



Virginia Criminal Sentencing Commission

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Meeting of the Virginia Criminal Sentencing Commission

November 1, 2023

10:00 am – 12:30 pm

Meeting held at the Virginia Supreme Court Building and via WebEx

Meeting Minutes

Members Attending in Person: **Judge Edward L. Hogshire** (Chairman), **Judge Dennis Hupp** (Vice Chairman), **Delegate Les R. Adams**, **Timothy S. Coyne**, **Senator John Edwards**, **Marcus Elam**, **Bethany Harrison**, **Judge Robert J. Humphreys**, **Judge Jack S. Hurley, Jr.**, **Judge Patricia Kelly**, **K. Scott Miles**, **Judge Stacey Moreau**, **Judge Bryant L. Sugg**, and **Judge Victoria A.B. Willis**

Members Attending Virtually*:

Steven C. Frucci – Reason cited: Principal residence is more than 60 miles from the meeting location / Participation location: Virginia Beach, Va.

Dr. Michon Moon – Reason cited: Temporary other medical condition that prevents the member's physical attendance / Participation location: Midlothian, Va.

Members Absent: **Nicole Whittmann**

WELCOME

Before calling the meeting to order, Judge Hogshire, Commission Chairman, welcomed members.

PUBLIC COMMENT

Judge Hogshire announced that the Commission would not be taking oral public comment at the end of the meeting but that anyone who wished to provide comment could do so in writing.

AGENDA

The meeting agenda is available at: <http://www.vcsc.virginia.gov/2023Meetings/agendaNov12023.pdf>

APPROVAL OF MINUTES FROM LAST COMMISSION MEETING

Minutes from the meeting held on September 11, 2023, were approved as submitted. The meeting minutes are available at: <http://www.vcsc.virginia.gov/2023Meetings/MinutesSep112023.pdf>.

* Virginia Code § 2.2-3708 specifies that, if remote participation by a member is approved, the minutes of the meeting must specify that the member participated remotely, the general location from which the member participated, and the specific condition cited by the member when notifying the Chair of his or her need for remote participation.

POSSIBLE RECOMMENDATIONS FOR GUIDELINES REVISIONS

Presentation link: <http://www.vcsc.virginia.gov/2023Meetings/PossRecommend11012023.pdf>

Ms. Cassandra Wright, Training Associate, stated that staff had six proposals for the members to consider. Virginia's Sentencing Guidelines are designed to provide judges with a benchmark that represents the typical, or average, case outcome given the defendant's offense(s) and prior record. Any modifications to the Guidelines adopted by the Commission must be presented in its Annual Report, which is submitted to the General Assembly each December 1. Ms. Wright reminded members that all proposals are based on empirical analysis and reflect the best fit for the historical data.

Recommendation 1 - Amend Miscellaneous/Other Sentencing Guidelines to add Delivery of Drugs to Prisoner (§ 18.2-474.1) as a Guidelines offense.

Ms. Wright presented the staff's proposal for adding delivery of drugs to a prisoner (§ 18.2-474.1) as a Guidelines-covered offense. She reviewed the current provisions of § 18.2-474.1 and summarized recent sentencing patterns for this offense. For example, during the five-year period examined, 28.4% of defendants convicted of delivering drugs to prisoners were given an incarceration term of more than six months; for these offenders, the median sentence was 1.1 years.

Ms. Wright displayed the proposed Guidelines Section A, B, and C worksheets. Judge Humphreys inquired as to whether the type of drug was known in these cases and if possession of the drug would be the primary offense in a sentencing event. Ms. Wright said that the analysis focused on cases in which the delivery of drugs to a prisoner was the primary offense. She noted that the type of drug was unknown unless it was specified in the Case Details Worksheet.

As presented by Ms. Wright, the proposed Guidelines produced recommendations that aligned well with actual sentencing practices during the period analyzed. Mr. Coyne stated that he was concerned the proposed change would result in more offenders sentenced to incarceration greater than six months.

