

Virginia Criminal Sentencing Commission
March 23, 2020
Meeting Minutes

Due to precautions related to COVID-19, the meeting was held via conference call.

Members on the Conference Call:

Judge Edward L. Hogshire (Chairman), Judge Charles S. Sharp (Vice-Chairman), Diane Abato, Delegate Les R. Adams, Timothy S. Coyne, Judge James Fisher, Judge Steven C. Frucci, Judge Patricia Kelly, Judge W. Revell Lewis, Judge Stacey Moreau, Judge Michael Lee Moore, Kyanna Perkins, Judge James E. Plowman, Kemba Smith Pradia, Shannon L. Taylor and Judge James S. Yoffy

Members Absent from Call:

Judge Michael Lee Moore and Senator Bryce E. Reeves

Judge Hogshire informed members that Chief Justice Lemons had appointed two new members to fill the vacancies created by the departures of Judge Cavedo and Judge Kemler. The Chief Justice appointed Judge Stacey Moreau from the 22nd Circuit (Pittsylvania County) and Judge Patricia Kelly from the 15th Circuit (Hanover County).

The meeting commenced at 10:05 a.m.

Agenda

I. Approval of Minutes

Judge Hogshire asked the Commission members to approve the minutes from the previous meeting, held on November 6, 2019. The Commission unanimously approved the minutes without amendment.

II. Report on the 2020 General Assembly & Legislative Impact Analysis

Ms. Farrar-Owens, the Commission's Director, described the many activities of Commission staff during the 2020 Session of the General Assembly. These activities included the preparation of fiscal impact statements, as required by statute, responding to legislators' requests for supplemental information, monitoring legislation, observing the judicial interview process and providing technical assistance to other agencies.

Ms. Farrar-Owens then provided an overview of the requirements pertaining to fiscal impact statements. She reviewed the provisions of § 30-19.1:4, which became effective in 2000. The Commission is required to prepare a fiscal impact statement for any bill that would result in a net increase in the state prison population. This includes proposals to add new crimes to the *Code of Virginia*, increase statutory penalties, create or increase mandatory minimum sentences, or modify laws governing the release of prisoners.

Effective July 1, 2002, the impact statement must include an analysis of the impact on local and regional jails, as well as state and local community corrections programs. In preparing the impact statement, the Commission must note any adjustments to the sentencing guidelines that would be necessary if the legislation were adopted.

To prepare the impact statement, the Commission must estimate the increase in annual operating costs for state adult correctional facilities that would result if the proposal were to be enacted. Pursuant to § 30-19.1:4, a six-year projection is required. The highest single-year increase in operating costs is identified. This amount must be printed on the face of the bill. Per § 30-19.1:4, for each law enacted that results in a net increase in the prison population, a one-year appropriation must be made in the amount printed on the bill. Further, Item 48 of Chapter 2 of the 2018 Acts of Assembly, Special Session I (Appropriation Act) specifies that, for any bill for which the Commission does not have sufficient information to project the impact, the Commission must assign a minimum fiscal impact of \$50,000.

Ms. Farrar-Owens described the process used by staff to calculate the fiscal impact estimates. Using the most recent data available, staff identify the number of offenders likely to be affected by the proposed legislation. The data are used in a computer simulation model to estimate the number of additional beds in state facilities that would be required to house those offenders over the following six years. If data do not contain sufficient detail to estimate the impact of the proposal, staff provide background statistics, to the extent possible.

Ms. Farrar-Owens presented an overview of the number and kinds of impact statements prepared for the 2020 General Assembly. Staff produced 375 statements, the highest number of the last decade. She noted that only 56% of the bills sent to the Commission for a fiscal impact statement as of January 10, 2020, were formally introduced. Proposals requiring fiscal impact statements most frequently involved the expansion or clarification of an existing statute (87.5%) or the definition of a new crime (46.4%). Ms. Farrar-Owens displayed a slide to show the diversity of topic areas among fiscal impact statements prepared. For the 2020 Session, the most common topic area was firearms.

As indicated by Ms. Farrar-Owens, legislators can ask the Joint Legislative Audit and Review Committee (JLARC) to conduct an independent review of any fiscal impact statement prepared by the Commission. The number of such requests has ranged from zero to two per year. During the 2020 Session, JLARC was not asked to review any of the Commission's fiscal impact statements.

Ms. Meredith Farrar-Owens reviewed several pieces of legislation she believed would be of interest to Commission members. She noted that her presentation was not intended to be comprehensive but would serve to highlight several bills related to the Commission, sentencing guidelines, criminal penalties, or time to be served by convicted felons. Before beginning this portion of her presentation, Ms. Farrar-Owens informed members that no legislation had been introduced during the 2020 General Assembly session pertaining to the recommendations in the Commission's *2019 Annual Report*. Therefore, the Commission's recommendations for guidelines revisions were to become effective on July 1, 2020.

