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Virginia Criminal Sentencing Commission November 6, 2019 Meeting Minutes

Members Present:

Judge Edward L. Hogshire (Chairman), Judge Charles S. Sharp (Vice-Chairman), Diane Abato, Delegate Les R. Adams, Judge Bradley B. Cavedo, Timothy S. Coyne, Judge James Fisher, Judge Steven C. Frucci, Judge Lisa Bondareff Kemler, Judge W. Revell Lewis, Judge Michael Lee Moore, Kyanna Perkins, Judge James E. Plowman, Kemba Smith Pradia, Senator Bryce E. Reeves, Shannon L. Taylor and Judge James S. Yoffy

Members Absent:

None

The meeting commenced at 10:05 a.m.

Agenda

I. Approval of Minutes

Judge Hogshire asked Commission members if there were any amendments to the draft minutes from the previous meeting, held on September 9, 2019. The Commission unanimously approved the minutes without amendment.

II. Results of Burglary Guidelines Study

Ms. Farrar-Owens, the Commission's Director, provided members with an overview of the results of the burglary guidelines study. In June 2018, at the request of a group of judges, the Commission had approved a special study of the sentencing guidelines for burglary offenses. The purpose of the new analysis was to determine if the guidelines for burglary needed to be refined to better reflect current judicial thinking in such cases. In order to fully explore sentencing in burglary cases, staff had completed an extensive data collection project to gather additional case details not otherwise available in automated data systems.

Ms. Farrar-Owens briefly described the staff's methodology for the study. Staff examined offenders sentenced during FY2014-FY2018 for whom burglary was the most serious offense. The sample was based on a stratified random sampling technique to undersample the most common types of burglary and oversample other types of burglaries. This ensured that an adequate number of cases for less common burglaries were included in the sample. She displayed a slide showing the number of cases for each type of burglary for the study sample (total sample size: 1,839). Ms. Farrar-Owens then presented a series of slides listing the elements of each case that were sought during the supplemental data collection. These included, but were not limited to, the type of victim (individual, business, pharmacy, nonprofit, etc.), whether victims were present at the time of the offense, vulnerability of

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victims (elderly, young children), victim injury (emotional, threatened, physical, life threatening), types of items taken (electronics, opioids/other drugs, etc.), value of the items taken, and offender issues (mental health, substance abuse, etc.).

Staff had identified the information sources most likely to contain the details of interest and most likely to be available to the Commission during the course of the study. Pre-Sentence Investigation (PSI) reports typically provide the most descriptive information about an offense. The staff requested and received automated PSI data from the Virginia Department of Corrections that included the offense narrative. Unfortunately, judges requested PSI reports in less than 41% of burglary cases. The staff concluded that the electronic document filing system used by some clerks (known as the Officer of the Court Remote Access system, or OCRA) would be the next best source of case information. The staff contacted 101 circuit court clerks who use OCRA to request access for the duration of the project. Of those contacted, 47 clerks approved access for Commission staff. Site visits were made to the remaining courts. Ms. Farrar-Owens noted that despite a substantial data collection effort, case details were often unavailable, which ultimately limited the analysis that could be conducted.

Ms. Farrar-Owens discussed the findings of the study. Factors related to the nature of the offense, including the type of structure, were presented. Nearly two-thirds (63.1%) of the burglarized structures were homes (excluding garages, sheds, etc.). Another 4.9% of the burglaries involved garages, sheds or similar areas attached to, or on the same property, as the home. Overall, 19.7% of the burglarized structures were commercial businesses, while an additional 0.6% involved business storage facilities. The remaining categories (pharmacy, public building, places of worship, vehicles/boats and other) each accounted for less than 2% of the burglaries in the study. Information was insufficient to determine the type of structure in 9.7% of the cases.

The staff was also interested in the degree of planning undertaken by the offender before committing the burglary or burglaries. In two-thirds of the cases, available sources did not contain this particular detail. When information was available, the staff found that, in 15.9% of the cases, the offender had been involved in a string of burglaries. For the majority of burglary cases (64.9%), the offender's intent in committing the burglary was to steal property. When time of day of the offense was available, burglaries were most often committed between 11:00 p.m. and 6:00 a.m. Records revealed that someone was present at the time of the burglary, or arrived home during the burglary, in 20.7% of the cases and that judges were more somewhat more likely to sentence above the guidelines in such cases. Documentation about a weapon or weapons in the offender's possession at the time of the burglary was rarely available; that detail was unknown or missing for 87.3% of the cases in the sample. When information regarding co-defendants was available, most offenders either acted alone or with a single codefendant.

