1.3%	79 98.7%	1 1.3%	76 98.7%
Total	113 32.6%	234 67.4%	12 3.5%	331 96.5%	6 1.8%	333 98.2%

Respondents then gave their opinions on an alternative law which would give the trial judge discretion in determining whether or not the license should be suspended. As shown in Table 35, about 55% to 60% of all court officials and 40% of the police supported judicial discretion on the license for first offenders. This support for judicial discretion in suspending an offender's license fell considerably for second and multiple offenders, with less than 20% of the respondents favoring discretion in dealing with repeat offenders.

Table 35

Would you favor a law giving the trial judge discretion to determine whether or not a driver's license of a DUI offender should be suspended for

Response / Occupation	First Offenders? No	First Offenders? Yes	Second Offenders? No	Second Offenders? Yes	Multiple Offenders? No	Multiple Offenders? Yes
General District Ct.	32 42.7%	43 57.3%	52 74.3%	18 25.7%	54 77.1%	16 22.9%
Juvenile Ct.	14 40.0%	21 60.0%	26 74.3%	9 25.7%	30 85.7%	5 14.3%
Circuit Ct.	31 43.7%	40 56.3%	49 74.2%	17 25.8%	52 78.8%	14 21.2%
Prosecutors	42 47.7%	46 52.3%	71 84.5%	13 15.5%	74 88.1%	10 11.9%
Police	49 59.0%	34 41.0%	63 88.7%	8 11.3%	62 91.2%	6 8.8%
Total	168 47.7%	185 52.3%	261 80.1%	65 19.9%	272 84.2%	51 15.8%

Under present law, judges permit the DUI offender to retain a full driving privilege if his case is referred to VASAP without a conviction. Following the questions on whether a conviction for DUI should be required prior to referral to the VASAP, which were reviewed in a previous section, the respondents were asked to indicate whether an offender referred to the VASAP should be permitted to retain a full driving privilege, be issued a restricted license, or have his license suspended. Approximately 60% of the judges and prosecutors and 43% of the police favored the practice of permitting a first offender to retain a full driving privilege if his case was referred without a conviction (see Table 36). In addition, Table 37 shows that 68% of the respondents would support a law giving some form of a restricted license to first offenders who are referred. A cross tabulation between these two questions showed that 65% of the respondents who said no to giving first offenders a full license favored a restricted license. Similarly, most of the respondents (70%)

who favored giving the offender a full driving privilege also favored a restricted license. The major complaint of those persons who were opposed to the restricted license was the difficulty of enforcing the restrictions.

Table 36

Presently, the DUI offender is permitted to retain a full driving privilege if his case is referred to VASAP without a conviction. Do you favor this practice for

Response / Occupation	First Offenders? No	First Offenders? Yes	Second Offenders? No	Second Offenders? Yes	Multiple Offenders? No	Multiple Offenders? Yes
General District Ct.	25 35.7%	45 64.3%	63 94.0%	4 6.0%	65 95.6%	3 4.4%
Juvenile Ct.	11 31.4%	24 68.6%	28 80.0%	7 20.0%	32 94.1%	2 5.9%
Circuit Ct.	32 45.1%	39 54.9%	56 84.8%	10 15.2%	60 90.9%	6 9.1%
Prosecutors	37 42.5%	50 57.5%	76 91.6%	7 8.4%	82 95.3%	4 4.7%
Police	46 56.8%	35 43.2%	67 94.4%	4 5.6%	65 92.9%	5 7.1%
Total	151 43.9%	193 56.1%	290 90.1%	32 9.9%	304 93.8%	20 6.2%

Table 37

Would you support a law giving some form of restricted license to DUI offenders who are referred to VASAP for

Response / Occupation	First Offenders? No	First Offenders? Yes	Second Offenders? No	Second Offenders? Yes	Multiple Offenders? No	Multiple Offenders? Yes
General District Ct.	25 33.3%	50 66.7%	45 64.3%	25 35.7%	52 74.3%	18 25.7%
Juvenile Ct.	11 31.4%	24 68.6%	18 51.4%	17 48.6%	23 65.7%	12 34.3%
Circuit Ct.	23 32.9%	47 67.1%	37 56.9%	28 43.1%	46 73.0%	17 27.0%
Prosecutors	25 28.1%	64 71.9%	47 54.7%	39 45.3%	57 66.3%	29 33.7%
Police	28 33.7%	55 66.3%	56 80.0%	14 20.0%	58 86.6%	9 13.4%
Total	112 31.8%	240 68.2%	203 62.3%	123 37.7%	236 73.5%	85 26.5%

The answers were markedly different for second and multiple offenders (see Tables 36 and 37). Over 90% of the respondents did not approve of the practice of permitting second and multiple offenders to retain a full driving privilege if they were referred to the VASAP. However, 42% of the judges and prosecutors would support a law giving a restricted license to second offenders, while only 30% favored giving a restricted license to multiple offenders. The police were most strongly opposed to allowing second and multiple offenders to obtain a restricted license. These responses show that a small number of respondents who are opposed to giving second and multiple offenders a full driving privilege would support a law giving some form of restricted license to these offenders.

In their responses to two additional questions (see Tables 38 and 39), 68% of the judges, but only 49% of the prosecutors, thought that permitting a DUI offender to retain a full license was sufficient incentive for completion of the VASAP. In contrast, 75% of the judges and 72% of the prosecutors thought that a

restricted license would provide sufficient incentive. Most of the respondents indicated the need to give the defendant some kind of break in return for his participation in the VASAP. However, some felt that the defendant was not benefiting from the VASAP when permitted to retain a full driving privilege, because he was just entering the program to keep his license, not to improve his drinking and driving habits. Others felt that if his driving privileges were restricted, the offender would take the VASAP more seriously. Most of the respondents felt that both types of licenses would provide the offender sufficient incentive to complete the program.

Table 38

Do you feel that permitting the DUI offender to retain a <u>full driving privilege</u> while in VASAP serves as an incentive for successful completion of the rehabilitation program?

Response / Occupation	No	Yes
General District Ct.	19 27.1%	51 72.9%
Juvenile Ct.	11 34.4%	21 65.6%
Circuit Ct.	23 34.8%	43 65.2%
Prosecutors	43 51.2%	41 48.8%
Total	96 38.1%	156 61.9%

Table 39

Do you feel a restricted license would provide sufficient incentive for the driver to complete the program?

Response / Occupation	No	Yes
General District Ct.	18 26.5%	50 73.5%
Juvenile Ct.	6. 18.2%	27. 81.8%
Circuit Ct.	16. 25.4%	47. 74.6%
Prosecutors	24. 27.9%	62. 72.1%
Total	64 25.6%	186 74.4%

The respondents who approved of giving a restricted license to DUI offenders were next asked to indicate the types of restrictions they would prefer to see. Respondents were permitted to check more than one of the alternatives provided and add any other restrictions. Table 40 shows that 95% of the judges and prosecutors who answered the question wanted to give the defendant permission to drive to and from work or school, while 75% would also give him permission to drive to and from the rehabilitation program. The other alternatives listed — permission to drive during daylight hours and permission to drive only on specified routes — were preferred by a minority of respondents. Among the other alternatives added by the respondents the most popular were permission to drive in strict emergency situations, as part of employment, and to and from church.

Table 40

Which of the following restrictions would you prefer to see on the driving privileges of DUI offenders who enter VASAP? (Check more than one if appropriate)

_____a) permission to drive to and from work or school only

_____b) permission to drive to and from the rehabilitation program only

_____c) permission to drive during daylight hours only

_____d) permission to drive only on specified routes

_____e) other (please specify) _____

Response / Occupation	Number of Respondents	Yes to A	Yes to B	Yes to C	Yes to D
General District Ct.	49	46 93.9%	38 77.6%	6 12.2%	8 16.3%
Juvenile Ct.	27	25 92.6%	20 74.1%	8 29.6%	8 29.6%
Circuit Ct.	48	45 93.8%	34 70.8%	5 10.4%	3 6.3%
Prosecutors	66	64 97.0%	50 75.8%	5 7.6%	11 16.7%
Total	190	180 94.7%	142 74.7%	24 12.6%	30 15.8%

Respondents were also asked the type of model they would favor for implementing a restricted license program (see Table 41). An overwhelming majority (79%) favored a model where the court issues the restricted license rather than the DMV. Twenty-two percent said the court should issue a license to all persons referred to VASAP, while 57% indicated that each court should have discretion in determining which of the persons it refers to VASAP should receive a restricted license.

Table 41

Which of the following models do you favor for implementing a restricted license program?

_____a) the Division of Motor Vehicles (DMV) issues a restricted license to all persons referred to VASAP

_____b) each court issues a restricted license to all persons it refers to VASAP

_____c) the DMV has discretion in determining which persons referred to VASAP should receive a restricted license

_____d) each court has discretion in determining which of the persons it refers to VASAP should receive a restricted license

_____e) other (please specify) _____

Response / Occupation	A DMV Issues	B Court Issues	C DMV Discretion	D Court Discretion
General District Ct.	6 11.3%	6 11.3%	0 0%	41 77.4%
Juvenile Ct.	3 11.5%	2 7.7%	4 8.0%	18 69.2%
Circuit Ct.	12 24.0%	6 12.0%	2 2.9%	28 56.0%
Prosecutors	10 14.5%	17 24.6%	3 11.5%	40 58.0%
Total	31 15.7%	31 15.7%	9 4.5%	127 64.1%
Additional tallies for persons who favored more than one model	7	17	0	0
Total	38 17.1%	48 21.6%	9 4.1%	127 57.2%

In considering the licensing sanction for handling DUI offenders, it seems appropriate to review the policy of other states on restricted licenses, the arguments for and against restricted licenses, and the literature on the effectiveness of restricted licenses. There are currently 35 states that issue some form of restricted license after a DUI conviction. Sixteen of the states list participation in or successful completion of a driver rehabilitation program as a condition to getting a restricted license. Ten states permit restricted licenses after a conviction for DUI, regardless of whether the offender enters a rehabilitation program. In addition, 9 states allow traffic offenders to get a restricted license under a variety of circumstances, not necessarily connected with a DUI offense.

