

Virginia Criminal Sentencing Commission
November 4, 2020
Meeting Minutes

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

Members participating:

Judge Edward L. Hogshire (Chairman), Dick Vorhis (for Diane Abato), Delegate Les R. Adams, Timothy S. Coyne, Judge Steven C. Frucci, Judge Patricia Kelly, Judge W. Revell Lewis, Judge Thomas Mann, Judge Michael Lee Moore, Judge Stacey Moreau, Kyanna Perkins, Senator John Edwards, Shannon Taylor and Judge James S. Yoffy
Members absent: Judge Charles S. Sharp (Vice-Chairman), Judge James Fisher and Kemba Smith Pradia

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 14, 2020. The Commission unanimously approved the minutes without amendment.

II. Results of the Probation Violation Guidelines Study

Mr. Joe Boelsche, Research Associate, provided an overview of recent activities related to the probation violation guidelines study. Staff had recently assembled a focus group of stakeholders, including probation officers, prosecutors and defense attorneys, to provide feedback regarding the proposed probation violation guidelines factors. The focus group provided important qualitative feedback. The primary feedback from the focus group meeting was that some factors may be “gameable” in the negotiation process between the defense and prosecution, that precise instructions must be developed to construct the revocation timeline for scoring purposes, and that convictions are easier to score than the convention of “sentencing events” often employed by the Commission. Staff conducted another round of analysis following the stakeholder meeting and refined certain factors.

Mr. Boelsche then described the sample used in the analysis. The staff initially drew a sample of 4,000 probation violation cases. However, a total of 590 cases had to be dropped from the study due to invalid supervision dates, missing major violation reports, uncertainty as to new law violations, or the individual not having committed a violation of supervised probation (e.g., the individual committed a violation during a period of good behavior, which is not covered by the guidelines). The final analysis included 3,410 cases, 695 of which were probationers who committed a new felony law violation and 2,715 were probationers who committed a technical violation or a new misdemeanor law violation.

Mr. Boelsche outlined the analytical process used. Staff compiled all available data sources and tested the significance of offender and revocation case characteristics in terms of sentencing outcomes. During this phase of analysis, staff discovered that the best fit for

handling new law (Condition 1) violators was to form two scoring groups - one for new felony law violators, and one for technical and new misdemeanor law violators - using separate factors and scoring values for each group. Once guidelines scoring factors were determined, analysts “rescored” the sample cases against the new factors to compare each case’s actual revocation sentence to the proposed total score.

As presented by Mr. Boelsche, two probation violation guidelines (PVG) scoring groups were created based on the data analysis, meaning that two PVG worksheets were developed. Based on the statistical model, four factors were identified as being significant in the sentencing of new felony law violators. Scoring factors consist of: new felony convictions for crimes against a person, new felony convictions for non-person crimes, prior “home court” revocations associated with the offense(s) for which the individual is on probation, and behavior while under supervision that resulted in a new conviction that was the same as or similar to the original offense.

For technical violators and new misdemeanor law violators, the statistical model identified seven factors as significant. These were: “home court” prior revocations associated with the offense(s) for which the person is on probation, being a registered sex offender, previous felony convictions for offenses committed between the original sentencing date and the start of the current supervision period, previous felony convictions before the original sentencing date in the “home court” only, absconding, new misdemeanor convictions with the same behavior as the offense(s) for which the person is being supervised, and drug violations. Ms. Taylor asked if the registered sex offender factor only applied to that subset of probationers that are sex offenders, which Mr. Boelsche confirmed. While many control factors were tested, attorney type (specifically, a court-appointed attorney), gender, circuit court location, and year of revocation persisted as influential factors in the analysis. Race and age of offender were thoroughly tested; however, analysts did not find any consistent statistical effects of these factors on revocation sentencing patterns.

Senator Edwards asked Mr. Boelsche to clarify the results pertaining to attorney type. Mr. Boelsche stated that if the defendant had a court-appointed attorney (not a public defender or privately-retained attorney), the sentence for the violation was a little longer than with other attorney types. Mr. Boelsche noted that the focus of the data analysis was not on attorney type and more research would be needed to reach any conclusion regarding that factor.

