



# Virginia Criminal Sentencing Commission

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## Meeting of the Virginia Criminal Sentencing Commission

June 7, 2021

10:00 am – 12:30 pm

Meeting held via Zoom

**DRAFT**

**Meeting Minutes**

Members Attending via Zoom: Judge Edward L. Hogshire (Chairman), Judge Charles S. Sharp (Vice Chairman), Linda Brown, Timothy S. Coyne, Senator John Edwards, Marcus Elam, Judge Steven C. Frucci, Judge Jack S. Hurley, Judge Patricia Kelly, Judge W. Revell Lewis, Judge Thomas Mann, K. Scott Miles, Judge Stacey Moreau, Kyanna Perkins, and Shannon Taylor

Members Absent: Delegate Les R. Adams and Judge James Fisher

### **WELCOME**

Before calling the meeting to order, Judge Hogshire, Commission Chairman, welcomed a new member. Ms. Linda Brown was appointed by Governor Northam to serve the remainder of Kemba Smith Pradia's unexpired term. Ms. Brown is a special education teacher in Chesapeake and works with the group Restore Justice in Virginia.

### **AGENDA**

The meeting agenda is available at: <http://www.vcsc.virginia.gov/2021Meeting/AgendaJun72021.pdf>

### **APPROVAL OF MINUTES FROM LAST COMMISSION MEETING**

Minutes from the meeting held on March 22, 2021, were approved as submitted. The meeting minutes are available at: <http://www.vcsc.virginia.gov/2021Meeting/MinutesMar222021.pdf>

### **SENTENCING GUIDELINES CONCURRENCE – FY2021 TO DATE**

Presentation link: <http://www.vcsc.virginia.gov/2021Meeting/ComplianceFY2021Preliminary.pdf>

Mr. Jody Fridley, the Commission's Deputy Director, presented a preliminary compliance report for FY2021 to date. A total of 12,148 guidelines worksheets had been submitted to the Commission and automated as of April 5, 2021. He noted that staff had been in contact with clerks and judges from jurisdictions with low numbers of guidelines worksheets.

For the time period, overall judicial concurrence with the guidelines was 83.3%. Of the FY2021 departures, 35.7% were cases of aggravation while 64.3% were cases of mitigation. Mr. Fridley presented compliance by Circuit, offense group, and type of midpoint enhancement. A complete analysis of concurrence and departures will be included in the Commission's *2021 Annual Report*, due December 1, 2021.

## **POSSIBLE RECOMMENDATIONS FOR GUIDELINES REVISIONS AND LEGISLATIVE PROPOSALS**

Presentation link: <http://www.vcsc.virginia.gov/2021Meeting/PossibleRecommendations.pdf>

Ms. Farrar-Owens, the Commission's Director, briefly described the history and structure of Virginia's Sentencing Guidelines. The guidelines were introduced with the goal of reducing unwarranted sentencing disparity and promoting greater consistency and predictability in sentencing outcomes. Virginia's Sentencing Guidelines were designed to provide sentence recommendations based on historical practices using information regarding the nature of the current offense(s) and a defendant's criminal history. She highlighted key elements of Virginia's Sentencing Guidelines system.

Ms. Farrar-Owens provided details on the process for developing and implementing revisions to Virginia's Sentencing Guidelines. The staff closely monitors the Sentencing Guidelines system and, each year, the Commission deliberates upon possible modifications to enhance the usefulness of the guidelines as a tool for judges. Under § 17.1-806 of the *Code of Virginia*, any modifications adopted by the Commission must be presented in its annual report, due to the General Assembly each December 1. Unless otherwise provided by law, the changes recommended by the Commission become effective on the following July 1.

Prior to 1995, guidelines re-analysis occurred each year. Guidelines were "benchmarked" to the most recent five years of sentencing data. Based on the re-analysis, the guidelines recommendation for some defendants would increase while the recommendation for others would decrease. Since 1995, the Commission's approach to guidelines revisions each year has focused on specific offenses. The Commission has maintained 100%, 300% and 500% enhancements for violent offenders specified in § 17.1-805.