In these 35 states a restricted license is offered as an alternative to complete license suspension for various traffic offenses. The license is generally issued on the basis of either the economic hardship expected to result from complete license suspension or for compliance with some condition such as attending a driver improvement or drunk driving rehabilitation program.

Those who support restricted licensing argue that complete withdrawals of the driving privilege can deprive a person of his livelihood, especially where the licensee must drive during work or in order to travel to and from work. The restricted license permits the offender to avoid unnecessary hardship while still curtailing his enjoyment of driving and limiting his driving exposure. This argument is valid if one can assume that loss of the driving privilege would result in economic hardship for most drivers. In 1974, Baker and Robertson tested this assumption by interviewing 450 persons who drove to work.[33] Participants were asked how they would reach work if a broken leg prevented them from driving. Only 21% said they would not be able to make other travel arrangements. Although the percentage of persons unable to reach work would be higher in a rural area or in an area where mass transit was not available, the study does suggest the need for close scrutiny by the courts to ascertain the offender's need to drive in order to work. For the persons who would suffer economically, the restricted license may be the best alternative.

Proponents of the restricted license also argue that it serves as an incentive for driver improvement in cases where the license normally would be suspended. This rationale is reflected in the practice of many states. Some of these states require completion of a driver improvement course or progress in a treatment program before issuing the license, while the others permit immediate issuance of the license upon a conviction for DUI or other offense on the condition that the offender will

participate in and complete a course or rehabilitation program.

Proponents of the restricted license also cite studies which have shown that many persons continue to drive while under complete suspension. A study reported by Coppin and Van Oldenbeck in 1965 demonstrated that a high percentage of negligent drivers whose licenses were suspended or revoked continued to drive.[34] They found that 33% of all suspended and 60% of all revoked drivers were cited for one or more traffic violations during their periods of suspension or revocation. These findings were supported by a study conducted by Kaestner and Speight in Oregon in 1974.[35] The results of their mailing survey indicated that 52% of the respondents drove while their licenses were suspended. These and other studies suggest that license suspension or revocation is not completely effective in removing drivers from the highway. Proponents argue that a restricted license gives a driver the incentive he needs for improvement rather than forcing him to drive under suspension and taking the chance of being apprehended.

One principal counterargument of the opponents to restricted licenses, as reflected in some of the responses to the questionnaire, is the difficulty of enforcing the restrictions. If a complete suspension is so difficult to enforce, then it would be nearly impossible to limit offenders to driving only in accordance with certain restrictions. Giving the licensee the privilege to drive at certain times encourages him to drive in other situations as well.

Opponents also argue that since the goal of license suspension is to promote highway safety, serious traffic offenders should be removed from the road. Restricted licenses present a threat to public safety by allowing these unsafe drivers to continue to drive. They argue that license suspension serves as a deterrent to unsafe driving conduct because a person will try to modify his driving behavior if he knows his license will be suspended. However, most of this deterrent value of license withdrawal is lost if drivers can obtain restricted licenses for their essential driving. Opponents feel that if someone commits a serious traffic offense, he should suffer the consequences of his conduct by being removed from the road.

There have been a handful of studies on the effectiveness of license suspension and restricted licenses as sanctions in traffic cases. In 1974, Kaestner and Speight tested the effectiveness of various sanctions in the context of a formal driver improvement program in Oregon.[35] Drivers eligible for a first time discretionary driver improvement license suspension were randomly assigned to the five conditions of no contact, a last

chance warning letter, a 1-month probationary license, a Defensive Driving Course or a 1-month license suspension. The authors then compared the proportion of drivers in each group who were able to drive a full year without a moving violation or chargeable accident. They found that the impact of license suspension on subsequent driving was not significantly different from that of a last chance warning letter or no formal agency contact. Drivers in the probationary license group and the Defensive Driving Course group were more successful in driving a year without a moving violation or chargeable accident than were the suspension group. The probationary license also had a significant delaying effect on the occurrence of moving violations or chargeable accidents.

The authors recommended more extensive use of a probationary license as a driver improvement device but warned against discontinuing the suspension option by saying: "It is not unlikely that the effectiveness of the probationary license . . . depended upon the existence of suspension as an alternative".

Also, the discretionary use of license suspension in a driver improvement setting was studied in Washington by Paulsrude and Klingsberg.[36] A group of problem drivers were randomly assigned to the three conditions of no contact, group interview and license suspension. The authors found no differences in effectiveness between the groups for reducing subsequent accidents and citation involvement for the 12-month period following the assignment. However, in one critique of the study, McGuire and Peck suggest that it cannot be regarded as proof that license suspensions do not work because if the authors had used an adequate sample size with the same results, the differences in favor of the suspended group would have been statistically significant.[23]

These two studies have shown that license suspension has no greater effect on driving behavior than other, less severe sanctions when it is used in a driver improvement setting. Also, the Oregon study has shown that the use of a restricted license can be more successful than license suspension in changing driving behavior. However, the results of these studies must be reviewed with caution because they are not oriented toward drinking drivers.

The only study which has evaluated the effectiveness of a restricted license in a DUI setting was conducted by Johns and Pascarella of the Highway Safety Research Center in North Carolina.[37] Prior to July 1969, North Carolina required mandatory revocation of a driver's license for 1 year upon conviction for a first DUI offense. Since many judges were reluctant to convict offenders for DUI because of the perceived harshness of mandatory suspension, the law was amended in 1969 to allow a court the option

to grant DUI first offenders a limited driving privilege whenever a need to drive was indicated.

Johns and Pascarella evaluated this new legislation by examining the court's disposition of DUI cases for periods before and after the law became effective. They found that the number of convictions for first offenders increased 10.5%, while the number of amended charges (such as reckless driving) decreased 33.8%. In addition, the pre-adjudication and post-adjudication violation and accident rates for samples of persons convicted of DUI before and after the law was amended were not significantly different.

The authors then compared the subsequent 1-year driving records of three groups: (1) a sample of DUI first offenders who received limited licenses (limited group), (2) a random sample of North Carolina drivers (random group), and (3) a sample of drivers whose licenses were revoked before the law was amended (revoked group). The limited group had a significantly lower traffic violation rate than the random group and a similar subsequent accident rate. However, the limited group did have significantly more subsequent DUI convictions. The revoked group had significantly fewer accidents than both the limited group and the random group. However, the group of drivers who had had their licenses revoked were still under revocation during the study period so their driving exposure was limited. The authors concluded that the driving record of the limited driving license recipient was no worse than that of the average North Carolina driver.

There also has been only one study made of the effectiveness of mandatory license suspension in DUI cases. In 1977, Hagen compared the subsequent driving history of 2 groups of multiple DUI offenders in California.(38) One group was permitted to keep their licenses by having their prior convictions declared unconstitutional, while the other group was subject to mandatory license suspension. After completing a variety of multivariate analyses, Hagen found that the drivers convicted of multiple DUI offenses who received a mandated license suspension evidenced a significantly better 6-year subsequent driving record than that of a comparable group of drivers not receiving the mandated licensing action. He concluded that the use of mandated licensing actions in addition to fines and/or jail sentences for multiple DUI offenders had a more positive effect on traffic safety than the use of only fines and/or jail sentences.

The North Carolina study on restricted licenses and the California study on mandatory license suspension have limited application to the problem of handling DUI offenders in Virginia, because neither study involves the use of a treatment program

such as VASAP. The California study evaluated the effectiveness of license suspension for multiple offenders when there was no treatment program. No one in Virginia questions the use of a mandatory license suspension for second and multiple DUI offenders who are not referred to a rehabilitation program. Similarly, the North Carolina study evaluated only the use of restricted licenses with first offenders when there was no treatment program. Again, no one has suggested that limited licenses be issued to persons not referred to VASAP.

In Virginia, the issue is whether a restricted license should be issued to persons who are referred to VASAP without a conviction instead of permitting the offender to retain his full driving privilege. Even though the questionnaire answers reveal that a few judges are presently issuing restricted licenses for VASAP referrals or taking their licenses away for a certain period of time, most judges are permitting DUI offenders referred to the VASAP without a conviction to retain a full driving privilege. Since the issue in Virginia is different from the issue normally encountered in deciding on a restricted license program, the literature has limited application to the situation in Virginia. No study has examined the effectiveness of a full license as compared to a restricted license in a DUI setting. In addition, it may be appropriate to apply different licensing sanctions to DUI offenders depending on whether they are classified as first, second or multiple offenders.