Mr. Boelsche described a second analysis in which staff examined the reasons cited by judges for departing from the current probation violation guidelines. In particular, staff were interested in the judge’s assessment of the probationer’s rehabilitation potential (good or poor) and the extent that this was cited as the reason for departing from the guidelines. Analysts examined all FY2014-FY2019 Sentencing Revocation Report (SRR) data. This analysis grouped offenders by judicial departure reasons - good rehabilitation potential, poor rehabilitation potential, or neither departure noted - and compared effective revocation sentences for each group. The median, mean, and maximum sentence for cases in which the judge cited good rehabilitation potential as the reason for departing from the probation violation guidelines were significantly lower than for the groups with poor potential or no such departure noted. Of particular note, the median sentence in cases in which the judge noted good rehabilitation potential was zero (or time served). Based on these empirical findings, staff concluded that a new factor could be added to account for a probationer’s

rehabilitation potential. When the judge determines a probationer has good rehabilitation potential, despite the current violation, analysis of the data support an adjustment to the probation violation guidelines to reduce the low end of the range to zero or time served.

The probation violation guidelines worksheet for technical and new misdemeanor law violators was displayed, followed by the worksheet for the new felony new law violators. Mr. Boelsche indicated that the results of the probation violation study reflect much of the input provided by judges and other court stakeholders through the Commission's surveys. Judges identified the original offense type, sex offender violations, prior revocations, new felony convictions, and patterns of similar behavior as factors that are weighed most heavily in their revocation sentencing decisions. The proposed guidelines, based on empirical analysis, cover all of these factors. Through the surveys, probation officers, Commonwealth attorneys and defense attorneys submitted lists of factors absent from the guidelines that they believed merit inclusion and several were found to be significant in the analysis. For example, "positive behavior" and "amenability to supervision" are addressed by the proposed rehabilitation potential factor and "same offense behavior associated with new conviction" is covered by the proposed same behavior factor. Factors that probation officers and attorneys noted as problematic to accurately score have been removed, amended, or modified (e.g., length of time absconded, months until first noncompliant incident, never reported or unsuccessful discharge from a program). Probation officers and attorneys were also asked which technical violations the judge considers most serious in their court. The top three responses - absconding, use/possess/ distribute controlled substances, and sex offender conditions - were found to be significant and appear as scoring factors on the proposed guidelines.

Mr. Fridley, the Commission's Deputy Director, then discussed procedural issues revealed through the study. The staff identified four key procedural challenges in revocation sentencing: timeliness of guidelines submissions, good behavior violations processed as probation violations, judicial access to case information, and inconsistent policies on reporting probation violations. In addition to these procedural concerns, the staff noted substantial variation in revocation sentencing outcomes that appear to reflect varying judicial sentencing philosophies. Mr. Fridley discussed each of the procedural challenges. First, it was the staff's recommendation that the probation violation guidelines should only apply if prepared by a probation officer or based on a Major Violation Report; otherwise, policy would require the Commonwealth's attorney to proceed with a good behavior violation (guidelines would not apply). Second, staff recommended that the Commission revise its forms with the goal of standardizing the information provided to the judge for each revocation hearing. Mr. Fridley displayed the Sentencing Revocation Report (SRR), which is provided to the judge for every revocation hearing. The revised SRR proposed by staff included a number of new fields. If approved, beginning July 1, 2021, the SRR cover sheet will include fields to indicate:

- Use of treatment programs, sanctions, and other sentencing alternatives and the status of each program or sanction (completed/enrolled, not completed, or ineligible);
- Specific sex offender condition(s) violated based on the Department of Corrections' alphabetic special instructions code;
- Pre-hearing status release and date ranges for pre-hearing confinement; and
- Judicially-determined guidelines modification for "good rehabilitation potential".

The staff has also added documentation fields to the probation violation guidelines worksheets. These include:

- The amount of revocable time available for the violation (this field was moved from the SRR to the guidelines worksheet and must be determined in advance of the revocation hearing);
- The most serious offense for which the individual is on probation and the type of disposition originally ordered by the court;
- Interstate Compact Offender Tracking System (ICOTS) status and, if applicable, current supervising state;
- Confinement and sentencing dates, Virginia Crime Code, sentencing status, locality, and effective sentence for any new convictions; and
- The sum of effective sentences for all new convictions.

