



Virginia Criminal Sentencing Commission

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Meeting of the Virginia Criminal Sentencing Commission

November 3, 2021

10:00 am – 12:06 pm

Meeting held via Zoom

DRAFT

Meeting Minutes

Members Attending via Zoom: **Judge Edward L. Hogshire** (Chairman), **Judge Charles S. Sharp** (Vice Chairman), **Delegate Les R. Adams**, **Linda Brown**, **Timothy S. Coyne**, **Senator John Edwards**, **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: **Marcus Elam** and **Judge James Fisher**

WELCOME

Before calling the meeting to order, Judge Hogshire, Commission Chairman, welcomed a new staff member. Lynne Harrison has served as a faculty member at Virginia State University and as the Training Director for the US Virgin Islands Police Department. Lynne's first day with the Commission was October 12.

AGENDA

The meeting agenda is available at: <http://www.vcsc.virginia.gov/2021Meeting/AgendaNov321.pdf>

APPROVAL OF MINUTES FROM LAST COMMISSION MEETING

Minutes from the meeting held on September 13, 2021, were approved as submitted. The meeting minutes are available at: <http://www.vcsc.virginia.gov/2021Meeting/MinutesSep132021.pdf>

SUBCOMMITTEE REPORT AND DATA PRESENTATION

Presentation link: <http://www.vcsc.virginia.gov/2021Meeting/SubcommReport2021.pdf>

At the last meeting, Judge Hogshire appointed a Subcommittee of the Commission to discuss several matters brought to the members' attention by staff and to make recommendations to the full body. The Subcommittee met virtually on October 4. Judge Hogshire asked the Subcommittee co-chairs, Senator Edwards and Ms. Taylor to present their findings.

Ms. Taylor recognized all of the members of the Subcommittee, which included herself, Senator Edwards, Judge Moreau and Mr. Coyne. Since the passage of [House Bill 2038](#) (related to probation and violations of supervision), the staff has received a number of questions related to the legislation and requests for guidance regarding interpretation of the new law. As reported by Ms. Taylor, the Subcommittee discussed the role of the Commission in this circumstance. During the Subcommittee meeting, Judge Moreau stated that judges are not allowed to give interpretation of statutory language in any matter that may be the subject of a case before them; interpretation of legislation must be left to individual judges hearing such cases. Thus, Ms. Taylor reported the Subcommittee's general conclusion that judges on the Commission could not interpret or render an opinion on the questions related to House Bill 2038. Nonetheless, the Subcommittee felt that the Commission was in a unique position to document the questions raised by an array of court stakeholders and the potential unintended consequences of the legislation they described. Ms. Taylor thanked Ms. Farrar-Owens, the Commission's Director, for her presentation to the Richmond Bench-Bar Conference the previous week on this same topic. Judge Moreau stated that it was the Subcommittee's recommendation to include a chapter in the Commission's [2021 Annual Report](#) that would detail stakeholders' questions and the potential unintended consequences of the legislation.

Ms. Taylor asked Mr. Fridley, the Commission's Deputy Director, to present preliminary findings on the data collected from the Case Details Worksheet and the newly-implemented Guidelines modification for substantial assistance, acceptance of responsibility or expression of remorse. According to Mr. Fridley, a total of 1,861 Guidelines worksheets had been submitted to the Commission and automated for July and August 2021. For that time period, the entire Case Details Worksheet was missing in 14% of the cases. Mr. Fridley found that, in 61% of the cases, there was no response to Question #21. Ms. Farrar-Owens added that the Subcommittee supported the idea of sending a letter from Judge Hogshire to circuit court judges and Commonwealth attorneys reminding them of the requirement for a completed Case Details Worksheet. Ms. Taylor expressed concerns about Question #21-J regarding the Defendant's Response (e.g., accepts responsibility, sought treatment, developed rehabilitation plans, etc). She felt that responses to Question #21-J were too subjective and unreliable for the Commission to use in its analyses.