Other Possible Alternatives

Each respondent was asked whether all DUI offenders should be given at least one opportunity to go through a VASAP program. As shown in Table 42, juvenile court judges are the group most in support of the proposition, with 63% indicating that every DUI offender should be given one chance at the program. The remaining occupational groups vary between 48% and 57% supporting one opportunity for all offenders. It is clear that a sizeable minority (46% of all the respondents) believe that some DUI offenders are not suited for rehabilitation, and therefore, do not deserve even one chance to enter a program.

Table 43 reveals that only a small minority of state officials favor a law requiring mandatory referral to the VASAP for all first offenders. In each of the three groups of Virginia judges, 75% to 80% oppose the idea of mandatory referral. It is interesting that 41% of the police, who are the group most opposed to the rehabiliatation approach, support mandatory referral for all first offenders.

Table 42

Should all DUI offenders be given at least one opportunity to go through a VASAP program?

Response / Occupation	No	Yes
General District Ct.	37 51.4%	35 48.6%
Juvenile Ct.	13 37.1%	22 62.9%
Circuit Ct.	36 50.7%	35 49.3%
Prosecutors	38 43.2%	50 56.8%
Police	38 44.7%	47 55.3%
Total	162 46.2%	189 53.8%

Table 43

Would you favor a law requiring mandatory referral to VASAP for all "first offenders"?

Response / Occupation	No	Yes
General District Ct.	58 80.6%	14 19.4%
Juvenile Ct.	27 75.0%	9 25.0%
Circuit Ct.	53 77.9%	15 22.1%
Prosecutors	65 73.9%	23 26.1%
Police	50 59.5%	34 40.5%
Total	253 72.7%	95 27.3%

The general opposition to a mandatory statute shows that most court officials prefer the present discretion given a trial judge to determine a defendant's eligibility for the VASAP. Judges would argue that each DUI offense presents potentially unique circumstances which cannot properly be dealt with if a court is forced into a straitjacket by a requirement of mandatory referral. Although Table 42 shows that a slight majority of respondents approve of giving DUI offenders one chance at the VASAP, officials do not want to be forced into giving that chance. Cross tabulations of the responses to the two questions reveals that of all respondents who answered both questions, about 30% favor giving one chance at the VASAP but oppose mandatory referral. As noted by one judge, under a mandatory statute "courts will be completely bypassed; the VASAP program would supplant the courts in the most serious violation of traffic laws." (See Appendix E for commentary on Equal Protection Issues.)

Another possible countermeasure to drinking and driving would be the introduction of a "per se" law. Such a law would make it prima facie unlawful to drive a vehicle with a BAC above a certain level (i.e., 0.10%). The Uniform Vehicle Code (§11-902(a)(1)) recommends a "per se" law, and 12 states have adopted such a law in one form or another. North Carolina, for example, made it unlawful in 1973 for a driver to operate a vehicle when his BAC is 0.10% or above; violation constitutes a "lesser included offense of the offense of driving under the influence," somewhat akin to Virginia's pre-1971 offense of "driving while impaired." In other states, operation of a vehicle with a BAC of 0.10% or above carries the same penalty as a standard DUI conviction.

The results in Table 44 reveal that only the police (87%) favor the adoption of a "per se" law in Virginia. The majority of the four remaining groups rejected such a change, with circuit court judges (75%) being most strongly in opposition. A few respondents took the opportunity to comment on a possible "per se" law.

Under present law, a person arrested with a Blood Alcohol Content (BAC) of 0.10% or above is "presumed" to have been driving under the influence of alcohol, but this presumption can be rebutted by other evidence. Would you support a "per se" law making it unlawful to drive with a BAC of 0.10% or above?

One prosecutor felt the proposed law was "the most needed reform next to the abolition of VASAP", and suggested an even lower BAC level. Some of those opposing the law believed that a person with a BAC of 0.10%-0.15% may not necessarily be "under the influence", on the premise that vast differences in intoxication exist among individuals with the same BAC level. Three judges felt that a "per se" law, by creating what is in effect an irrebutable presumption of DUI, might be unconstitutional.

Table 44

Response / Occupation	No	Yes
General District Ct.	42 58.3%	30 41.7%
Juvenile Ct.	19 52.8%	17 47.2%
Circuit Ct.	52 75.4%	17 24.6%
Prosecutors	48 54.5%	40 45.5%
Police	11 13.3%	72 86.7%
Total	172 49.4%	176 50.6%

Proposal for Revision of Virginia DUI Laws

First Offenders

The questionnaire results clearly indicate that most state court officials oppose mandatory referral to the VASAP for all first offenders, believing that some persons are not suited for rehabilitation and should not have an opportunity to enroll in the program. These responses suggest that the trial judge should retain the discretion to determine whether or not a first offender may be referred to the VASAP. A requirement of automatic referral to the program of all first offenders would probably breed judicial hostility toward the program and ignores the unique circumstances surrounding each DUI case.

One possible revision to the present law would be to require a DUI conviction for first offenders prior to referral to the VASAP. As noted previously, judges are making great use of their discretion to decide what may be required prior to referral. Presently, a conviction prior to referral is not really a viable alternative for many judges because it demands mandatory suspension of the driver's license. For this reason, less than 20% of the judges currently require a DUI conviction prior to referral, and only about 35% of the judges favor amending the law to require a DUI conviction. Nearly 60% of the judges and prosecutors support requiring a conviction prior to referral if the mandatory license suspension provision were changed. The remaining 40% oppose requiring a conviction for reasons other than the mandatory suspension provision. An attempt to force this substantial number of judges to require a conviction prior to referral might be counter-productive. Instead of convicting the offender of DUI and referring him to the VASAP, these judges might decide to circumvent the requirement by convicting the offender of a lesser offense. In these circumstances the offender would never be referred to the program for rehabilitation. The authors therefore recommend that the law continue to provide the trial judge with his present flexibility to refer first offenders to the VASAP with or without a conviction.

In order to make a conviction prior to referral a viable alternative for the trial judge, some revision of the licensing statute will be necessary. The questionnaire results reveal that for first offenders, majority support exists for each of four possibilities which may not be inconsistent: mandatory suspension of the license upon a first DUI conviction; judicial discretion to determine whether the license should be suspended; retention of the full driving privilege while in the VASAP; and issuance of a restricted license. Although a review of the literature revealed that restricted licenses may be more effective than license

suspension in improving driving behavior, no study indicated that a restricted license, when used in the context of a DUI offense, would effectively reduce DUI recidivism. In addition, no study has examined the effectiveness of restricted licenses when issued in conjunction with referral to a rehabilitation program. Even though most respondents feel that a limited license would provide sufficient incentive for an offender to successfully complete the VASAP, the authors believe that the results of the literature survey, as well as difficulty in enforcement, make a persuasive case against the adoption of a limited license at the present time. Instead, the authors recommend a licensing system for first offenders which combines the other propositions supported by a majority of court officials — mandatory suspension upon a conviction, judicial discretion on the licensing action, and the offender's retention of a full license while enrolled in the VASAP.

The authors' recommended procedures for dealing with first offenders are outlined in Figure 1. When the defendant first appears in court, the judge shall retain his present discretion to either convict or not convict for DUI, and to refer or not refer the offender to the VASAP. If the judge convicts the offender for DUI and removes the opportunity for enrolling in the VASAP, the defendant should be subject to mandatory suspension of the license for 6-12 months and the possibility of fine or jail sentence, as is presently the case. However, the judge may decide to convict the offender and then refer him to the VASAP. If the judge chooses this option, he should be able to take the offender's license prior to referral for a discretionary period of 0-3 months. Thus, an offender who has been convicted of DUI may be without a license for some period of time while he is enrolled in the VASAP. The licensing statute should be revised to also provide that offenders convicted of DUI who successfully complete the program will lose their license for the discretionary period only. Mandatory suspension (6-12 months) would apply to those offenders convicted of DUI and referred to the VASAP and who eventually drop out of the program or otherwide fail to successfully complete it. The offender would prefer judicial discretion on a 0-3 months suspension period over a 6-12 month mandatory suspension period, and would thus have an incentive to satisfy the requirements of his rehabilitation program. Those offenders who successfully complete the program would still face the possibility of a fine or jail sentence, although such action would be unlikely.