Ms. Farrar-Owens proposed that the staff embark on a comprehensive review of the Sentencing Guidelines. She noted that there were areas of the guidelines that could be refined to better reflect current sentencing practices (e.g., midpoint enhancement cases). In addition, recent legislative changes would have implications for the guidelines (e.g., changes in the felony larceny threshold in 2018 and 2020; changes in penalties for robbery offenses in 2021).

Ms. Farrar-Owens described the reanalysis as a holistic approach, rather than piecemeal. It would involve a large-scale, multi-year project. Re-analysis could begin with violent offenses that will remain under the 85% minimum time served requirement. Because the Commission's risk assessment instruments have been integrated into the guidelines for nearly 20 years, historical data captures judicial sentencing under these tools. As a result, the Commission would need to determine if the tools are still needed. If they are not, legislation might be necessary to remove the 1994 requirement from § 17.1-803. Ms. Farrar-Owens indicated that, if approved by the members, a reanalysis proposal could be included in the Commission's *2021 Annual Report*.

Ms. Farrar-Owens then discussed statutory provisions related to guidelines midpoint enhancements. Section 17.1-805 requires that specific enhancements be incorporated into the guidelines to increase the sentence recommendations for violent offenders. She stated that changing or removing the specific percent enhancements in § 17.1-805 could be done through legislation. Ms. Farrar-Owens believed this would clarify the power of the Commission to base such enhancements solely on analysis of the data, rather than a predetermined percent increase.

Ms. Taylor indicated that she would support a full-scale re-analysis, especially a thorough review of enhancements for violent offenders and consideration of a decay factor in the scoring of older criminal convictions. Judge Hogshire had some technical difficulties with his connection, so Judge

Sharp filled in as Chairman during his absence. Judge Moreau stated that she supported the proposal for re-analysis for the entire guidelines system, as opposed to specific offenses or statutes; she felt that the removal of the specific midpoint enhancements from § 17.1-805 to reflect historical data should be considered due to the high mitigation rate for Category I offenders. Mr. Coyne commented that he was in favor of full re-analysis. He also questioned if the Commission would recommend removal of the midpoint enhancements. Ms. Farrar-Owens said it would be up to the Commission to decide whether that would be part of a formal proposal.

Senator Edwards inquired as to the good conduct credits that inmates are earning on average. Ms. Farrar-Owens responded that, while she did not have that information on hand, she would send a request to the Department of Corrections (DOC) on the Senator's behalf. Ms. Brown requested a copy of the good conduct credit information. She also wondered if the awarding of sentence credits by DOC had changed over time. Ms. Farrar-Owens said she would request that data for Ms. Brown.

Judge Hogshire rejoined the meeting.

Judge Sharp supported the re-analysis but added that some judges were experiencing sentencing guidelines fatigue due to the numerous changes this year. He noted that many changes were due to legislation adopted by the General Assembly and not the Commission. Judge Sharp expressed concern about the potential impact of the proposed study on judges and other court stakeholders. Judge Sharp said the Commission should advise users what is being done and why it is being done.

Ms. Farrar-Owens noted that the staff will have the necessary information for the analysis because of the implementation of the Case Details Worksheet on July 1, 2021. She suggested that the Chair could appoint a sub-committee to oversee the study, if desired.

Judge Moreau made a motion to proceed with the re-analysis of the guidelines, reviewing all guidelines and nonguidelines offenses, with the results presented in a future Annual Report. Judge Sharp seconded the motion. The Commission voted 15-0 in favor.

Judge Moreau made a motion to recommend the removal of § 17.1-805 through legislation and include an analysis of enhancements for violent offenders. Mr. Coyne seconded the motion. The Commission voted 15-0 in favor.

Mr. Coyne asked staff to take into account that the current enhancements have been incorporated into the guidelines and, thus, sentencing data for 25 years.