Regarding damage committed during the burglary, the offender caused damage to the dwelling or other structure in more than one-third of cases; however, most of the time, the damage was limited to that which was necessary to enter the dwelling or structure. The staff also recorded the types of property taken or damaged during each burglary (this excluded damage to the dwelling or structure). The most common type of item taken in burglary cases was electronics (including televisions, computers, cell phones, and video

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games), with 24.0% of the burglaries involving at least one electronic device. The second most common item (in 18.2% of the cases) was cash or other financial items, such as credit cards. This was followed by jewelry, which was taken in 13.7% of the burglaries. The value of items taken or damaged during the burglary was missing in 40.9% of the cases examined; however, approximately one-fourth of the burglaries were found to have involved a loss of less than \$1,000. Only a small percentage of burglaries involved any act of violence. In 19% of the burglaries, the offender knew the victim in some way.

Some offenders in the sample were under some sort of restriction or had an open court matter when the burglary was committed. According to information available in case files, 10.2% of burglary offenders were on probation, parole or post-release supervision at the time of the offense. Another 7.1% were identified as having violated court-imposed terms of good behavior or unsupervised probation. Less than 1% of offenders violated a protective order when committing the burglary. For the majority of cases, however, this type of information was not available.

Ms. Farrar-Owens concluded by saying that despite the staff's substantial data collection effort, details in burglary cases were often unavailable, which limited the analysis that could be conducted with the supplemental data. However, by analyzing available sentencing guidelines data, staff did develop a series of possible recommendations for revising both the Burglary/Dwelling and the Burglary/Other guidelines. The proposed revisions were to be presented as part of the next agenda item.

Judge Sharp commented about the high percentages of missing information. He felt the Commission should proceed with caution, as it was difficult to determine if sufficient information was available to formulate any revisions to the guidelines based on the supplemental data collection. Some members expressed concern about Commission staff being denied access to OCRA by some clerks. Ms. Smith Pradia asked if the Commission should mandate cooperation through legislation. Judge Plowman suggested legislation to grant the Commission OCRA access; he also supported a written proffer or statement of facts submitted as part of the record of the case. Judge Kemler commented that a stipulation of facts is done orally in her court. She also noted that judges in Alexandria requested a pre-sentence report more often in the past than they do today.

III. Possible Recommendations for Sentencing Guidelines Revisions

Ms. Farrar-Owens first summarized the process by which proposals for revisions to the sentencing guidelines are developed. Topics for possible guidelines revisions are suggested by Commission members, judges, guidelines users (via the hotline or in training seminars), and staff. Guidelines provide judges with a benchmark for the typical, or average, case given the offenses at conviction and the defendant's prior record. Ms. Farrar-Owens emphasized that proposals for guidelines revisions reflect the best fit to the historical data. Based on detailed analysis of available data, seven possible recommendations were developed this year for the members' consideration. Any modifications to the guidelines adopted by the Commission must be presented in its Annual Report, submitted to the General Assembly each December 1.

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Proposed Recommendation 1 – Simplify the Section B Recommendation Tables for the Burglary/Dwelling and Burglary/Other Guidelines

Ms. Farrar-Owens presented the first proposed recommendation, which was to simplify the Section B Recommendation Tables used for the Burglary/Dwelling and Burglary/Other guidelines. Analysis of FY2014-FY2018 sentencing guidelines data suggested that the Section B Recommendation Tables could be refined to better reflect recent judicial sentencing patterns. Currently, the Section B Recommendation Tables for burglary offenses result in recommendations of probation/no incarceration, incarceration of 1 day-3 months, or incarceration of 3-6 months. Analysis of the data revealed that combining the latter two categories to simplify the Section B Recommendation Tables would better reflect sentencing practices in burglary cases, particularly in terms of the types of disposition recommended. With this change, the Section B Recommendation Tables for burglary guidelines would produce a recommendation of either probation/no incarceration or incarceration of 1 day-6 months. Ms. Farrar-Owens noted that the Section B Recommendation Tables for Fraud, Larceny, Traffic, Weapon, and Miscellaneous Guidelines were already structured in this manner. This modification was expected to slightly improve guidelines concurrence rates.