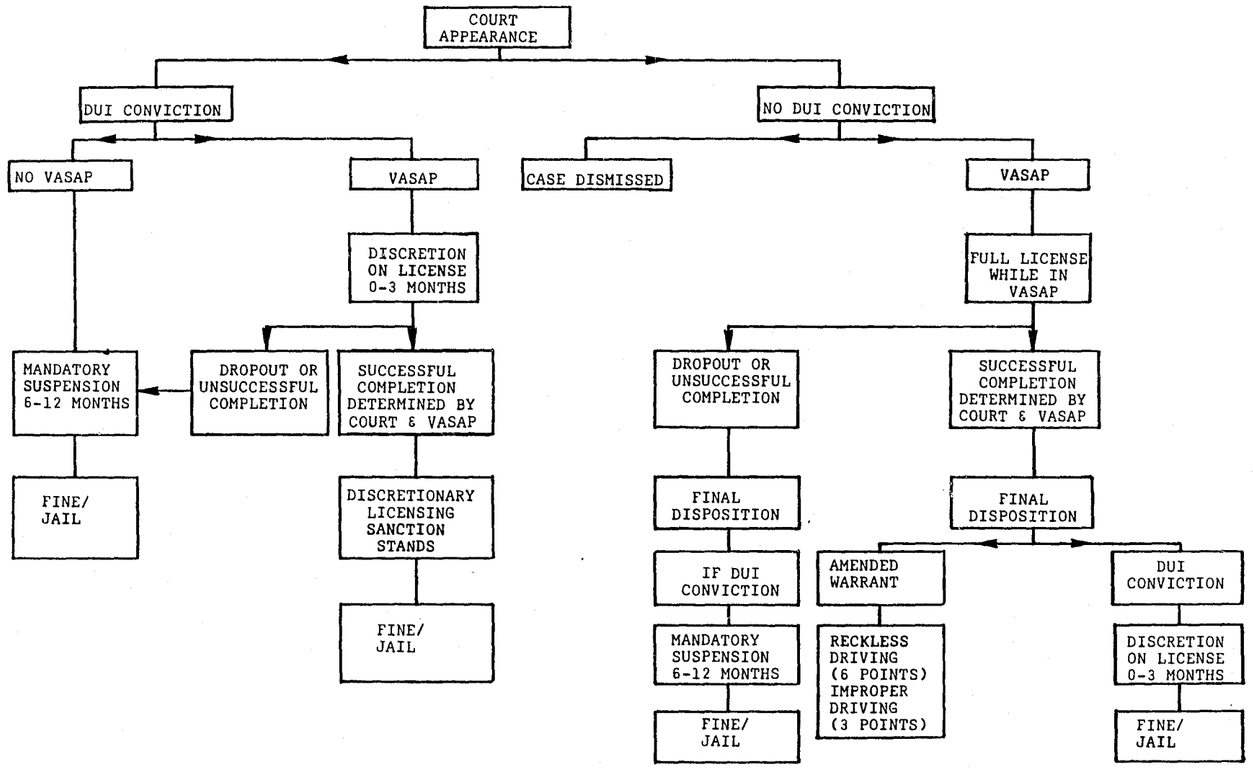

FIGURE 1. RECOMMENDED PROCEDURES FOR FIRST OFFENDERS.

The authors recommend that the judge retain the option to refer a defendant to the VASAP without a DUI conviction. If the judge elects this option, the offender keeps his full license until final disposition of the case. Defendants who fail to meet the requirements of the rehabilitation program are returned to court for disposition; if convicted of DUI, these offenders should face mandatory suspension of the license for the present 6-12 month period and the possibility of fine or jail sentence. If the offender successfully completes VASAP, the authors recommend that the judge retain the discretion to convict for DUI or amend the warrant, but no longer have the option to accept the VASAP "in lieu" of a DUI conviction (see p.31 above). An offender who is ultimately convicted for DUI should be penalized with a 0-3 month discretionary suspension of the license and the possibility of fine or jail in order that he be placed on a par with the offender who successfully completes the program after an initial DUI conviction. The judge may decide to amend the warrant and convict for reckless driving or improper driving; in either case demerit points will be placed on the license and notation will be made that the offender has been through the VASAP. It is important that the offender's driving record indicate that he has attended the VASAP. For example, if the offender completes the VASAP and is then convicted of reckless driving, his record should read, "Reckless driving, VASAP - completed." If the offender is referred to the VASAP and drops out, his record could read, "DUI conviction, VASAP - drop out." In this way, the court would always know if the offender has had an opportunity to attend the VASAP and the result of his participation.

The authors emphasize that a portion of these procedures recommended for first offenders are based on personal opinion and are only indirectly supported by the questionnaire results. For example, no question specifically asked the judges whether the VASAP "in lieu" option should be eliminated, and 25% of the judges use this option more than three-quarters of the time (see Table 20, p.30). Nevertheless, the authors feel that removing this option is not such a drastic step, since the judge may still amend the warrant to improper driving. Elimination of the VASAP in lieu alternative has the advantage of ensuring some penalty on the offender's license, even if that penalty is only 3 demerit points and equates DUI with a minor traffic offense in this respect. Further, some type of conviction will appear on the offender's record, which will make it easier to discover that the offender has participated in the program in the event he becomes a DUI recidivist.

Also, although the respondents did indicate support for judicial discretion on the license, they had no opportunity to react to the specific time period recommended by the authors (0-3 months), or to speculate whether this provision would provide incentive for the offender to successfully complete the program. However, because of the responses to the incentive questions for full and restricted licenses, the authors believe it is safe to assume that the respondents would find the possibility of recovering the license after a short period of time to also be an effective incentive for completion of the VASAP. Again, the proposed change is not very dramatic. Judges are left free to deal with first offenders as they presently do; the only difference is that convicting the offender for DUI becomes more feasible with the availability of discretion on the license. Elimination of mandatory suspension for offenders who successfully complete VASAP makes this option more available to the judge, and has the added benefit of inducing compliance with rehabilitation.

Second Offenders

The questionnaire results support a recommendation that a DUI conviction be required by law prior to referral to the VASAP for second offenders. The vast majority of judges and prosecutors favor this change, and most feel that this revision would not lead to increases in the number of DUI appeals, the number of cases involving plea bargaining, or any court backlog of DUI cases which might presently exist. Although the responses show that very few judges refer second offenders to the VASAP, the authors believe that a judge should not be prevented from referring a second offender as the individual circumstances dictate, because of the possibility of misclassification the first time.

The author's recommended procedures for dealing with second offenders appear in Figure 2. A requirement of a conviction prior to referral means that the licensing statute should be partially revised. Again, judicial discretion on the license can be used as an incentive for the second offender who is referred to the VASAP to successfully complete the program. The authors suggest that a second offender with a previous DUI conviction who is referred to the VASAP again should have his license suspended for not less than one-half of the present statutory requirement of 3 years prior to entry into VASAP. If the offender successfully completes the rehabilitation program, the judge would impose this 1 1/2 -3 year suspension along with any fine or jail sentence. Offenders who drop out of the program or otherwise fail to successfully complete it would be subject to the full 3 year period of mandatory suspension.

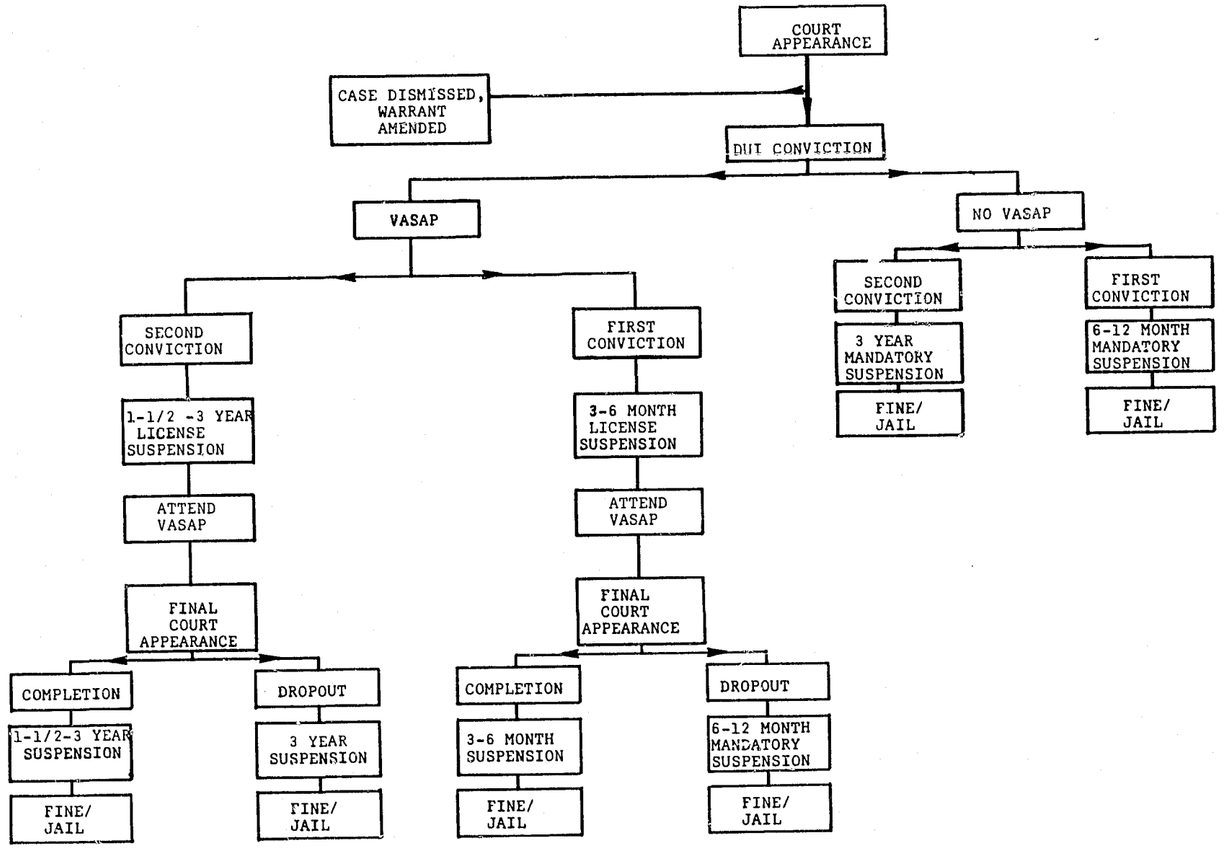

FIGURE 2. RECOMMENDED PROCEDURES FOR SECOND OFFENDERS.