Mr. Coyne commented that one of the factors on the worksheet for technical or new misdemeanor violators could have an unintended consequence by counting an offense committed before the offender was placed on probation when the conviction for that offense occurs during the supervision period. Mr. Boelsche clarified that, to be scored on that factor, the offense must have occurred after the original sentencing date. Mr. Coyne requested that this be made clear in the instructions.

Mr. Elam wondered if there was any discussion regarding the factor for pretrial confinement and the difficulties in determining it for a specific offense. Mr. Fridley responded that staff had discussed the issue and tried to analyze data to address pretrial confinement, but the available data were not sufficiently detailed. Mr. Fridley asked Mr. Elam if he would be willing to assist with the crafting the instructions pertaining to that field, and Mr. Elam agreed.

III. Possible Recommendations for Sentencing Guidelines Revisions

Ms. Farrar-Owens, the Commission’s Director, stated that staff had eight proposals for guidelines revisions for the members to consider. Any modifications to the guidelines adopted by the Commission must be presented in its *Annual Report*, submitted to the General Assembly each December 1.

Proposed Recommendation 1 – Revise the Probation Violation Guidelines based on the results of the most recent study of sentencing outcomes in revocation cases.

Ms. Farrar-Owens presented the first proposed recommendation, which was to approve the proposed Probation Violation Guidelines and implementation plan. Until February 2021, the staff would focus on refining worksheets and instructions to clearly identify factors and scoring rules. This will involve continued collaboration with stakeholders to make sure all documentation is concise and clear for standardized use. Beginning in May 2021, training staff will offer statewide training to guidelines preparers on the new worksheets. At the start of fiscal year 2022 (July 1, 2021), the staff will begin statewide implementation of the new Probation Violation Guidelines (Phase I). Phase II will be an evaluation of Phase I and, on December 1, 2022, staff will propose any necessary refinements.

Mr. Coyne asked if the proposed guidelines would increase judicial compliance with the recommendations in revocation cases. Ms. Farrar-Owens responded that she was cautiously

optimistic that the new instruments would increase compliance rates. Mr. Boelsche added that the new judicial factor for rehabilitation potential may increase compliance and reduce mitigations.

Judge Moore made a motion to adopt this recommendation, which was seconded by Senator Edwards. With no further discussion, the Commission voted 14-0 in favor.

Proposed Recommendation 2 – Revise the guidelines for Aggravated Sexual Battery (§ 18.2-67.3) to better reflect current sentencing practices.

Before discussing the next proposal, Ms. Farrar-Owens reminded members that, unlike many states, Virginia’s sentencing guidelines are based on analysis of actual sentencing practices and are designed to provide judges with a benchmark that represents the typical, or average, case outcome. All of the proposals for revisions to the guidelines were based on empirical analysis and represent the best fit for the historical data.

Ms. Farrar-Owens presented the proposal for revising the guidelines for aggravated sexual battery (§ 18.2-67.3). During FY2017-FY2020, judicial concurrence with the Aggravated Sexual Battery guidelines was 71.7%. The upward departure rate (21.5%) was considerably higher than the downward departure rate (6.8%) in these cases. This indicates that, when judges depart, they are significantly more likely to sentence above the guidelines than below.

During FY2017-FY2020, the guidelines recommended 81.8% of defendants for a term of incarceration over six months, while 18.2% were recommended for a lesser sanction. In practice, however, judges sentenced 88.1% to more than six months of incarceration. Thus, the current guidelines for these offenses were not closely aligned with the actual dispositions in these cases. Judges were sentencing offenders convicted of aggravated sexual battery to incarceration terms in excess of six months more often than recommended by the current guidelines.

To address this issue, staff proposed two scoring modifications on Section A of the Other Sexual Assault worksheet. Currently, aggravated sexual battery of an incapacitated victim, aggravated sexual battery resulting in serious injury, and aggravated sexual battery involving a weapon are scored under part F of the Primary Offense factor. Under the staff’s proposal, these offenses would be moved to part G of the Primary Offense factor. As a result, defendants convicted of these particular aggravated sexual battery offenses would receive higher points on the Primary Offense factor. In part G, the staff recommends increasing the Primary Offense points assigned for one count of the offense from six to seven.