Judge Moore made a motion to adopt this recommendation, which was seconded. With no further discussion, the Commission voted 15-2 in favor.

Proposed Recommendation 2 – Revise the Burglary/Dwelling Guidelines to better reflect current sentencing practices

Ms. Farrar-Owens presented the proposal for revising the Burglary/Dwelling guidelines. During FY2014-FY2018, judicial concurrence with the Burglary/Dwelling guidelines was 69.6%. This is well below the overall average concurrence rate for all offenses (approximately 80%). Departures from the Burglary/Dwelling guidelines were relatively evenly split above and below the recommended range. The Burglary/Dwelling guidelines recommended 28.2% of the offenders for probation/no incarceration, while 6.1% were recommended for a short jail term. In practice, judges sentenced only 14.4% of offenders to probation without a term of incarceration and, instead, ordered a short jail term for 16.4% of the offenders. Thus, judges were sentencing Burglary/Dwelling offenders to jail terms at a much higher rate than had been recommended by the guidelines. Judges were more likely to concur with the Burglary/Dwelling guidelines when a longer term of incarceration (more than six months) was recommended. The analysis indicated that the staff needed to focus on probation/no incarceration and jail recommendations, as the Burglary/Dwelling guidelines were not closely aligned with actual dispositions ordered by the court in such cases. Ms. Farrar-Owens noted that, while overall departures in Burglary/Dwelling cases appear to be relatively balanced above and below the guidelines recommendation, there are clearly differences in the underlying patterns depending on the type of disposition recommended by the guidelines.

Based on the analysis, staff recommended an increase in points for the Section B Primary Offense factor for most Burglary/Dwelling offenders. Under the proposal, offenders whose primary offense is burglary of a dwelling with intent to commit larceny, etc., without a deadly weapon would receive either three points (for one count of the primary offense) or

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five points (for two or more counts of the primary offense) on the Section B Primary Offense factor; currently, these offenders receive only one point for all counts. Also, points scored for the Legal Restraint factor on Section B would increase from three to four. The staff also recommended adding two new factors to the Burglary/Dwelling Section B worksheet. The first of these accounted for Additional Offense convictions in the current sentencing event. Two points would be scored when an offender has additional offenses for which the sum of the statutory maximum penalties is five years or more. The second new factor would add one point when a stolen firearm was removed from the property during the burglary (this factor was based on the data from the supplemental data collection). The proposed changes will increase the likelihood that a burglary offender will be recommended for a short jail term rather than probation without incarceration.

Ms. Farrar-Owens stated that, with these changes, the guidelines would yield recommendations more aligned with actual dispositions in Burglary/Dwelling cases. This was expected to increase dispositional concurrence rates and better balance dispositional departures above and below the guidelines. Overall concurrence would remain essentially unchanged. Although the proposed changes were expected to decrease the rate of upward departures, some of the affected offenders would receive sentences that fall below the new (higher) Section B recommendation. These new mitigation cases from Section B will be in addition to the existing Section C mitigation cases, thus increasing the overall mitigation rate.

Judge Moore made a motion to adopt this recommendation, which was seconded. The Commission voted 15-2 in favor.

Proposed Recommendation 3 – Revise the Burglary/Other Guidelines to better reflect current sentencing practices

Ms. Farrar-Owens continued by presenting the proposal for revising the Burglary/Other guidelines. During FY2014-FY2018, concurrence with the Burglary/Other guidelines was 78.2%, which was close to the overall average concurrence rate for all offenses (around 80%). Departures from the Burglary/Other guidelines were relatively evenly split above and below the recommended range.

During FY2014-FY2018, the Burglary/Other guidelines recommended 25.7% of the offenders for probation/no incarceration, while 6.2% were recommended for a short jail term. In practice, judges sentenced only 17.5% of offenders to probation without a term of incarceration and, instead, ordered a short jail term for 16.7% of the offenders. As with the Burglary/Dwelling guidelines, judges had sentenced Burglary/Other offenders to jail terms at a higher rate than recommended by the current guidelines. Judges were more likely to concur with the Burglary/Other guidelines when a longer term of incarceration (more than six months) was recommended. Analysis revealed that, while departures in Burglary/Other cases appear to be relatively balanced overall, there were clearly differences in the underlying patterns depending on the type of disposition recommended by the guidelines. As indicated by the data, staff focused on probation/no incarceration and jail recommendations, as the Burglary/Other guidelines are not closely aligned with actual dispositions ordered by the court in such cases. This was very similar to the pattern observed for the previous Recommendation.