Ms. Taylor made a motion to pause the collection of data for Question #21-J. Senator Edwards seconded the motion. Judge Sharp inquired of Ms. Taylor if she would prefer to delete Question #21-J. Ms. Taylor responded that, perhaps, it could become meaningful data in the future. Judge Moreau noted that Question #21-J is from the defendant's perspective; responses would reflect the defendant's position, not the determination of the court. The judge, at sentencing, determines if the Guidelines modification for acceptance of responsibility should apply. Ms. Taylor asked if the data on the Case Details Worksheet and the Guidelines cover sheet are collected separately. Ms. Farrar-Owens confirmed that data on the Case Details Worksheet and the Guidelines cover sheet are distinct. Ms. Taylor withdrew her motion.

Mr. Fridley reported that, on 187 Guidelines worksheets, the judge checked the box indicating the defendant's substantial assistance, acceptance of responsibility or expression of remorse. Of that total, 59% of the cases were brought into strict concurrence with the Guidelines. He noted that strict concurrence is defined as an effective sentence between the low end and the high end of the Guidelines recommended range.

Mr. Fridley indicated that judges and attorneys have requested more guidance in applying the new Guidelines modification for substantial assistance, acceptance of responsibility or expression of remorse. To aid in the discussion, the staff manually reviewed the written departure reasons submitted by judges in recent cases. Based on the analysis of nearly 200 departure reasons, the court sentenced below the Guidelines when the defendant demonstrated a change in attitude or behavior

prior to sentencing. Mr. Fridley provided a list of departure reasons used in the past to justify a sentence below the Guidelines recommendation. The reasons could be shared with Guidelines users to show what reasons judges have cited in the past. Judge Frucci commented that the check box on the cover sheet should be split into three boxes (i.e., provide separate box for substantial assistance, acceptance of responsibility or expression of remorse).

Judge Kelly made a motion to send a letter to circuit court judges, Commonwealth attorneys, and public defenders with guidance for applying the Guidelines modification, particularly acceptance of responsibility. Senator Edwards seconded the motion. Senator Edwards suggested adding this information to the Sentencing Guidelines manual. Judge Moreau stated that, rather than a letter, the Commission's next newsletter should include the clarification for the acceptance of responsibility. Judge Kelly accepted the amendment to her motion and noted that the information should be disseminated as widely as possible.

Judge Moreau made a motion to adopt this recommendation, which was seconded. With no further discussion, the Commission voted 15-0 in favor.

Ms. Taylor made a motion to modify the back of the Guidelines cover sheet to add three check boxes for the Guidelines modification, per Judge Frucci's suggestion. Mr. Fridley noted that the staff recommended a single check box so as not to identify a defendant who provided substantial assistance (which might put the defendant in danger). Ms. Taylor agreed and decided to amend her motion to remove substantial assistance because it was subjective and the data were unreliable. Ms. Farrar-Owens advised that the Guidelines modification factor was developed by analyzing historical data and information regarding substantial assistance had been incorporated into the data analysis for the development of the factor. Judge Moreau felt that making such a change would cause confusion in the field. Mr. Coyne also did not want to remove the substantial assistance modification at this time. The motion was not seconded.

Judge Moreau made a motion for the Chairman to send a letter to all circuit court judges to further explain the Case Details Worksheet. Ms. Taylor seconded. With no further discussion, the Commission voted 15-0 in favor.

POSSIBLE RECOMMENDATIONS FOR SENTENCING GUIDELINES REVISIONS

Presentation link: <http://www.vcsc.virginia.gov/2021Meeting/SGRevisions2021.pdf>

Ms. Farrar-Owens stated that staff had three 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. She reminded members that all proposals reflect the best fit for the historical data.

Proposed Recommendation 1 – Revise the Murder/Homicide Guidelines to cover the crime of Aggravated Murder.

Ms. Farrar-Owens presented the first proposed recommendation, which was a proposal for adding aggravated murder as a Guidelines-covered offense.