Ms. Farrar-Owens stated that judges often departed above the guidelines in aggravated sexual battery cases when the guidelines recommended probation, instead sentencing the defendant to an active jail term. To address this issue, the staff recommended adding a new factor to the Section B worksheet, to be scored only when the primary offense at sentencing was aggravated sexual battery. This factor would account for the type of additional offense convictions in the current sentencing event. One point would be scored if the defendant had an additional conviction for a sexual assault or an obscenity-related offense (such as possession of child pornography). These changes will increase the likelihood that a defendant convicted of aggravated sexual battery will be recommended for a jail term up to six months rather than probation with no active term of incarceration. No changes were recommended for Section C.

Overall concurrence is projected to remain the same under the proposal (71.7%). However, a reduction in the rate of upward departures is anticipated, which will achieve a better balance in departures above and below the guidelines. Mr. Coyne inquired about the breakdown of all aggravating reasons for departures in these cases. Ms. Farrar-Owens named the most frequently cited reason for aggravation. In responding to a question about the number of cases needed for analysis, Ms. Farrar-Owens said the staff typically would like a minimum of 100 cases.

Ms. Taylor made a motion to adopt the recommendation, which was seconded by Judge Moore. With no additional discussion, the Commission voted 14-0 in favor.

Proposed Recommendation 3 – Revise the guidelines for Indecent Liberties (§ 18.2-370 and § 18.2-370.1) to better reflect current sentencing practices.

Ms. Farrar-Owens next presented the proposal for revising the guidelines for indecent liberties with a child (§ 18.2-370 and § 18.2-370.1). During FY2017-FY2020, judicial concurrence with the guidelines in these cases was 63.7%, far lower than the overall average concurrence rate of approximately 82% for all offenses. The upward departure rate (28.0%) was substantially higher than the downward departure rate (8.3%). This suggests that the current guidelines for indecent liberties are not as closely aligned with actual dispositions as they could be. Judges have sentenced offenders convicted of indecent liberties to incarceration terms in excess of six months more often than is recommended by the current guidelines.

On Section A, the staff proposed revising the points for the Primary Offense factor. The points assigned on the Primary Offense factor for one count of indecent liberties with a child under age 15 would increase from three to four. For indecent liberties by a custodian, Primary Offense points would increase from four to five for one count of the offense, from six to seven for two counts, and from seven to eight for three counts. These changes in scoring will increase the likelihood that defendants convicted of indecent liberties will be recommended for more than six months of incarceration (scored on Section C).

Staff proposed two modifications to the Section B worksheet. The Victim Injury factor would be expanded such that defendants convicted of indecent liberties with a child under age 15 would also be scored for victim injury. A new factor would be added to the Section B worksheet that would be scored when the primary offense at sentencing is indecent liberties. With this change, defendants who have an additional conviction for a sexual assault or an obscenity-related offense would receive one additional point. This change will increase the likelihood that the guidelines will recommend a jail term up to six months rather than probation.

On Section C, the staff recommended modifying the Primary Offense factor to increase the score for one count of indecent liberties. Currently, a defendant convicted of one count of indecent liberties receives 6 points for the Section C Primary Offense factor if his prior record is classified as Other, 12 points if he has a Category II record, or 24 points if he has a Category I record. The proposal would increase those scores to 9, 18, and 36 points, respectively.

Ms. Farrar-Owens stated that a modest decrease in overall concurrence is also projected (from 63.7% to 60.2%). However, a reduction in the rate of upward departures is anticipated, which would better balance departures above and below the guidelines.

Judge Mann made a motion to adopt this recommendation, which was seconded. The Commission voted 12-2 in favor (Ms. Taylor and Mr. Coyne opposed). Mr. Coyne noted that he voted against the recommendation because it did not improve the compliance rate.

Proposed Recommendation 4 – Revise the guidelines for Carnal Knowledge (§ 18.2-63) to better reflect current sentencing practices.