Ms. Farrar-Owens began with legislation relating specifically to the Commission. House Bill 1022 would explicitly define the Virginia Criminal Sentencing Commission as a state criminal justice agency. According to Ms. Farrar-Owens, this designation would be beneficial as the agency works with other state sentencing commissions to seek better access to national criminal history data. Ms. Farrar-Owens reported that the bill passed both houses and was approved by the Governor.

Ms. Farrar-Owens discussed other bills relating to the Commission: House Bill 1545 (to increase guidelines recommendations for acts of domestic terrorism), Senate Bill 438 (to require new reporting related to risk assessment and a judge's use of alternative sanctions), House Bill 1010 (to clarify requirements for fiscal impact statements), House Joint Resolution 65 (to direct the Commission to provide assistance with a study on the classification of crimes as violent felonies), Senate Joint Resolution 34 (to direct the Commission to provide assistance with a study of mandatory minimum penalties), Senate Bill 810 (to require that juries be given the applicable sentencing guidelines), and Senate Joint Resolution 39 (to require the Commission to assist with a study on the feasibility of abolishing jury sentencing in Virginia). Specifically, Senate Bill 438 would require the Commission to report the number of offenders during a judge's term who qualified for risk assessment, were recommended for an alternative sanction, but did not receive an alternative sanction. Also, Senate Bill 438 would require the Commission to determine the cost of incarceration based on the minimum guidelines recommended sentence and include the cost on the sentencing guidelines form for each offender who qualified for risk assessment and received a recommendation for an alternative sanction. Although none of these bills were passed, several were referred to the Virginia State Crime Commission for study, with findings to be reported back to the General Assembly.

Ms. Farrar-Owens described several other bills relating to sentencing: Senate Bill 811 (to allow the accused in jury cases to request sentencing by a judge), Senate Bill 326 (to allow a jury to recommend that the imposed sentence be suspended in whole or in part), House Bill 295 (to set a maximum term of probation for most offenses), Senate Bill 537 (to prevent the application of mandatory minimum punishments), and several bills related to the authority of judges to defer and dismiss certain charges or reduce the sentences for offenders who provide substantial assistance in the investigation of certain crimes. Most of these bills failed to pass but were referred to the Crime Commission for study. The outcome of three bills related to judicial authority to defer and dismiss and reduce sentences for substantial assistance (House Bill 660, Senate Bill 133 and Senate Bill 1018) were not known at the time of the meeting (update: these bills were passed and will become effective on July 1).

Ms. Farrar-Owens reviewed several pieces of legislation relating to parole, earned sentence credits, geriatric release, and time to be served by convicted persons. Most of these were referred to the Crime Commission for study; however, House Bill 35 (specifying that a person sentenced to life or more than 20 years for an offense committed as a juvenile is eligible for parole after serving 20 years) and Senate Bill 793 (specifying that a person sentenced by jury prior to the *Fishback* court decision is eligible for parole) had passed the General Assembly and had been signed by the Governor.

Ms. Farrar-Owens provided members with an overview of House Bill 995, which will increase from \$500 to \$1000 the threshold at which a larceny becomes a felony. The bill also increases the felony threshold for certain other property crimes. She reviewed the guidelines rules for scoring offenses for which the statutory punishment has changed. Under guidelines rules, offenses are scored at the current statutory penalty specified in the *Code*. When offense information is missing or unclear, the offense must be scored at the lowest statutory penalty. According to Ms. Farrar-Owens, Commission staff is developing a methodology to study criminal history records, specifically prior felony and misdemeanor larceny convictions/adjudications. The purpose of the study is to determine the feasibility of modifying the Larceny sentencing guidelines to score all prior larceny convictions/adjudications in the same manner (without distinguishing felony versus misdemeanor). If the data support such a modification, the Larceny guidelines factor could be revised accordingly.

Judge Sharp wondered if the staff should send a memo to judges about the changes to the felony larceny threshold, as the Commission had when the threshold was raised in 2018. Judge Hogshire suggested that this topic be discussed at the Judicial Conference. Judge Moreau agreed. Ms. Farrar-Owens said she would draft a letter explaining the law change as it relates to the scoring of sentencing guidelines.

Ms. Farrar-Owens concluded her presentation by reviewing other miscellaneous legislation, most of which was not adopted by the 2020 General Assembly.