A second offender with no prior conviction for DUI (i.e., his charges were reduced for the first offense) must be dealt with differently, since his conviction for the second DUI offense carries a mandatory suspension of only 6-12 months. If this type of second offender is referred to the VASAP, his license should also be suspended for one-half of the statutory period, in this case 3-6 months, prior to entry into the program. This 3-6 month discretionary suspension would be the final action on the license if the offender successfully completes the program; otherwise the full mandatory period of 6-12 months would apply.

Second offenders who are not referred to the VASAP will be subject to the present penalties. If this is the offender's first DUI conviction, he will face mandatory suspension of the license for a 6-12 month period, as well as a possible fine or jail sentence. If the offender now has a second DUI conviction, he will be subject to the 3 year mandatory suspension period and the fine or jail sentence.

Because the statutory technique recommended for second offenders is the same as for first offenders, the caveat to the reader which appears at the end of the first offender section applies here. The authors stress that some of these recommendations for handling second offenders also are only partially substantiated by the questionnaire research. However, Table 45 indicates that most court officials would approve of some guidance for uniform treatment of second and multiple offenders. The authors have attempted to synthesize the responses to various questions with the aim that any recommendation be as amenable to as many viewpoints as possible.

Table 45

Do you think that there should be guidelines for uniform judicial treatment -

	For Second Offenders?		For Multiple Offenders?	
Response / Occupation	No	Yes	No	Yes
General District Ct.	31 43.7%	40 56.3%	27 39.1%	42 60.9%
Juvenile Ct.	8 23.5%	26 76.5%	6 17.6%	28 82.4%
Circuit Ct.	17 26.2%	48 73.8%	14 23.0%	47 77.0%
Prosecutors	35 41.2%	50 58.8%	29 34.9%	54 65.1%
Total	91 35.7%	164 64.3%	76 30.8%	171 69.2%

Multiple Offenders

The questionnaire results indicate that nearly 95% of Virginia court officials would not refer multiple offenders to the VASAP, and that a vast majority of the respondents would support a law requiring a conviction for multiple offenders.

In light of these statistics, the authors recommend that all multiple offenders found guilty of DUI be convicted of that offense. The offender would then face mandatory suspension of his license and criminal penalties presently prescribed by the Virginia Code for that conviction, the severity being dependent upon whether it is his first or subsequent conviction. If the changes recommended by the authors are adopted, a multiple offender will have already received at least one prior DUI conviction (the mandatory DUI conviction imposed on second offenders). The authors also recommend that some limitation be placed on the judge's discretion to refer multiple offenders to the VASAP. Section 18.2-271.1 should be revised to either completely ban referrals to VASAP a third time or limit such referral to "unusual or dire circumstances." In the event that a multiple offender is referred to the VASAP, no reduction of the mandatory suspension period should be possible. If the judge wishes to induce successful completion of the rehabilitation program, he can do so by altering the fine or jail sentence.

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APPENDIX A

HOUSE JOINT RESOLUTION NO. 102

Creating a commission to study all aspects of the laws relating to probation, education and rehabilitation of persons charged with or convicted of driving under the influence of alcohol and the Virginia Alcohol Safety Action Program; allocating funds.

Agreed to by the House of Delegates, March 11, 1978

Agreed to by the Senate, March 11, 1978

WHEREAS, the present laws governing probation, education and rehabilitation of persons charged with driving under the influence of alcohol grant unlimited discretion in the trial judge as to who may enter an alcohol safety action program, or a driver alcohol rehabilitation program, and under what conditions; and

WHEREAS, the Virginia Alcohol Safety Action Program, and other such programs are not available in all of the several sectors of the Commonwealth; and

WHEREAS, these laws have been in effect since nineteen hundred seventy-five, and sufficient data should now be available as to the effectiveness of such programs, and a study should be made as to whether the laws should be changed insofar as limiting judicial discretion; whether convictions should be required prior to entry of such programs; whether work privileges to operate a motor vehicle should be issued instead of allowing the offender to retain his license; and whether second offenders should be privileged to again enter such a program; as well as any other matters pertinent to such a study; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That a Commission is hereby created for the purpose of studying all aspects of the laws relating to driving under the influence of alcohol or drugs, particularly relating to the probation, education and rehabilitation of persons charged with such offenses. The Commission shall consist of eleven members, five of whom shall be members of the House of Delegates to be appointed by the Speaker thereof; three of whom shall be members of the Senate to be appointed by the Committee on Privileges and Elections thereof; the Director of the Division of Alcoholic Services, or his designee, one citizen at large, to be appointed by the Speaker of the House of Delegates and one general district court judge to be appointed by the Committee on Privileges and Elections of the Senate. The Commission shall study all aspects of the problem, including, but not limited to, (i) whether the laws should limit the discretion of the trial judge; (ii) whether convictions shall be required prior to entry of such programs; (iii) whether work permits to operate motor vehicles should be issued rather than allowing the offender to retain his license; (iv) the problem of second offenders; and (v) the Alcohol Safety Action Program. All interested agencies of the Commonwealth shall assist the Commission in its study. The Commission shall select its chairman.

All members of the Commission shall be reimbursed for their actual expenses incurred by them in the performance of the work of the Commission, and legislative members shall receive such compensation as is provided in § 14.1-18. For these and such other expenses as may be required, including secretarial and other professional assistance, there is hereby allocated from the general appropriation to the General Assembly the sum of ten thousand dollars.

The Commission shall complete its study and submit its report to the Governor and the General Assembly no later than November one, nineteen hundred seventy-eight.

APPENDIX B

DEPARTMENT OF HIGHWAYS & TRANSPORTATION
HAROLD C. KING, COMMISSIONER

LEO E. BUSSER, III
DEPUTY COMMISSIONER AND
CHIEF ENGINEER

OSCAR K. MABRY
DIRECTOR OF PLANNING

JACK H. DILLARD, HEAD
VIRGINIA HIGHWAY & TRANSPORTATION RESEARCH COUNCIL

UNIVERSITY OF VIRGINIA
DR. FRANK L. HEREFORD, JR., PRESIDENT

SCHOOL OF ENGINEERING & APPLIED SCIENCE
JOHN E. GIBSON, DEAN

DR. LESTER A. HOEL, CHAIRMAN
DEPARTMENT OF CIVIL ENGINEERING

COMMONWEALTH of VIRGINIA

HIGHWAY & TRANSPORTATION RESEARCH COUNCIL

BOX 3817 UNIVERSITY STATION
CHARLOTTESVILLE, VIRGINIA 22903

IN REPLY PLEASE
REFER TO FILE NO. 7.41

July 17, 1978

SAMPLE QUESTIONNAIRE AND
COVER LETTER

Dear Judge

This year the General Assembly passed House Joint Resolution #102, calling for a review of the Virginia Alcohol Safety Action Program and all laws relating to driving under the influence of alcohol. Specifically, the General Assembly will study whether the laws should be changed to limit judicial discretion as to who may enter the Program; whether convictions should be required prior to entry into a rehabilitation program; whether work privileges to operate a motor vehicle should be issued instead of allowing an offender to retain his full driving privilege; and whether second offenders should be given another opportunity to enter a rehabilitation program.

The Virginia Highway and Transportation Research Council is conducting an independent study which will help the General Assembly make informed decisions about Virginia's drunk driving laws. Vital to this research is a survey of the opinions on alternative court procedures from those persons who work daily with DUI offenders. By expressing your views on this controversial subject, you will give the General Assembly essential information on present court procedures and possible alternatives.

We ask that you complete the attached questionnaire and return it in the enclosed envelope. We would appreciate receiving your reply by August 2, so that our report may be completed in time to be considered by the General Assembly. If you do not try traffic cases, please note that fact as part of your reply to Question #3. Then you may either proceed to Part III if you wish to express your opinions on possible revisions to

CONTINUED

1 OF 2

Virginia law, or return the questionnaire unanswered. If you have any questions, call John Abbene or Peter Keith, graduate legal assistants on our staff, at (804) 977-0290.

Thank you for your assistance.

Very truly yours,

Jack H. Dillard, Head
Virginia Highway & Transportation
Research Council

JA/PK:jms
Attachment

cc: Mr. John T. Hanna

Virginia Highway and Transportation Research Council

VASAP QUESTIONNAIRE

Name _____

Court _____

Phone Number ( ) _____

This questionnaire is part of a study of the role of the judiciary in controlling the drinking driver. The questions are designed to survey current court procedures in drinking-driver cases and to seek opinions about alternative procedures which might be used in Virginia. Please consider each question carefully. Your responses will provide information for the General Assembly's discussion on possible changes in Virginia law.

When you have finished, use the enclosed envelope to return the questionnaire. We would appreciate receiving your reply by August 2, so that our report may be completed in time to be considered by the General Assembly. Thank you for your help in this matter.

PART I

1. In the handling of persons arrested for driving under the influence of alcohol (DUI), driver rehabilitation and education should be used —

   _____ a) as an alternative to traditional criminal sanctions
   _____ b) in conjunction with traditional criminal sanctions
   _____ c) not at all

2. Have you ever attended a judicial seminar on Alcohol and Highway Safety sponsored by the Highway Safety Division?

   Yes _____ No _____

3. Do you use the Virginia Alcohol Safety Action Program (VASAP) and its local programs in the disposition of cases involving individuals accused of DUI?

   Yes _____ No _____

   If not, please state your reasons and skip to Part III.