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Based on the analysis, staff recommended an increase in points for the Section B Primary Offense factor for most Burglary/Other offenders. Offenders whose primary offense was burglary of a structure other than a dwelling with intent to commit larceny, etc., without a deadly weapon would now receive three points on the Section B Primary Offense factor (rather than the current one point). Also, points scored for the Legal Restraint factor on Section B would increase from three to four. The staff also recommended adding one new factor to the Burglary/Other Section B worksheet. The factor would account for Additional Offense convictions in the current sentencing event. One point would be scored when the offender has additional offenses for which the sum of the statutory maximum penalties is five years or more. The proposed changes will increase the likelihood that a burglary offender will be recommended for a short jail term rather than probation without incarceration.

Ms. Farrar-Owens stated that, with these changes, the guidelines would yield recommendations more aligned with actual dispositions in Burglary/Other cases. This was expected to increase dispositional concurrence rates and better balance departures above and below the guidelines. Although the proposed changes are expected to decrease the rate of upward departures, it may also increase the percentage of downward departures (similar to the previous recommendation).

Some members expressed concern that burglary offenders may have substance abuse or other issues that could be addressed more effectively through a community-based program rather than a jail term, as may be recommended under this proposal, as well as the previous one. Mr. Coyne expressed concern regarding the potential impact the recommendations may have on plea negotiations in burglary cases by making it more difficult to negotiate a community-based punishment option for the defendant, which may better address his or her needs. He noted that offenders convicted of burglary, by statute, are not eligible to participate in drug treatment court programs.

Ms. Smith Pradia asked if Virginia's guidelines for burglary offenses were similar to those in other states. Ms. Farrar-Owens responded that, because states vary as to parole laws and sentence credits awarded, the comparison would not be "apples to apples."

Judge Cavedo made a motion to adopt this recommendation, which was seconded by Judge Moore. With no further discussion, the Commission voted 14-3 in favor.

Proposed Recommendation 4 – Revise the Kidnapping Guidelines to better reflect current sentencing practices

Tom Barnes, Research Associate, presented the proposal to revise the guidelines for the offenses of abduction by force without legal justification (§ 18.2-47(A)) and assisting or threatening to abduct (§ 18.2-49). The concurrence rate with the guidelines for these offenses was relatively low during CY2014-CY2018 at 72.5% (compared to approximately 80% across all offenses). The upward departure rate (16.6%) was higher than the downward departure rate (10.9%) in these cases. This suggested that the guidelines for this offense could be refined to better reflect actual judicial sentencing practices.

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Staff analysis revealed that, during CY2014-CY2018, the guidelines recommended 40.3% of the offenders for probation or incarceration up to six months in jail, while 59.7% were recommended for incarceration of more than six months. In practice, judges sentenced only 31.4% of offenders to probation or jail up to six months and, instead, ordered longer incarceration terms for 68.6% of the offenders. Thus, the current guidelines for these offenses were not closely aligned with the actual dispositions in these cases. Judges were sentencing offenders convicted of these kidnapping offenses to incarceration terms in excess of six months more often than had been recommended by the current guidelines. Further analysis of the data revealed differences in rates of concurrence with the guidelines for these kidnapping offenses were largely based upon whether or not the offender had been convicted of additional crimes. The concurrence rate was 75.9% when there were no additional convictions but 67.5% when additional convictions were included in the sentencing event.