Judge Hogshire moved up Agenda Item IV (Data Sources for Future Projects) due to guest speaker, Steven Dalle Mura, Director of Legal Research, Virginia Supreme Court.

IV. Data Sources for Future Projects

Jody Fridley, the Commission's Deputy Director, began his presentation by reviewing sources of data used by the Commission. In the past, the Pre-Sentence Investigation Report (PSI) system was a rich resource of information. PSI reports typically contain detail on the offense, the offender and the victim. However, judges do not order a pre-sentence report in every case. Mr. Fridley reviewed the statutory requirements related to PSIs and changes in the *Code* since 1995. He noted that, due to budget concerns and workload issues over the years, the number of PSIs completed has been falling since 1999. This has created challenges for the Commission when conducting research. According to Mr. Fridley, judges ordered a pre-sentence report in 44% of the felony sentencing events in 2018. He noted that, during the recession beginning in 2008-2009, the Department of Corrections (DOC) was unable to fill vacant probation officer positions; with fewer staff, DOC gradually stopped preparing post-sentencing reports (which, up to that time, were completed whenever the judge did not order a pre-sentence report). Furthermore, the 2006 General Assembly passed legislation to allow the court, with no objections from the Commonwealth or defense, to order an abbreviated pre-sentence report. He stated that the PSI reporting system was no longer the great source of information that it once was and that Commission staff faced significant challenges when conducting sentencing research to inform judges and policymakers.

Mr. Fridley then reviewed current data sources, including the sentencing guidelines database, court data, Virginia criminal history data from the State Police, and the many special studies conducted by the Commission. As a future data source, staff are working with other state sentencing commissions, to improve access to national criminal history data (out-of-state arrests and convictions). In the future, the Commission may turn to DOC for certain data to assist with the Commission's research, but it can be difficult to tie DOC data back to the offenses and sentencing dates of interest.

Continuing, Mr. Fridley noted that staff had received permission from circuit court clerks to access the Officer of the Court Remote Access (OCRA) system in most of the localities where it was used. In examining court records during the Commission's research projects, staff found that the information contained in court records typically did not provide the level of detail and consistency sought. Mr. Fridley indicated that, for the future, staff were interested in ways in which court data could be standardized to a greater degree. He indicated that the Commission could explore the possibility of legislation to require a written statement of facts, prepared by the Commonwealth's Attorney, that would be included in the court file, or could inquire as to the feasibility of a Rule of Court to require a written statement of facts. Mr. Fridley then asked Steven Dalle Mura, Director of Legal Research for the Office of the Executive Secretary of the Supreme Court of Virginia, to discuss the procedure of establishing a Rule of Court.

Mr. Dalle Mura began by saying that his colleague, Kristi Wright, Director of Legislative and Public Relations, was also on the conference call and available to answer questions. Mr. Dalle Mura stated that the Judicial Council of Virginia established the Advisory Committee on Rules to provide members of the Virginia State Bar and other interested stakeholders a means of more easily proposing Rule changes to the Council for recommendation to the Supreme Court. The duties of the Advisory Committee include evaluating suggestions for modification of the Rules made by the Bench, Bar, and public, and recommending proposed changes to the Judicial Council for its consideration. Mr. Dalle Mura indicated that the Advisory Committee's March meeting was canceled due to concerns regarding the COVID-19 pandemic. Ms. Wright said that the Judicial Conference was scheduled to meet in April and October. Judge Hogshire asked if the Commission should send a proposal over to the Committee. Mr. Dalle Mura indicated that would be a good first step. Judge Hogshire asked the members what they thought about the content of such a proposal. Ms. Abato asked as to what the Rule would look like. Judge Moreau suggested that a Subcommittee of the Commission be established to work on a draft of the content before the next meeting.

Judge Moreau made a motion to establish a Subcommittee of three or four members to explore developing a Rule that would require courts to order the submission of a statement of facts. Ms. Taylor seconded the motion but added that a public defender should be on the Subcommittee. The motion was amended to include Ms. Taylor's recommendation. The Commission voted 15-0 in favor.

Judge Hogshire asked Judge Frucci to serve as Chair of the Subcommittee. Judge Moreau, Judge Sharp, Judge Yoffy, Mr. Coyne and Ms. Taylor volunteered to serve on the Subcommittee. Judge Hogshire asked the Subcommittee to report back at the next meeting. Mr. Fridley will be the contact for the staff.

V. Issues Related to the Probation Violations Guidelines

Mr. Fridley provided a brief overview of the probation violation guidelines revision project that had been approved by the Commission. The goal of the project is to refine and improve the utility of the probation violation guidelines for Virginia's judges.