   _____

   _____

   _____

PART II Present Court Procedures

IN THE FOLLOWING QUESTIONS, A DUI "FIRST OFFENDER" IS DEFINED AS A PERSON WHO HAS NEVER BEEN REFERRED TO VASAP, EVEN THOUGH HE MAY PREVIOUSLY HAVE BEEN ARRESTED OR CONVICTED FOR DUI.

4. What do you generally require prior to referring a DUI "first offender" to VASAP? (Check any which apply)

_____ a) the defendant must plead guilty to DUI
_____ b) the court need only to hear evidence sufficient to support a finding of guilt
_____ c) the defendant must be convicted of DUI
_____ d) other (please specify) _____

_____

5. What percentage of DUI "first offenders" do you refer to VASAP? (Specify if you wish) _____

_____ a) less than 50%
_____ b) 50% - 75%
_____ c) 75% - 85%
_____ d) 85% - 95%
_____ e) more than 95%

6. How important are the following factors in determining that a "first offender" should not be referred to VASAP?

1) very important 2) important
3) somewhat important 4) not important

_____ a) the Blood Alcohol Content (BAC) level at the time of arrest
_____ b) the offender's involvement in a fatal accident
_____ c) the offender's involvement in an accident causing personal injury
_____ d) the offender's involvement in an accident causing property damage
_____ e) prior DUI convictions
_____ f) other (please specify) _____

_____

7. Does the court receive a report based on an investigation into the personal and social background of all DUI offenders (i.e., employment, drinking history, etc.) prior to referral to VASAP?

Yes _____ No _____ (If no, skip to #9)

8. Who conducts this investigation?

_____ a) the local VASAP office
_____ b) court personnel
_____ c) other (please specify) _____

9. Under §18.1-271.1(a1) the court shall require a DUI offender entering VASAP to pay a fee of not more than $200. Do you waive this fee if the defendant is determined to be indigent?

Yes _____ No _____ (If no, skip to #11)

10. Must a DUI offender file an affidavit of indigency or inability to pay which must then be approved by the court in order for the offender to be declared indigent?

Yes _____ No _____

11. What percentage of "first offenders" that you refer to VASAP complete the program? (Specify if you wish) _____

_____ a) less than 50%
_____ b) 50% - 75%
_____ c) 75% - 85%
_____ d) 85% - 95%
_____ e) more than 95%

12. In dealing with "first offenders" who have completed a rehabilitation program, about how often do you —

_____% a) convict the defendant for DUI
_____% b) convict the defendant for reckless driving
_____% c) convict the defendant for improper driving
_____% d) accept VASAP completion in lieu of a conviction
_____% e) other (please specify) _____

_____

IN THE FOLLOWING QUESTIONS, INCLUDED WITHIN THE DEFINITION OF A DUI "SECOND OFFENDER" ARE ALL PERSONS WHO HAVE BEEN GIVEN ONE PRIOR OPPORTUNITY TO PARTICIPATE IN VASAP, REGARDLESS OF THE NUMBER OF PREVIOUS CONVICTIONS OR WHETHER THE FIRST REHABILITATION PROGRAM WAS COMPLETED.

13. Do you usually request information to find out whether a person arrested for DUI is a "second offender"?

Yes _____ No _____

14. Do you usually receive sufficient information to indicate whether a particular DUI defendant is a "second offender"?

Yes _____ No _____

15. Are you usually notified if a particular DUI offender is presently enrolled in VASAP in another jurisdiction?

Yes _____ No _____

16. Would you generally refer a DUI "second offender" to VASAP again?

Yes _____ No _____ (If no, skip to #20)

17. What percentage of "second offenders" do you refer to VASAP?

_____

18. Would you recommend that the "second offender" be placed in a higher level VASAP program (such as an alcohol treatment program) than that to which he was previously assigned?

Yes _____ No _____

19. Which of the following procedures do you usually follow in disposing of cases involving "second offenders" you have referred to VASAP for a second time? (Check any which apply)

_____ a) convict for DUI with VASAP participation as a condition of probation

_____ b) continue the case and convict for DUI after completion of the program

_____ c) continue the case and convict for a lesser charge after completion of the program

_____ d) continue the case and accept VASAP participation in lieu of a conviction

_____ e) other (please specify) _____

_____

20. Would you refer to VASAP a DUI offender who has been referred to VASAP at least twice previously?

Yes _____ No _____

PART III Alternative Court Procedures

IN THE FOLLOWING QUESTIONS, "FIRST OFFENDERS" ARE DEFINED AS PERSONS WHO HAVE NEVER BEEN REFERRED TO VASAP; "SECOND OFFENDERS" ARE DEFINED AS PERSONS WHO HAVE BEEN GIVEN ONE PRIOR OPPORTUNITY TO PARTICIPATE IN VASAP; AND "MULTIPLE OFFENDERS" ARE DEFINED AS PERSONS WHO HAVE BEEN GIVEN TWO OR MORE PRIOR OPPORTUNITIES TO PARTICIPATE IN VASAP.

21. Under present law, a person convicted of DUI must have his driver's license suspended for a certain period of time. Do you approve of this mandate for

a) first offenders? Yes _____ No _____
b) second offenders? Yes _____ No _____
c) multiple offenders? Yes _____ No _____

22. Would you favor a law giving the trial judge discretion to determine whether or not a driver's license of a DUI offender should be suspended for

a) first offenders? Yes _____ No _____
b) second offenders? Yes _____ No _____
c) multiple offenders? Yes _____ No _____

23. Current law gives a judge the option to refer a DUI offender to VASAP (or another driver alcohol rehabilitation group) with or without a conviction. Would you support changing the law to require a conviction for DUI prior to referral to VASAP for

a) first offenders? Yes _____ No _____
b) second offenders? Yes _____ No _____
c) multiple offenders? Yes _____ No _____

24. Suppose the law were amended to no longer require mandatory suspension of the driver's license upon a conviction for DUI. Would you then favor requiring a conviction prior to referral to VASAP for

a) first offenders? Yes _____ No _____
b) second offenders? Yes _____ No _____
c) multiple offenders? Yes _____ No _____

25. Presently, the DUI offender is permitted to retain a full driving privilege if his case is referred to VASAP without a conviction. Do you favor this practice for

a) first offenders? Yes _____ No _____
b) second offenders? Yes _____ No _____
c) multiple offenders? Yes _____ No _____

26. Would you support a law giving some form of restricted license to DUI offenders who are referred to VASAP for

a) first offenders? Yes _____ No _____
b) second offenders? Yes _____ No _____
c) multiple offenders? Yes _____ No _____

(If all nos, skip to #29)

27. Which of the following restrictions would you prefer to see on the driving privileges of DUI offenders who enter VASAP? (Check more than one if appropriate)

_____ a) permission to drive to and from work or school only

_____ b) permission to drive to and from the rehabilitation program only

_____ c) permission to drive during daylight hours only

_____ d) permission to drive only on specified routes

_____ e) other (please specify) _____

_____

28. Which of the following models do you favor for implementing a restricted license program?

_____ a) the Division of Motor Vehicles (DMV) issues a restricted license to all persons referred to VASAP

_____ b) each court issues a restricted license to all persons it refers to VASAP

_____ c) the DMV has discretion in determining which persons referred to VASAP should receive a restricted license

_____ d) each court has discretion in determining which of the persons it refers to VASAP should receive a restricted license

_____ e) other (please specify) _____

_____

29. Do you feel that permitting the DUI offender to retain a full driving privilege while in VASAP serves as an incentive for successful completion of the rehabilitation program?

Yes _____ No _____

30. Do you feel that a restricted license would provide sufficient incentive for the driver to complete the program?

Yes _____ No _____

31. Should all DUI offenders be given at least one opportunity to go through a VASAP program?

Yes _____ No _____

32. Would you favor a law requiring mandatory referral to VASAP for all "first offenders"?

Yes _____ No _____

33. Do you think that there should be guidelines for uniform judicial treatment of

a) second offenders? Yes _____ No _____

b) multiple offenders? Yes _____ No _____

34. Should the trial court receive a report based on an investigation into the offender's background prior to referral to VASAP?

Yes _____ No _____

35. Do current procedures lead to a backlog of DUI ca[illegible]n your court?

Yes _____ No _____

36. Do you think that requiring a conviction prior to referral to VASAP would create more backlog than at present?

Yes _____ No _____ Unsure _____

37. Do you think that requiring a conviction prior to referral to VASAP would create more backlog than at present if there were no mandatory suspension of the driver's license?

Yes _____ No _____ Unsure _____

38. Under present law, a person arrested with a Blood Alcohol Content (BAC) of 0.10% or above is "presumed" to have been driving under the influence of alcohol, but this presumption can be rebutted by other evidence. Would you support a per se law making it unlawful to drive with a BAC of 0.10% or above?

Yes _____ No _____

Feel free to make any additional comments. Thank you for your time and consideration. Your comments are confidential and will be used along with the responses of other officials in our report to the General Assembly. Return this questionnaire to

Virginia Highway and Transportation Research Council
Box 3817 University Station
Charlottesville, Virginia 22903

Attention: Safety Section

APPENDIX C

LOCAL VASAP DIRECTORS' RESPONSES

Introduction

A separate questionnaire was mailed to the director of each of the 22 currently active, local VASAP areas. The questionnaire contained many of the same questions directed to the other occupational groups, as well as specific questions on local VASAP-court interaction.

The preliminary data presented below compile the responses of the 21 of 22 local VASAP directors who have thus far returned the questionnaire. Raw numbers in the blanks next to each answer indicate the total number of VASAP directors who selected that answer. The corresponding percentage of directors answering the question in that manner appears in parentheses next to the raw number.