Ms. Farrar-Owens reported that concurrence with the guidelines for carnal knowledge (§ 18.2-63) was lower than the overall average concurrence rate for all offenses and, when departing from the guidelines, judges heavily favor upward departures. Staff found that judges frequently disagreed with the type of disposition recommended by the current guidelines. During FY2017-FY2020, judicial concurrence with the guidelines in these cases was 65.8%. Judges sentenced above the guidelines range in 28.4% of the cases, with only 5.9% of the sentences falling below the recommended range. During FY2017-FY2020, the current guidelines recommended 59.0% of defendants for a term of incarceration over six months. In practice, however, judges sentenced 73.0% of defendants to more than six months of incarceration. Based on this finding, the staff focused the analysis on the types of dispositions recommended by the guidelines.

On Section A, the staff recommended revising the points for the Primary Offense factor. The score on the Primary Offense factor for carnal knowledge of a child 13 or 14 years of age would increase from two to six points for one count of the offense and from eight to nine points for two counts. This change in scoring will increase the likelihood these defendants will be recommended for more than six months of incarceration (scored on Section C).

On Section B, the staff recommended two modifications. First, the Primary Offense points would increase to two points for one count, four points for two counts and six points for three counts of carnal knowledge. As a result, defendants convicted of two or more counts of carnal knowledge who are scored on Section B would always be recommended for a short jail term. Second, a new factor would be added to the Section B worksheet and scored only when the primary offense at sentencing is carnal knowledge. One point would be scored if the defendant had an additional conviction for a sexual assault or an obscenity-related offense. These changes will increase the likelihood that the defendant will be recommended for a jail term up to six months rather than probation without an active term of incarceration. The staff did not recommend any changes to Section C.

Overall concurrence was projected to improve under the recommendation, with an increase from 65.8% to 67.6%. Moreover, a reduction in the rate of upward departures was anticipated and this would result in a better balance in departures above and below the guidelines.

Mr. Coyne inquired about the type of aggravating reasons. Ms. Farrar-Owens responded that judges frequently cited young age of the victim, facts of the case, plea agreement and that the guidelines recommendation was too low. Mr. Coyne commented that he is reluctant to support a recommendation where the scores increase because it hurts his clients. He also remarked that he understood the role of the Commission, but he had reservations. Ms. Taylor felt that most prosecutors believe the guidelines are too low in these cases. Judge Moore noted that the Commission has lowered scores for some offenses in the past, when indicated by the data.

Judge Frucci made a motion to adopt this recommendation, which was seconded by Judge Moore. With no further discussion, the Commission voted 14-0 in favor.

Proposed Recommendation 5 – Revise the guidelines for Online Solicitation of a Minor (§ 18.2-374.3) to better reflect current sentencing practices.

According to Ms. Farrar-Owens, during FY2016-FY2020, judicial concurrence with the guidelines for online solicitation of a minor (§ 18.2-374.3) was 71.5% (compared to 82% for all offenses). The upward departure rate (24.6%) was more than six times higher than the downward departure rate (3.9%). Judges were sentencing offenders convicted of online solicitation to incarceration terms in excess of six months more often than was recommended by the current guidelines.

On Section A, the staff proposed one scoring modification. The Primary Offense points assigned for one count of online solicitation involving a child under age 15 would increase from eight to nine. With this change, offenders convicted of online solicitation of a child under age 15 would be recommended for a prison term in all cases. No changes were proposed for Section B or Section C.

With the change, overall concurrence was expected to increase under the proposal (from 71.5% to 77.2%). In addition, the proposal should improve the balance in departures above and below the guidelines.

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.

Judge Yoffy made a motion to adopt this recommendation, which was seconded by Judge Mann. With no further discussion, the Commission voted 13-1 in favor (Mr. Coyne opposed).

Proposed Recommendation 6 – Revise the Guidelines recommendation to reflect current judicial sentencing when defendants provide substantial assistance or accept responsibility.

Mr. Fridley presented the next proposal. According to Mr. Fridley, staff had carefully examined cases in which judges, when departing from the guidelines, cited the defendant's substantial assistance in apprehension or prosecution of others, the defendant's acceptance of responsibility for the offense, or the defendant's expression of remorse for the crimes. Judges have historically sentenced below the guidelines more often in such cases. In many cases, the defendant started the rehabilitation process or worked towards making the victim whole before the date of sentencing. Mr. Fridley noted that judicial departure reasons provided on the guidelines forms provide the only reliable data source to identify sentencing events that resulted in reduced sentences because of the defendant's assistance, acceptance of responsibility, or remorse.