Mr. Fridley discussed two issues regarding the probation violation guidelines that had been raised by users in the field. First, users were concerned that individuals receive points on the probation violation guidelines for new arrests, even those where the individual was found not guilty or the charge was dismissed. Mr. Fridley indicated that incorporating new law violations (Condition 1) into the probation violation guidelines may reduce the need for the new arrest factor and thereby address the concerns. Second, users were concerned that the factor for the period of absconding was scored based on the time between the last known contact with the probationer and the violation hearing date. Users suggested that the period of absconding should be based on the time between the last known contact and the date the individual was arrested on the capias (rather than the violation hearing date). Mr. Fridley noted that it was sometimes difficult to identify the capias arrest date from available data sources. However, he assured members that staff would be sensitive to these issues when analyzing the data.

Mr. Fridley also discussed another challenge identified by staff. Information regarding testimony and/or evidence presented during the violation hearing is not available. This type of detail could be important, as such information may affect the judicial sentencing decision. The current sources are limited to information associated with the probationer's behavior while supervised, the major violation report submitted to the court by the probation officer, Virginia criminal history records, and judicial departure reasons for sentencing outside of the probation violation guidelines. Mr. Fridley asked members for suggestions on how staff might capture court testimony. Judge Hogshire felt that a transcript would be the only option. Mr. Coyne said the letters written to the court about the defendant are submitted to the record. Judge Moreau said the staff could conduct a survey to Clerks office asking about testimony, letters and evidence. Mr. Fridley said that he would investigate the feasibility of contacting the Clerks' offices for this information.

Mr. Fridley requested guidance from members regarding individuals removed from DOC's CCAP program and whether or not the probation violation guidelines should be completed for such individuals. CCAP is designed to target a different population than the previous Detention and Diversion Center programs. Because CCAP did not exist the last time the probation violation guidelines were revised, the data did not include sentencing information related to individuals removed from CCAP and returned to court. Thus, under current guidelines rules, removal from a Detention or Diversion Center program is scored on the probation violation guidelines, while removal from CCAP is not scored. Due to the lack of data on CCAP removals, Mr. Fridley asked members if the Commission should suspend the use of the probation violation guidelines for individuals removed from CCAP.

Mr. Coyne made a motion to suspend completion of the probation violation guidelines for individuals removed from CCAP, which was seconded by Ms. Smith-Pradia. The Commission voted 15-0 in favor.

Judge Hogshire requested that staff return to Agenda Item III at this time.

III. Options for an Information Dashboard

Mr. Joe Boelsche, Research Associate, described for Commission members a type of information management tool known as a data dashboard. A dashboard is a visual summary of information that captures publicly accessible content, driven by live or frequently updated data sources. If the Commission were to implement a data dashboard, it could reduce staff time required to process Freedom of Information Act (FOIA) requests. In addition, a data dashboard can be seen as increasing transparency and improving public access to government data.

Mr. Boelsche then displayed the Sentencing Guidelines data dashboard that is ready for upload to the Commission's webpage. Dashboards connect large amounts of data in the form of tables, charts, and graphs, and they provide a central location for hosting information, such as the agency's website. The data visualization simplifies complex datasets to help users better comprehend what the data mean in practice, trends in the data, and outcomes. Data dashboards vary in their appearance and can be created using a variety of data analysis and visualization programs. The dashboard should be user friendly. Mr. Boelsche reviewed the dashboard by clicking on tabs that outline user instructions, and caveats regarding the data. The staff would update the file annually as new fiscal year data becomes available. He then discussed the filters tab that allows users to select the fiscal years, primary offenses, and circuit courts of interest. He mentioned that is the only editable portion of the dashboard for the user. The combination of these filters creates the data set for the dashboard visuals, summary metrics, and VCC table. A report with no filters will display visuals and summary data for all FY2017 through FY2019 cases. He noted that filters can be reset and customized as many times as the user needs, allowing for unlimited reports once the dashboard is uploaded.

Mr. Boelsche then asked members if they would like staff to post the dashboard to the Commission's website. The staff would examine various approaches to maintaining a data dashboard and would solicit user feedback.

Judge Lewis asked when the information would be posted. Mr. Boelsche said that he could post the data in the next week or two.

Ms. Taylor made a motion to post the data dashboard to the Commission's website, which was seconded. With no further discussion, the Commission voted 15-0 in favor.

VI. Miscellaneous Items

Ms. Farrar-Owens reminded the members of upcoming dates. The Commission is scheduled to meet on June 1, September 14 and November 4.

With no further business on the agenda, the Commission adjourned at 12:20 p.m.