Responses to questions which deviated from any of the standard answers provided, or which gave additional information, are not included in the raw numbers and percentages.

PART I Current Procedures

In the following questions, "first offenders" are defined as persons who have never been referred to VASAP; "second offenders" are defined as persons who have been given one prior opportunity to participate in VASAP; and "multiple offenders" are defined as persons who have been given two or more prior opportunities to participate in VASAP.

1. In dealing with persons arrested for driving under the influence of alcohol (DUI), VASAP driver education and rehabilitation programs — (check one)

   (57%) 12 a) serve as an alternative to traditional criminal penalties such as fines or jail sentences

   (43%) 9 b) act in conjunction with traditional criminal penalties

2. Do you usually provide the court with a report based on an investigation into the personal and social background (i.e. employment, drinking history, etc.) of the DUI offender prior to his referral to VASAP?

   Yes 1 (5%) No 18 (95%)

3. What percentage of DUI "first offenders" who are referred to your VASAP office complete the program? (Specify if you wish_____)

(0%) 0 a) less than 50%
(5%) 1 b) 50% - 75%
(14%) 3 c) 75% - 85%
(57%) 12 d) 85% - 95%
(24%) 5 e) more than 95%

4. When do you usually receive information which indicates whether a particular DUI offender has been previously enrolled in VASAP?

(0%) 0 a) never
(72%) 13 b) before the court reaches a decision on whether to refer the offender to VASAP
(28%) 5 c) after the offender's second referral to VASAP but prior to the final disposition of the case
(0%) 0 d) after the court's final disposition of the case

5. When do you usually give this information to the court?

(0%) 0 a) never
(61%) 11 b) before the court reaches a decision on whether to refer the offender to VASAP
(39%) 7 c) after the offender's second referral to VASAP but prior to the final disposition of the case
(0%) 0 d) after the court's final disposition of the case

6. When do you usually receive information indicating whether a particular DUI offender is presently enrolled in VASAP in another jurisdiction?

(12%) 2 a) never
(29%) 5 b) before the court reaches a decision on whether to refer the offender to VASAP
(59%) 10 c) after the offender's second referral to VASAP but prior to the final disposition of the case
(0%) 0 d) after the court's final disposition of the case

7. When do you usually give this information to the court?

(12%) 2 a) never
(29%) 5 b) before the court reaches a decision on whether to refer the offender to VASAP
(59%) 10 c) after the offender's second referral to VASAP but prior to the final disposition of the case
(0%) 0 d) after the court's final disposition of the case

8. Should a DUI "second offender" be given an opportunity to enter VASAP again?

Yes 12 (60%) No 8 (40%)

Why or why not?

Yes: **Offender may be an alcoholic who has "slipped" or who fails to admit he has a problem; offender may have been misclassified the first time. General consensus that referral of second offenders should take place only on a case-by-case basis.**

No: **VASAP should not be a "revolving door". Community support for the program will decrease if recidivists are given a seconi chance. The offender should suffer the consequences of his failure tc improve.**

9. Would you place the "second offender" in a higher level program (such as an alcohol treatment program) than that previously assigned?

Yes 17 (94%) No 1 (6%)

10. Based on your experience, do you believe VASAP education and rehabilitation has been effective in dealing with "second offenders"?

Yes 12 (80%) No 3 (20%)

Why or why not?

Yes: **VASAP has been as effective in dealing with recidivists as with first offenders-- the recidivist is more willing to admit he has a drinking problem, and there is more pressure on him tc change his behavior.**

No: **Insufficient experience in dealing with second offenders. One director felt a second VASAP referral is helpful only in cases of misclassification, where the offender can be reassigned to more intensive treatment.**

11. Should a DUI offender be given the opportunity to participate in VASAP more than twice?

Yes 1 (5%) No 19 (95%)

12. What types of information are contained in the case manager's recommendation and report to the court? What use does the court in your area make of this recommendation in disposing of the DUI case?

The depth of information in the case manager's recommendation varies with each locality. In some areas, the recommendation is limited to a report on the offender's attendance and compliance with other requirements of the program. Other areas provide a more extensive report, which may include details on the offender's personal and social history and an evaluation of the likelihood that he will continue to drink and drive. Nearly all directors indicated that the court utilizes the recommendation in its decision on final disposition of the case.

PART II Alternative Court Procedures

13. Under present law, a person convicted of DUI must have his driver's license suspended for a certain period of time. Do you approve of this mandate for

a) first offenders?	Yes 11 (52%)	No 10 (48%)
b) second offenders?	Yes 21 (100%)	No 0 (0%)
c) multiple offenders?	Yes 21 (100%)	No 0 (0%)

14. Would you favor a law giving the trial judge discretion to determine whether or not a driver's license of a DUI offender should be suspended for

a) first offenders?	Yes 11 (52%)	No 10 (48%)
b) second offenders?	Yes 5 (25%)	No 15 (75%)
c) multiple offenders?	Yes 4 (20%)	No 16 (80%)

15. Current law gives a judge the option to refer a DUI offender to VASAP (or another driver alcohol rehabilitation group) with or without a conviction. Would you support changing the law to require a conviction for DUI prior to referral to VASAP for

a) first offenders?	Yes 8 (40%)	No 12 (60%)
b) second offenders?	Yes 15 (79%)	No 4 (21%)
c) multiple offenders?	Yes 16 (84%)	No 3 (16%)

16. Suppose the law were amended to no longer require mandatory suspension of the driver's license upon a conviction for DUI. Would you then favor requiring a conviction prior to referral to VASAP for

a) first offenders?	Yes 9 (45%)	No 11 (55%)
b) second offenders?	Yes 14 (74%)	No 5 (26%)
c) multiple offenders?	Yes 14 (74%)	No 5 (26%)

17. Presently, the DUI offender is permitted to retain a full driving privileg if his case is referred to VASAP without a conviction. Do you favor this practice for

a) first offenders?	Yes 16 (76%)	No 5 (24%)
b) second offenders?	Yes 2 (10%)	No 18 (90%)
c) multiple offenders?	Yes 1 (5%)	No 19 (95%)

18. Would you support a law giving some form of restricted license to DUI offenders who are referred to VASAP for

a) first offenders?	Yes 14 (67%)	No 7 (33%)
b) second offenders?	Yes 12 (60%)	No 8 (40%)
c) multiple offenders?	Yes 8 (40%)	No 12 (60%)

(If all nos, skip to #21)

19. Which of the following restrictions would you prefer to see on the driving privileges of DUI offenders who enter VASAP? (Check more than one if appropriate)

- 15 a) permission to drive to and from work or school only
- 11 b) permission to drive to and from the rehabilitation program only
- 0 c) permission to drive during daylight hours only
- 0 d) permission to drive only on specified routes
- _____ e) other (please specify) _____

20. Which of the following models do you favor for implementing a restricted license program?

- (33%) 5 a) the Division of Motor Vehicles (DMV) issues a restricted license to all persons referred to VASAP
- (33%) 5 b) each court issues a restricted license to all persons it refers to VASAP
- (7%) 1 c) the DMV has discretion in determining which persons referred to VASAP should receive a restricted license
- (26%) 4 d) each court has discretion in determining which of the persons it refers to VASAP should receive a restricted license
- _____ e) other (please specify) _____

21. Do you feel that permitting the DUI offender to retain a full driving privilege while in VASAP serves as an incentive for successful completion of the rehabilitation program?

Yes 18 (86%) No 3 (14%)

22. Do you feel that a restricted license would provide sufficient incentive for the driver to complete the program?

Yes 15 (75%) No 5 (25%)

23. Should all DUI offenders be given at least one opportunity to go through a VASAP program?

Yes 20 (95%) No 1 (5%)

24. Would you favor a law requiring mandatory referral to VASAP for all "first offenders" (defined as persons who have never been referred to VASAP)?

Yes 15 (71%) No 6 (29%)

25. Do you think there should be guidelines for uniform judicial treatment of

a) second offenders? Yes 16 (76%) No 5 (24%)

b) multiple offenders? Yes 18 (86%) No 3 (14%)

26. Should the trial court receive a report based on an investigation into the offender's background prior to referral to VASAP?

Yes 13 (65%) No 7 (35%)

Feel free to make any additional comments. Thank you for your time and consideration. Your comments are confidential and will be used along with the responses of other officials in our report to the General Assembly. Return this questionnaire to

Virginia Highway and Transportation Research Council
Box 3817 University Station
Charlottesville, Virginia 22903

Attention: Safety Section

APPENDIX D

RURAL-URBAN DIFFERENCES IN THE QUESTIONNAIRE RESULTS

The statewide VASAP program is modeled upon the experiences of the federally-funded ASAP in Northern Virginia, a heavily populated, urban area. It may be hypothesized that much of the dissatisfaction with present DUI laws occurs in rural localities, where the drinking-driving problem may be very different from that encountered in the state's large cities. From a political standpoint, it would be important to know whether the rural areas stand together in favoring a particular change to the present law.

To begin to test this hypothesis, each respondent was coded either "rural" or "urban" as his questionnaire was received. The urban group was limited to those respondents working in the four major urban areas of the state — Northern Virginia, Tidewater, Richmond and Roanoke. (See Table D-1.) Such a breakdown was of course, arbitrary, and resulted in respondents from other sizeable cities being classified as "rural". Nevertheless, the researchers felt that this breakdown would be sufficient to suggest possible rural-urban differences. The questionnaire results then were examined to determine if the responses to a particular question revealed a definite rural-urban split.