Between FY2016 and FY2020, there were 1,428 sentencing events with identified departures from the guidelines recommendations for one of these three reasons described above. Mr.

Fridley presented four options for modifying the guidelines in such cases, specifically ways to adjust the low end of the recommended range.

Judge Yoffy made a motion to adopt option four. Under this option, if the judge determines that the defendant provided substantial assistance, accepted responsibility or expressed remorse, the low end of the guidelines recommended range would be reduced to zero when the low end of the recommendation is three years or less. The midpoint and the high end of the sentencing guidelines range would remain unchanged. For defendants for whom the low end of the guidelines range is more than three years, the low end of the guidelines range would be reduced by 50%. The recommended changes to the guidelines allow the judge to consider the defendant's assistance, acceptance of responsibility or expression of remorse, if the judge wishes to do so, and still be considered in concurrence with the guidelines. Mr. Fridley stated that, to reflect historical sentencing and to be true to the source of the data, the decision to modify the guidelines recommendation must be made by the judge, not the guidelines preparer.

Judge Yoffy's motion to adopt option four was seconded by Mr. Coyne. The Commission voted 14-0 in favor.

Proposed Recommendation 7 – Revise the Robbery Guidelines to reflect current judicial sentencing when a completed murder or manslaughter is an additional offense.

Mr. Fridley presented the proposal to revise the Robbery Guidelines. The proposed recommendation would resolve a face validity issue. Between FY2011 and FY2020, there 92 sentencing events in which a completed robbery was the most serious offense and the defendant was convicted of an additional offense involving murder or manslaughter (43 involved completed second-degree murder). On Section C of the current Robbery guidelines, for the Type of Additional Offense factor, an additional offense of second-degree murder is assigned 63 points. Currently, other types of murder or manslaughter receive zero points on this factor. Guidelines users have requested that felony murder, acting as a principal in the second degree to murder, and being an accessory to capital murder be added so that they would also receive points on the Type of Additional Offense factor.

Mr. Fridley reported that, in FY2019-FY2020, there were two defendants convicted of robbery with an additional offense of felony murder and one defendant convicted of robbery and being an accessory to capital murder (another such case was identified in FY2009). In three of the four cases identified, the judge sentenced above the guidelines. The limited data suggest expanding the Type of Additional Offense factor such that robbery defendants convicted of murder or manslaughter (other than second-degree murder, which is already covered) would receive 22 points on that factor. This change would eliminate the face validity issue (where some murders are scored but not others), while improving concurrence with the guidelines. Senator Edwards and Mr. Coyne expressed concern about the small number of cases available for the analysis.

Senator Edwards made a motion to defer action on this recommendation until additional analysis can be completed. The motion was seconded by Mr. Coyne. With no further discussion, the Commission voted 14-0 in favor.

Proposed Recommendation 8 – Revise the cover sheet to advise judges that sentencing a defendant to an alternative sanction when it was recommended by the nonviolent offender risk assessment is not considered a departure from the guidelines.

Mr. Fridley provided an overview of the Commission’s nonviolent offender risk assessment instrument. In 1994, as part of the reform legislation that instituted truth-in-sentencing, the General Assembly directed the Commission to study the feasibility of applying an empirically-based risk assessment instrument to select 25% of the lowest risk, incarceration-bound, drug and property offenders for placement in alternative (non-prison) sanctions. Judges have stressed that the instrument is only useful when there are acceptable alternatives available to the court. The issue is how to better identify defendants recommended for alternatives and inform judges that the use of alternative sentences, when the defendant is recommended through risk assessment for such alternatives, is in concurrence with guidelines recommendations.

Mr. Fridley stated that concurrence rates with guidelines recommendations are consistently high for drug, fraud, and larceny offenses. In FY2020, the sentencing guidelines recommended over 51% of the defendants convicted of distribution of Schedule I/II drug to alternative sanctions, and the majority of defendants convicted of possession of a Schedule I/II drug were recommended for either probation or an alternative to incarceration (44% for probation and 19% for an alternative). However, since the proportion of drug cases recommended for alternatives was significant and the concurrence rates were high, there was no indication that the guidelines could be adjusted to better reflect historical sentencing practices.