Staff proposed several modifications to the Kidnapping Section A and Section C worksheets. On Section A of the proposed guidelines, the staff recommended adding three new factors, to be scored only when the primary offense at sentencing was abduction by force without legal justification or assisting or threatening to abduct. The first of these accounts for the type of Additional Offense convictions in the current sentencing event. One point would be scored if an offender has an additional conviction for a protective order violation, sexual assault, or a family offense, such as child abuse. A second new factor would add one point if an offender has a conviction in the current event requiring a mandatory minimum term of incarceration of six months or more. The third new factor addressed the degree of injury to the victim. No points would be scored for threatened injury; however, one point would be scored for emotional injury and two points would be scored if a victim suffered physical, serious physical, or life-threatening injury. The proposed changes will increase the likelihood that offenders convicted of one of the specified kidnapping crimes will be recommended for a term of incarceration in excess of six months.

On Section C, the staff recommended adding three new factors, to be scored only when the primary offense at sentencing was abduction by force without legal justification or assisting or threatening to abduct. These factors were similar to those proposed for the Section A worksheet. First, six points would be scored if an offender has an additional conviction for a protective order violation, sexual assault, or a family offense, such as child abuse. Second, six more points would be added if an offender has a conviction in the current sentencing event requiring a mandatory minimum term of incarceration of six months or more. The third new factor on Section C would capture victim injury. Two points would be scored for emotional injury and six points would be scored if a victim suffered physical, serious physical, or life-threatening injury. These Section C changes will increase the sentence length recommendation for offenders convicted of one of the specified kidnapping felonies who have additional convictions, who have a mandatory minimum term to serve, or who injured the victim emotionally or physically.

According to Mr. Barnes, the proposed revisions were expected to increase dispositional concurrence rates (from 82.6% to 86.8%) and better balance dispositional departures above and below the guidelines. Overall concurrence was expected to increase slightly under the proposal.

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Mr. Coyne asked if the proposed factor for additional offense convictions included the crime of domestic violence. Mr. Barnes responded that it did not.

Judge Cavedo made a motion to adopt this recommendation, which was seconded by Delegate Adams. With no further discussion, the Commission voted 16-1 in favor.

Proposed Recommendation 5 – Revise the guidelines for manufacture of methamphetamine (§ 18.2-248(C)) and (C1))

Joe Boelsche, Research Associate, presented the proposal to revise the guidelines for manufacturing methamphetamine. The act of manufacturing methamphetamine may be charged under § 18.2-248(C) or § 18.2-248(C1). Under § 18.2-248(C), manufacturing a Schedule I or II drug, such as methamphetamine, is punishable by imprisonment of 5 to 40 years for the first offense. Under § 18.2-248(C1), manufacturing methamphetamine is punishable by imprisonment of 10 to 40 years for the first offense. In addition to different penalty structures under these two subsections of the *Code*, the guidelines result in different guidelines recommendations depending on which subsection is used.

Mr. Boelsche focused the discussion on sentencing events during FY2014-FY2018 in which the primary offense was a single count of manufacturing a Schedule I or II drug under § 18.2-248(C) or manufacturing methamphetamine under § 18.2-248(C1). These cases were selected for analysis because there were no other convictions accompanying this specific drug charge. In this subset of cases, concurrence with the guidelines for methamphetamine manufacturing charged under § 18.2-248(C) was 52.0%, while concurrence with the guidelines for this act charged under § 18.2-248(C1) was 67.6%. In addition to this gap in concurrence rates, there was a gap in the mean sentences recommended by the guidelines, with the average recommended sentence for convictions under § 18.2-248(C) at 12 months versus nearly 25 months for convictions under § 18.2-248(C1). Based on analysis, staff developed a proposal to standardize scoring for manufacturing methamphetamine and better reflect sentencing for the typical methamphetamine manufacturing case.

Mr. Boelsche demonstrated the differences in scoring for the two subsections under current guidelines. The proposed scoring change applied uniform scoring for acts of manufacturing methamphetamine regardless of the subsection of the *Code* used. Staff analyzed the data by aggregating these cases and setting scores that reflect the typical sentence across all of the cases. Staff tested a range of point values to maximize sentencing concurrence under a standardized scoring structure. On Section C, as proposed, an offender convicted of one count of manufacturing methamphetamine under either § 18.2-248(C) or § 18.2-248(C1) would receive 26 points for the Primary Offense factor if the offender's prior record is classified as Other, 78 points if he or she is a Category II offender, or 130 points if he or she is a Category I offender. Mr. Boelsche stated that the proposed scores fall in between the scores for convictions under § 18.2-248(C) and § 18.2-248(C1) currently on Section C.