Major differences were discovered on the following issues:

(a) Conviction for DUI 1st Offenders Prior to Referral to VASAP — Fifty-six percent of the rural group expressed support for a change in the present law to require a DUI conviction for first offenders prior to referral to the VASAP; only 28% of urban respondents supported this change. Also, 68% of the rural group indicated support for requiring a DUI conviction if the law were also amended to no longer require mandatory suspension of the driver's license for persons so convicted; only 49% of the urban group supported this proposition. These figures suggest that DUI is perhaps considered a more serious offense in rural areas; that urban judges are somewhat more reluctant to deprive an offender of his driving privilege; and that a majority of rural officials would prefer to see the offender convicted for the offense which has actually been committed, with the VASAP then being used as a condition of probation.

(b) Final Disposition for DUI Second Offenders — As noted above, very few respondents indicated that they would generally refer second offenders to the VASAP again, and among those who would refer second offenders in certain circumstances, the majority would refer a total of less than 25% of second offenders.

TABLE D-1

AREAS OF THE STATE CLASSIFIED AS URBAN

TIDEWATER AREA

Chesapeake

Hampton

Newport News

Norfolk

Portsmouth

Virginia Beach

RICHMOND AREA

Richmond

Petersburg

Hopewell

Colonial Heights

Henrico County

NORTHERN VIRGINIA AREA

Alexandria

Fairfax County

Fairfax

Falls Church

Arlington County

Manassas - Manassas Park

ROANOKE AREA

Roanoke

Salem

Roanoke County

Significant rural/urban differences were discovered on the issue of final disposition of second offender cases. Sixty-seven percent of the rural group convict the defendant for DUI prior to referral to the VASAP and use rehabilitation as a condition of probation, versus 15% of the urban group, whereas 62% of the urban respondents said they would reduce charges for those second offenders completing the rehabilitation program, compared to only 33% of the rural group.

(c) Information Received on Second Offenders and Persons Enrolled in Another VASAP — It would appear that lines of communication between VASAP and court personnel are better in urban than in rural areas. Ninety-seven percent of urban officials receive information on second offenders, compared to only 83% of rural respondents. Also, 78% of the urban group receive information on whether the offender is enrolled in another VASAP, while only 59% of the rural group generally receive this information. It is clear that efforts to improve communication should be directed toward the less heavily populated areas of the state.

Rural/Urban differences of a lesser degree were discovered on the following issues:

(a) Present Requirements Prior to Referral for First Offenders — twenty-five percent of the rural respondents indicated that their courts presently require a DUI conviction prior to referral to the VASAP, compared to 14% of the urban group. On the other hand, 69% of the urban officials indicated that the court generally need only have sufficient evidence to reach a finding of guilt, compared to 54% of the rural group.

(b) Investigation Prior to Referral to the VASAP — thirty-one percent of urban officials noted that a background investigation of the DUI offender is presently made, compared to only 13% of the rural group. This difference may result from greater court resources in urban areas of the state.

(c) Percentage of First Offenders Referred to the VASAP — Less than 2% of the rural respondents said that their courts refer less than 50% of first offenders to the VASAP, compared to 14% of the urban respondents. Since the question was directed only at persons working in a presently operating VASAP area, the latter figure suggests the existence of a small core of urban judges who, although working in VASAP jurisdictions, refuse to make use of rehabilitation for the majority of DUI offenders tried in their courts.

(d) Final Disposition for DUI First Offenders — Results reveal that DUI convictions and the VASAP "in lieu" of a conviction are used to the same extent in rural and urban areas. Urban courts seem somewhat more prone to reduce the charges and convict the first offender for reckless driving — 48% of the urban group said the court convicted for reckless driving in more than three-quarters of first offender cases, compared to 38% of the rural group. The results concerning the use of improper driving are less consistent — 15% of the rural respondents said that courts use this technique in more than half the first offender cases, compared to only 6% of the urban groups. However, 63% of rural respondents said their courts never reduce charges to improper driving, compared to 50% of the urban group.

(e) Licensing Action for First Offenders — A higher percentage of the urban group supported changing the law to allow judicial discretion to suspend the driver's license of persons convicted of a first DUI offense (62% urban vs. 48% rural). More of the urban respondents favored allowing the first offender to retain his full driving privilege while enrolled in the VASAP (61% urban vs. 54% rural). Correspondingly, a higher percentage of the rural group supported the present law which requires mandatory suspension of the license upon a DUI conviction for a first offense (71% rural vs. 61% urban). These figures support the conclusion that urban judges are somewhat more reluctant to deprive a first offender of the opportunity to drive.

(f) Retention of the License as Incentive to Complete the VASAP — sixty-nine percent of the urban group believe that allowing the offender to keep his full license while enrolled in the VASAP acts as an incentive for him to successfully complete the rehabilitation program, whereas only 58% of the rural group are persuaded by this argument.

APPENDIX E

VASAP AND PROBLEMS OF EQUAL PROTECTION

It seems doubtful that the present DUI laws conflict with the Fourteenth Amendment of the United States Constitution, which guarantees to all citizens equal protection of the laws. In recent years the U. S. Supreme Court has followed a straightforward procedure in analyzing equal protection cases. If the court finds that either a "fundamental interest" or "suspect classification" is involved in a contested statute, the court will examine the statute with "strict scrutiny" and require that the state show a compelling interest and that the inequality is necessary to further the purpose of the statute. If neither a fundamental interest nor a suspect classification is involved, the court will make a more limited review of the statute, and uphold the law if it is rationally related to a legitimate state goal. It is clear that drinking drivers are not a suspect class (such as race or alienage), and that the right to equal opportunity for rehabilitation is not a constitutionally protected fundamental interest. Thus, the Court would apply only a limited standard of review, and §18.2-271.1 of the Virginia Code would be upheld if unequal opportunity for rehabilitation is rationally related to the purposes of the statute.

The present DUI statute suggests three possible contexts in which a defendant denied the opportunity to enter the VASAP might make an equal protection claim. First, under present law, each locality is allowed to assess its own needs and decide for itself whether to make rehabilitation available. Thus, a DUI offender may be denied the opportunity to enroll in the VASAP if he lives in an area that does not have an operational program. It seems certain that this situation would not give rise to a valid equal protection claim, because the Supreme Court has in the past held that different needs of local communities justify different application of state programs.

Second, because the present law grants the trial judge discretion to determine whether an offender is eligible for the VASAP, different sets of eligibility criteria are used among judges in different judicial districts. Thus, a particular DUI offender who was denied entry into the VASAP by the judge hearing his case may have been allowed to enroll in another area because that second judge uses different requirements for eligibility. However, this problem also probably fails to lead to a valid equal protection claim, again because the Supreme Court has held that uniformity of application of a state program in all areas of a state is not constitutionally required.

A third possible equal protection claim might be made by an indigent who is denied entry into the VASAP because of inability to pay the required fee. Of course, this situation would never arise if the indigency provision recommended in the body of this report is incorporated into §18.2-271.1. It is possible that a court might apply a stricter standard of review in this instance by choosing to classify wealth as "suspect". However, a court would more likely require only that the VASAP statute bear some rational relationship to its goal of improved highway safety. Under this lesser standard of review, a court would undoubtedly reason that although the VASAP is no guarantee of improved highway safety, its chances of success are sufficient to invalidate an equal protection claim.

It thus seems likely that the present DUI laws do not violate the equal protection clause of the Fourteenth Amendment. This conclusion is supported by the fact that in the responses to the questionnaire where officials were given the chance to comment generally on the DUI laws in Virginia, only one judge suggested that the present law might raise equal protection problems. The true concern should not be that §18.2-271.1 fails to meet equal protection requirements; rather, the Commission should ensure that the DUI laws provide equal justice for all state citizens. The Constitution may not require that each DUI offender be given the same opportunity to enter a rehabilitation program, but the Commission should demand equal opportunity up to the point where countervailing pressures dictate otherwise.

Equal opportunity for all state citizens could be ensured by a system which requires the VASAP to be adopted in all localities, and at the same time forces a judge to either refer all DUI offenders to the VASAP, or to apply an established set of criteria in determining whether a particular offender should be allowed entry into the program. This may, in fact, be an ideal model which will at some future point be adopted in Virginia. However, at the present time this system seems inappropriate. Local communities should not be forced to introduce a rehabilitation program; instead the VASAP should "sell" itself with its own effectiveness, which would lead to demand for the program within each locality. Further, the questionnaire results indicate that a large majority of court officials oppose mandatory referral of all first offenders to the VASAP. Because each DUI offense is unique, it would make sense to leave some discretion with the trial judge to deny access to the VASAP for certain offenders. Also, because of the varying circumstances surrounding each DUI case — BAC level; fatality, injury or property damage; prior VASAP referral or convictions for DUI; personal background of the offender; etc. — it may be impossible to establish a set of criteria which would guide judges in determining which offenders

are eligible for the VASAP. These countervailing considerations suggest that at present absolute equality of opportunity for rehabilitation may not be feasible.

Citations and a more detailed analysis of the equal protection problems can be found in the law review note "VASAP: A Rehabilitation Alternative to Traditional DUI Penalties". 35 Washington and Lee Law Review, 573 (1978).

END