Based on feedback from Virginia’s circuit court judges, there are three areas that, if addressed, may increase judicial use of alternative sanctions when they are recommended by the nonviolent offender risk assessment. First, Virginia should increase the availability of alternative sanctions across the Commonwealth. Making alternatives available across the state and providing effective treatment options for use by the courts would allow judges to better use the nonviolent risk assessment instrument. Second, the court must ensure the risk assessment instrument is completed by the attorney for the Commonwealth or the probation officer in every case (the Commission has determined that the risk assessment instrument, Section D, is not completed in every case it should be). Third, the Commission must ensure that circuit court judges understand how concurrence with the guidelines is calculated in risk assessment cases. It should be made clear to judges that when the risk assessment instrument recommends an alternative sanction, any less restrictive sentence ordered by the court is in concurrence with the guidelines recommendation. If the judge sentences a defendant to an alternative when recommended through risk assessment, the judge need not submit a departure reason.

To address two of the three concerns, Mr. Fridley presented the revised cover sheet proposed by staff, which included a new check box related to risk assessment. Adding the proposed check box to the back side of the cover sheet would serve two purposes. First, the presence of the proposed check box would remind judges to review the risk assessment instrument in every case and ask for it if it is missing. Second, the check box would clarify for judges that, when the defendant is recommended for an alternative and the judge sentences the defendant to an alternative, no departure reason is needed on the guidelines form.

Senator Edwards made a motion to adopt this recommendation, which was seconded by Judge Moore. With no further discussion, the Commission voted 13-0 in favor.

Ms. Farrar-Owens then spoke about possible studies for 2021 that included topics of embezzlement, larceny, assault and attempted/conspired capital murder. Mr. Coyne made a motion for the staff to study larceny and assault cases, which was seconded by Senator Edwards. With no further discussion, the Commission voted 13-0 in favor.

IV. Sentencing Guidelines Supplemental Case Information Form

Ms. Farrar-Owens displayed the Supplemental Case Information Form, which had been approved by the Commission during its meeting on September 14, 2020. The Commission approved this form to address the critical need for information. The one-page supplemental form will be a vital and essential tool for providing information to the court and to the Commission. The form would be completed by the individual preparing the guidelines for the court and included in the sentencing guidelines packet submitted for sentencing. Since the September meeting, staff had prepared policy statements and an instruction manual.

Ms. Farrar-Owens informed members that she had discussed the new form with the Deputy Director of the Department of Corrections (DOC), A. David Robinson. He acknowledged the potential impact on workload and stressed the importance of sufficient training for probation officers. She concluded by saying that DOC has not provided any written comment regarding the form or its implementation. Ms. Farrar-Owens then displayed a draft letter, for the Commission's review, which could be sent to the Virginia Association of Commonwealth Attorneys to request feedback on the new form.

Mr. Coyne made a motion to adopt the form and implement it on July 1, 2021. The motion was seconded by Judge Yoffy. With no further discussion, the Commission voted 13-0 in favor.

Judge Hogshire asked the members to review the letter and provide comments to Ms. Farrar-Owens. Senator Edwards and Mr. Coyne requested that Ms. Farrar-Owens remove from the letter a reference to legislation approved by the General Assembly to modify earned sentence credits. Ms. Farrar-Owens indicated that she would revise the letter and send an updated version to members.

V. Miscellaneous Items

Ms. Farrar-Owens briefly discussed four bills that had been taken up by the General Assembly during its recent Special Session: House Bill 5148 (earned sentence credits), House Bill 5146 (expungement of criminal records), Senate Bill 5007 (jury sentencing), and Senate Bill 5045 (fiscal impact statements prepared by the Commission). While the outcome of the bills was still pending at the time of the Commission meeting, Ms. Farrar-Owens indicated that staff would continue to track the bills and provide members with updates.

Judge Hogshire recognized Judge Yoffy and Judge Moore and noted that this meeting would be their last with the Commission. Both judges had served two consecutive terms and 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 2021 meetings. After some discussion, meetings were tentatively set for March 22, June 7, September 13, and November 3.

With no further business on the agenda, the Commission adjourned at 1:20 p.m.