This modification was expected to increase the overall concurrence rate for manufacturing methamphetamine and improve the balance between upward and downward departures somewhat. In addition, the proposed guidelines would yield sentence length

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recommendations that approximate judicial sentencing patterns for these offenses. Moreover, the proposed approach would eliminate regional disparity in guidelines scoring for the same criminal behavior, simplify scoring rules and reduce mis-scoring.

Some members expressed concern that offenders may have substance abuse or other issues that could be addressed more effectively through community-based treatment programs rather than a longer prison term.

A motion was made to adopt this recommendation, which was seconded. With no further discussion, the Commission voted 14-3 in favor.

Proposed Recommendation 6 – Eliminate the Drug Exception Rule for scoring primary offenses

Mr. Boelsche presented the staff's proposal for eliminating the Drug Exception Rule. Currently, all offenses defined in § 18.2-248(C) are scored on the Schedule I/II Drug guidelines as though they were multiples of the same offense. That is, convictions for manufacturing, distributing, selling and possessing with intent to sell a Schedule I or II drug under § 18.2-248(C) are considered multiple counts of the same offense for guidelines scoring purposes. This is called the Drug Exception Rule. However, analysis revealed somewhat different sentencing patterns across these four offenses. By eliminating the Drug Exception Rule, each offense defined within § 18.2-248(C) would be scored separately. This would improve the staff's ability to analyze sentencing practices in these cases and determine if further revisions to the Schedule I/II Drug guidelines were needed to better reflect sentencing practices for each specific offense.

Mr. Boelsche provided members with an overview of guidelines scoring for offenses included in the Drug Exception Rule. He then focused on sentencing events during FY2014-FY2018 in which the primary offense was a single count of an offense covered by the Drug Exception Rule (with no additional offenses in the sentencing event). Average prison sentence lengths spanned from 12 months to 19 months depending on the specific offense, indicating divergent sentencing patterns among Drug Exception Rule offenses.

For the next stage of the analysis, staff rescored 2,610 guidelines cases from FY2014-FY2018 that contained more than one count of a Drug Exception Rule offense as the primary offense in order to calculate the guidelines recommendation that would result if the Drug Exception Rule were eliminated. For the vast majority of affected cases, midpoint recommendations changed by three months or less. Eliminating the Drug Exception Rule in the analysis reduced compliance by 2.3 percentage points (81.8% to 79.5%), with an increase in downward departures (10.7% to 13.3%) and a slight decrease in upward departures (7.5% to 7.2%). A key limitation of the rescoring analysis was that guidelines recommendations were recalculated while assuming that historical judicial practices would remain constant.

To address this limitation, the staff performed further analysis on FY2014-FY2018 Drug Exception Rule cases that were incorrectly scored without using the rule as instructed by the Guidelines Manual. Examining this subset of cases provided the best assessment of what concurrence and departure rates would look like under the proposed change because

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this subset of cases was incorrectly scored by preparers as though the Drug Exception Rule did not exist. The overall concurrence rate for these cases was 82.4% or 0.6 percentage points higher than cases scored using the Drug Exception Rule. Moreover, in Drug Exception Rule-eligible cases that were incorrectly scored without using the Rule, departures were more evenly balanced (9.0% downward and 8.5% upward). Thus, staff estimated that judicial concurrence under the proposed Rule elimination would be approximately 82.4%.

Mr. Boelsche concluded by saying that eliminating the Drug Exception Rule would allow the staff to better analyze sentencing patterns for specific offenses defined in § 18.2-248(C). Judicial responses to these proposed guidelines would be monitored and staff would recommend adjustments, if necessary.

Mr. Boelsche also asked the members if they would like to change the VCC offense descriptions used in Commission materials to better distinguish between the sale of a Schedule I/II drug for profit versus distribution of a Schedule I/II drug.

Judge Cavedo made a motion to adopt the proposal to eliminate the Drug Exception Rule, which was seconded by Judge Yoffy. The motion failed to pass by a vote of 7-7.

Judge Frucci and Judge Plowman felt that the Commission should not make any changes to the VCC offense descriptions. Judge Cavedo stated that the change would better distinguish between wholesale versus retail drug sale/distribution so that the staff could gauge differences in sentencing patterns.