The 2021 General Assembly passed legislation to abolish the death penalty, including for persons currently on death row ([House Bill 2263/Senate Bill 1165](#)). In the legislation, capital murder was redefined as "aggravated murder" and it remains a Class 1 felony, now with a maximum penalty of life. On the Sentencing Guidelines, the primary offense is the offense with the highest statutory

maximum penalty. If there is a tie in statutory maximums, and one offense is covered by the Guidelines while the other one is not, Guidelines are completed using the Guidelines-covered offense as the primary and the non-Guidelines offense as the additional offense. Ms. Farrar-Owens stated that the Guidelines do not cover the crime of aggravated murder as the primary (or most serious) offense, so aggravated murder can be scored under current Guidelines rules as an additional offense to another felony that also carries a life maximum penalty. Because Guidelines analyses never included capital (now aggravated) murder, the Guidelines scored in such a way may produce recommendations that seem counterintuitive.

Ms. Farrar-Owens displayed the proposed Guidelines worksheets. These defendants would always be recommended by the Guidelines for a prison term. On Section C, as proposed, an offender convicted of completed aggravated murder would receive a recommendation of life. This reflects sentencing outcomes in such cases during FY2015-FY2021, as analyzed by staff. Defendants convicted of one count of attempted or conspired aggravated murder would receive a starting recommendation ranging from approximately nine years up to 35 years, depending on the defendant's prior record of violent offenses.

Mr. Coyne stated his concern that the Commission does not know how judges will sentence for aggravated murder going forward and it may differ from past sentencing practices. He felt that the data did not support the creation of Guidelines for this offense. Senator Edwards agreed. Ms. Taylor suggested that the proposal be tabled for future analysis.

As an alternative, Judge Moreau proposed that the Guidelines instructions be amended to instruct users not to prepare Guidelines for any sentencing event that contains a conviction for completed, attempted or conspired aggravated murder. Judge Hurley seconded the motion. With no further discussion, the Commission voted 13-2 in favor (Senator Edwards and Ms. Brown opposing).

Proposed Recommendation 2 – Request legislation to codify the Probation Violation Guidelines in the same manner as the Sentencing Guidelines for felony offenses.

Ms. Farrar-Owens reminded members that, at the June meeting, the Commission approved, in concept, two pieces of legislation for the 2022 General Assembly. The first of the proposals would codify the Probation Violation Guidelines in the same manner as the Sentencing Guidelines for felony offenses.

While the requirements for the Sentencing Guidelines for felony offenses are spelled out in statute (see § 17.1-803 and § 19.2-298.01), requirements related to the Probation Violation Guidelines are not codified. Since 2010, the Appropriation Act has included language to specify that a Sentencing Revocation Report and, if applicable, the Probation Violation Guidelines, must be presented to the court and reviewed by the judge for any violation hearing conducted pursuant to § 19.2-306. In 2020, the Commission completed a large-scale, multi-year study to revise and update the Probation Violation Guidelines that had been in place since 2004. Based on the results of this study, the Commission recommended revisions to the Probation Violation Guidelines, including an expansion to cover, for the first time, violations associated with new convictions. The 2021 General Assembly accepted the Commission's recommendation.

At its June 2021 meeting, the Commission directed staff to pursue draft legislation that would codify the Probation Violation Guidelines in the same manner as the Sentencing Guidelines for felony offenses and ensure that the statutory language accurately reflects the current use of Probation Violation Guidelines, as approved by the Commission in 2020 and accepted by the General Assembly in 2021. Ms. Farrar-Owens added that codifying these requirements will bolster the validity and

reliability of the data provided to the Commission and support the Commission's efforts to develop Guidelines that promote greater consistency and predictability in sentencing outcomes.

Ms. Farrar-Owens reviewed suggested language for the legislation, which largely paralleled the language in § 19.2-298.01 regarding use of Sentencing Guidelines for felony offenses.

Senator Edwards made a motion to adopt the recommendation and suggested language for the legislation, which was seconded by Judge Moreau. With no further discussion, the Commission voted 15-0 in favor.