Ms. Farrar-Owens next described a proposal related to the Sentencing Revocation Report and Probation Violation Guidelines. Since July 1, 2010, the Appropriation Act has specified that a Sentencing Revocation Report (SRR) and, if applicable, the Probation Violation Guidelines (PVG), must be presented to the court and reviewed by the judge for any violation hearing conducted pursuant to § 19.2-306. However, the current Appropriation language refers to the PVGs as being applicable only to technical violations. The new PVGs, which became effective on July 1, 2021, also cover violations arising from new felony or misdemeanor convictions. Ms. Farrar-Owens recommended that, at a minimum, the Appropriation language be updated to reflect the expansion of the new PVGs. Further, the Commission, if desired, could recommend that language requiring the SRR/PVGs be added to the *Code* in the same manner as the requirements for felony sentencing guidelines.

Mr. Coyne made a motion that language requiring the SRR/PVGs be added to the *Code* in the same manner as the requirements for felony sentencing guidelines. Senator Edwards seconded the motion. The Commission voted 15-0 in favor.

Ms. Brown requested a copy of the Sentencing Guidelines Manual.

### **FEEDBACK FROM THE FIELD REGARDING GUIDELINE CHANGES**

Presentation link: <http://www.vcsc.virginia.gov/2021Meeting/FeedbackfromtheFieldJun72021.pdf>

Mr. Fridley informed members that Commission staff have been traveling the state presenting seminars on the 2021 guidelines changes. Many virtual seminars have also been conducted. The Commission has received a variety of feedback on the changes, as well as questions regarding implementation.

Mr. Fridley first discussed the recent guidelines modification for substantial assistance, acceptance of responsibility or expression of remorse. Questions from the field primarily focus on the implementation of this factor. Mr. Fridley reminded members that this modification was not based on the federal guidelines system but rather on analysis of judicial departure reasons in Virginia. The modification is not intended to apply to most cases, as it does in the federal system. Virginia judges cited one of these three reasons in approximately 1% of guidelines cases overall (10% of all mitigation cases).

Ms. Taylor stated that concerns had been expressed to her regarding the potential for subjectivity in the implementation of this factor.

In responding to questions from the field, staff have emphasized that not every defendant who pleads guilty has accepted responsibility. This factor was developed based on judges departing from the guidelines because of actions of the defendants that were sufficient for judges to determine that the departure was appropriate. Judges have not departed in every case that a defendant pled guilty. Reducing the recommendation based on the method of adjudication would not be true to historical practice.

Mr. Fridley then asked the members how the staff should advise judges and attorneys about the proper implementation of this factor. Judge Hurley commented that the best way to advise judges is by attending their regional meetings. Judge Hogshire noted that the staff could add this information to the next Newsletter.

Next, Mr. Fridley discussed the Case Details Worksheet. To address the critical need for information, the Commission recently approved a Case Details Worksheet that was incorporated into the Sentencing Guidelines beginning July 1, 2021. This one-page worksheet will be a vital and essential tool for providing information to the court and to the Commission.

Users have questions or concerns about availability of bond information, negotiations about what details are revealed, and defense attorneys who are hesitant to provide information about their client for the form. Attorneys have indicated that, if the Commonwealth prepares the Case Details Worksheet, some details may not be revealed to the court (e.g., material facts, firearm use, injury, etc.) because of an agreement. Question 21 (<http://www.vcsc.virginia.gov/training/casedetails.pdf>) was designed, in part, to provide the court with possible reasons for mitigation. Also, some factors were added to encourage a discussion about the defendant's risks and needs and options that may be available to address those needs. Defense attorneys have expressed concern that the details may be damaging to the client in the current and future sentencing events.

Lastly, Mr. Fridley presented feedback regarding the Probation Violation Guidelines and recent legislation impacting the Guidelines. Mr. Fridley reminded members that the Commission adjusted the

Probation Violation Guidelines, developed through analysis of historical revocation sentencing data, to incorporate the statutory requirements that took effect July 1, 2021. He shared some of the questions and concerns that have been communicated to Commission staff.