Judge Kemler made a motion to adopt the proposal to modify the VCC offense descriptions as proposed, which was seconded by Mr. Coyne. With no further discussion, the Commission voted 16-0 in favor.

Proposed Recommendation 7 – Amend § 9.1-101 to designate the Virginia Criminal Sentencing Commission as a state criminal justice agency

Ms. Farrar-Owens presented the staff's proposal to amend § 9.1-101 to designate the Commission as a state criminal justice agency. While the Commission had sufficient access to Virginia criminal history records, Ms. Farrar-Owens described the challenges faced by the Commission when attempting to access out-of-state criminal history records. She described the process of accessing out-of-state criminal history records as cumbersome and time-consuming. She indicated that the US Sentencing Commission and other state sentencing commissions faced the same challenges. At the most recent National Association of Sentencing Commissions (NASC) conference, directors from the Virginia, Pennsylvania and Maryland sentencing commissions discussed the issue and there was interest in working together to seek change at the federal level in order to simplify the process and ease access for commissions. As approved by the Commission, staff will work with other state sentencing commissions to seek change. Commission directors could meet with FBI representatives to determine what must be changed to clear the path for more direct access to criminal history information. A delegation from the states could meet with members of Congress to gauge support and discuss a course of action.

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Under the proposal, the Commission would request legislation to amend § 9.1-101 of the *Code of Virginia* to explicitly define the Commission as a state criminal justice agency. Ms. Farrar-Owens explained that this step would likely prove beneficial when pursuing change at the federal level.

Judge Cavedo made a motion to adopt this recommendation, which was seconded by Judge Plowman. With no further discussion, the Commission voted 16-0 in favor.

IV. Issues from the Field

Mr. Fridley presented issues raised by guidelines users on the hotline, through text support and in training seminars.

The first issue related to the definition of violent offenses for guidelines purposes (§ 17.1-805(C)). A few attorneys had contacted the Commission believing that the language in this subsection should be amended to clarify the following reference: “any felony violation of subsection C of § 18.2-308.1 or 18.2-308.2.” Mr. Fridley asked members for guidance as to the interpretation of this language. Does the reference above apply to subsection C of § 18.2-308.1 only or does it apply to subsection C of § 18.2-308.1 and subsection C of § 18.2-308.2? Judge Kemler and Judge Cavedo stated that the language could be interpreted as applying to both *Code* sections and that it should be clarified. Mr. Fridley stated that staff would contact Virginia’s Code Commission to determine the next steps.

The second issue related to SWIFT, the Commission’s automated guidelines application. Currently, users who are preparing guidelines through the SWIFT application can utilize circuit court and general district court information to populate certain fields in the automated guidelines forms (e.g., name, dates, offenses). According to Mr. Fridley, attorneys had requested that the SWIFT application allow users to utilize information from JDR court (adult convictions only) in the same manner. Staff had worked with the Judicial Services Department and the Department of Judicial Information Technology (DJIT) to get approval for this expanded access. Mr. Fridley reported that the change had been approved and was being implemented.

V. Future Data Sources

Mr. Fridley quickly reviewed potential data sources for the Commission’s future projects. While Pre-Sentence Investigation (PSI) reports typically contain offense detail and victim information, judges do not order a PSI report in every case. Additional sources were needed for research projects. These may include: police reports, court records (using electronic access through the OCRA system, when and where clerks permit), prosecutors’ files, and victim impact statements. Mr. Fridley noted that a written stipulation of facts was submitted in a few courts. According to Judge Frucci, Virginia Beach judges require the prosecution to submit a stipulation of facts for every guilty plea. Judge Hogshire asked if Commission access to OCRA could be mandated. Mr. Fridley stated that staff would continue to explore such options and report back to the Commission.

VI. Miscellaneous Items

Judge Hogshire recognized Judge Cavedo and Judge Kemler and noted that this meeting would be their last with the Commission. Both judges had served two consecutive terms were not eligible for reappointment. He thanked both of them for their commitment and service to the Commission.

Ms. Farrar-Owens asked members to select tentative dates for the Commission's 2020 meetings. After some discussion, meetings were tentatively set for March 30, June 1, September 14, and November 4. (Note: The 2020 meeting dates were ultimately set for March 23, June 1, September 14, and November 4.)

With no further business on the agenda, the Commission adjourned at 12:30 p.m.