Proposed Recommendation 3 – Request legislation to clarify the Commission's authority to recommend revisions to the Guidelines based on historical sentencing data, specifically regarding the size of midpoint enhancements for defendants with prior violent felony convictions.

The second piece of legislation would clarify the Sentencing Commission's authority to recommend revisions to the Guidelines based on historical sentencing data, specifically regarding the size of midpoint enhancements for defendants with prior violent felony convictions.

Ms. Farrar-Owens advised members that, unlike many states, Virginia's Sentencing Guidelines are based on analysis of historical sentencing data. She noted one exception to the historical basis of Virginia's Guidelines. Per § 17.1-805, the Guidelines must include midpoint enhancements to increase recommendations for defendants with convictions for violent felony offenses (as defined in § 17.1-805(C)). That section of the *Code* specifies enhancements of 100%, 125%, 300% or 500% depending on the nature of the defendant's current and prior convictions for violent felonies. The percent enhancements specified in § 17.1-805 were not based on empirical analysis of sentencing data and have been in the *Code* since 1995.

In 2021, the Commission approved a full-scale re-analysis of all Guidelines offense groups over the next three years. Ms. Farrar-Owens explained that the approach will be holistic and comprehensive. The goal is to re-benchmark the Guidelines so that they reflect current sentencing practices as accurately as possible. Examining judicial concurrence with, and patterns of departure from, Guidelines recommendations, the staff have identified areas of the current Guidelines that appear to be out of sync with recent sentencing practices. Ms. Farrar-Owens noted that Virginia's circuit court judges concur with the Guidelines at a high rate overall; however, data show that judges often depart from the Guidelines in cases involving midpoint enhancements required by § 17.1-805. The Commission's recently-approved study would include a detailed examination of such cases.

Ms. Farrar-Owens reviewed suggested language for the legislation. The proposed legislation would serve to clarify the Commission's authority to recommend revisions to the Guidelines based on historical sentencing data, specifically in regards to the size of midpoint enhancements. Under the proposal, the Commission would not be required to set the enhancements at 100%, 125%, 300% or 500%, as currently designated in § 17.1-805. Rather, the Commission would be authorized to set the magnitude of midpoint enhancements based on analysis of actual sentencing data for felony offenses. This would allow the Commission to develop Guidelines that better reflect actual sentencing practices and provide judges with a more accurate benchmark of typical case outcomes for felony offenses.

Senator Edwards made a motion to adopt this recommendation, which was seconded by Delegate Adams. With no further discussion, the Commission voted 15-0 in favor.

MISCELLANEOUS ITEMS

Ms. Farrar-Owens provided members with an update on the required reporting to the Virginia Child Protection Accountability System. The Commission is required to submit information to the System for cases involving certain crimes, such as child abuse and neglect, kidnapping, and numerous sexually-related offenses. The Commission must report detailed information pertaining to each case including, but not limited to, the name of the sentencing judge, the sentence given, whether the sentence was within the Guidelines range or an upward or downward departure from the Guidelines, and the reasons given for the departure, if any. The FY2021 report will be completed and submitted to the Department of Social Services (DSS) in December 2021. Mr. Fridley advised that each circuit court judge will receive a copy of his or her FY2021 report for review prior to its submission to DSS.

Ms. Farrar-Owens reminded members that the Commission's *Annual Report* was due to the General Assembly on December 1, 2021. She advised that a draft of the report would be sent to all members for their review and comment prior to its submission to the General Assembly.

Ms. Farrar-Owens asked members to select tentative dates for the Commission's 2022 meetings. After some discussion, meetings were tentatively set for March 28, June 13, September 7, and November 2.

With no comments and there being no further business, the Commission adjourned at 12:06pm.

NEXT VCSC MEETING:

Date: Monday, March 28, 2022

Time : 10:00 am

Host Site: In-person or virtual meeting options to be determined

Members of the public may request participation by sending email to:

Carolyn.williamson@vacourts.gov.

Respectfully submitted by:

Carolyn Williamson, Research Associate

Minutes Reviewed by:

Meredith Farrar-Owens, Director