Mr. Fridley recommended that the Commission make changes to labels and descriptions on the SRR and PVG worksheets to address the feedback from stakeholders and resolve confusion. Changes are requested to encourage the accurate scoring of all factors on the guidelines.

Judge Sharp made a motion to revise the SRR, as shown by Mr. Fridley, to better reflect statutory requirements. Ms. Taylor seconded the motion. The Commission voted 15-0 in favor.

Mr. Fridley spoke briefly about possible unintended consequences that may be emerging related to the use of capias requests and PB15s, appointment of counsel in revocation cases, and extradition of absconders back to Virginia.

### **INVITATION TO PARTICIPATE IN THE VIRGINIA LONGITUDINAL DATA SYSTEM (VLDS)**

Presentation link: <http://www.vcsc.virginia.gov/2021Meeting/VaLongitudinalDataSystemJun72021.pdf>

Ms. Farrar-Owens announced that the Commission had received an invitation to participate in the Virginia Longitudinal Data System (VLDS). She presented information about the organization and what participation in the group would involve.

The VLDS is a consortium of state agencies who have agreed to share data among each other for research purposes, as well as to provide de-identified data to external researchers. VLDS is a partnership that allows the matching of individual records across agencies to build longitudinal datasets that have been de-identified and provided to researchers covered under contracts and Restricted Use Data Agreements to conduct policy relevant research. There is interest in including Sentencing Commission data with the education, wage, benefits, and other data from agencies already participating in VLDS.

In becoming a VLDS partner, the Commission would have a seat on the Data Governance Council, which meets monthly. If the Commission does not wish to join VLDS formally but approves the sharing of annual data, VLDS will make de-identified data available to the VLDS research community.

Ms. Farrar-Owens asked members if they would like the Commission to participate in VLDS and to what extent.

Judge Moreau made a motion for the Sentencing Commission to join VLDS, share data and accept a seat on the Data Governance Council. Senator Edwards seconded the motion. The Commission voted 15-0 in favor.

### **FEE WAIVERS FOR TRAINING AND MANUALS**

Presentation link: <http://www.vcsc.virginia.gov/2021Meeting/FeeWaivers.pdf>

Mr. Fridley provided a brief overview of the Commission's fee waiver program. While the Commission provides free guidelines manuals and training to government employees, such as Commonwealth's attorneys, probation officers and public defenders, the Commission charges private defense attorneys, including court-appointed attorneys, for manuals and training seminars. Applications for fee waivers are evaluated based on the percentage of the applicant's practice

focusing on indigent defense cases and the financial need of an applicant (especially new or solo practitioners). Mr. Fridley displayed the fee waiver application and the scoring sheet used by staff to objectively evaluate fee waiver applications, both of which had been approved by the Commission.

Mr. Fridley presented a status report on this program. He displayed information describing the characteristics of the applicants approved for fee waivers.

Mr. Fridley asked if the Commission wished to approve funds for waivers for FY2022. If so, Mr. Fridley asked members if the Commission desired to modify the application, scoring sheet, or procedures.

Senator Edwards made a motion that the Commission continue the program with an allocation of \$3,000 for FY2022 (the same amount as previous years). Judge Sharp seconded the motion, the Commission voted 15-0 in favor.

### **MISCELLANEOUS ITEMS**

Ms. Farrar-Owens reminded members of the remaining 2021 meeting dates: September 13 and November 3.

With no comments and there being no further business, the Commission adjourned at 12:35pm

### **NEXT VCSC MEETING:**

Date: Monday, September 13, 2021

Time : 10:00 am

Host Site:

Virginia Criminal Sentencing Commission, 100 North Ninth Street, 5<sup>th</sup> floor, Richmond Virginia 23219

Available via Zoom video conferencing.

Members of the public may request participation by sending email to [Carolyn.williamson@vacourts.gov](mailto:Carolyn.williamson@vacourts.gov).

Respectfully submitted by:  
Carolyn Williamson, Research Associate

Minutes Reviewed by:  
Meredith Farrar-Owens, Director  
Judge Edward Hogshire (Ret.), Chairman