Judge Hupp made a motion to adopt this recommendation. The motion was seconded by Judge Hurley. With no further discussion, the Commission voted 13-2 in favor.

Recommendation 2 - Amend Miscellaneous/Other Sentencing Guidelines to add Prisoner, Sell, Secrete, Etc., Unlawful Chemical (§ 53.1-203(5)) as a Guidelines offense.

Mr. Thomas Barnes, Research Associate, reviewed § 53.1-203(5), which makes it unlawful for a prisoner to possess, sell, secrete, etc., an unlawful chemical compound. During the five-year period examined, most of the offenders convicted under this provision (60.2%) were sentenced to a jail term ranging from one day to six months.

Mr. Barnes displayed the proposed Guidelines worksheets and explained how the factors would be scored for this offense. The rate at which the proposed Guidelines recommended incarceration terms of more than six months was very close to the rate at which defendants received such incarceration during the period studied. However, the proposed Guidelines recommended more defendants for jail incarceration of one day to six months than actually received that type of disposition (75% versus 60%), and fewer defendants were recommended by the proposed Guidelines for probation/no incarceration than received that type of disposition in actual practice. Judge Kelly noted these differences. Judge Humphreys suggested that the staff continue to study this offense with particular attention to other charges that may accompany the offense.

Judge Kelly made a motion to table this recommendation for further study. Mr. Coyne seconded the motion. With no further discussion, the Commission voted 15-0 in favor.

Recommendation 3 - Amend Drug Schedule I/II Sentencing Guidelines to add Distribution, Etc., of 10 Grams or More of Methamphetamine (§ 18.2-248 (C,4)) as a Guidelines offense.

Mr. Jody Fridley, Deputy Director, reviewed the provisions of § 18.2-248(C,4), distribution or possession with intent to distribute 10 grams or more of methamphetamine or 20 grams or more of a mixture containing a detectable amount of methamphetamine, which carries a five-year mandatory minimum prison term. The offense is currently not covered by the Sentencing Guidelines. All defendants convicted of this offense during the study period received a prison term and the median sentence was five years, the mandatory minimum required by statute.

Mr. Fridley displayed the proposed Guidelines worksheets, which recommended all defendants convicted under § 18.2-248(C,4) for an incarceration term of more than six months, matching actual sentencing practice. Moreover, the median sentence recommended by the proposed Guidelines matched the actual median sentence in such cases.

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

Recommendation 4 - Amend Miscellaneous/Person & Property Sentencing Guidelines to add Violation of a Protective Order, 3rd or Subsequent Offense within 20 years, in violation of § 16.1-253.2(A) as a Guidelines offense.

Dr. Chang Kwon, Chief Methodologist, presented the staff's proposal for adding violation of a protective order, 3rd or subsequent offense within 20 years (§ 16.1-253.2(A)), as a Guidelines offense. During the five-year period examined, nearly two-thirds (62.6%) of defendants were sentenced to a term of incarceration greater than six months and the median sentence in such cases was one year. Another 37.4% received a jail term of one day to six months and no offenders received probation/no incarceration.

Dr. Kwon displayed the proposed Guidelines worksheets and described how they would be scored in such cases. Results of the analysis indicated that, as proposed, the Guidelines recommendations were closely aligned with actual sentencing practices.

Mr. Coyne asked if 99 cases were sufficient for developing new Guidelines. Dr. Kwon responded that, statistically-speaking, 99 cases was sufficient for the analysis.

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

Recommendation 5 - Amend Larceny Sentencing Guidelines to add Conspiring or Assisting in Larceny with an Aggregate Value of \$1,000 or More, a violation of § 18.2-23(B), as a Guidelines offense.

Mr. Fridley discussed the next proposal. Currently, Virginia's Sentencing Guidelines do not cover the offense of conspiring to commit or assisting in larceny with an aggregate value of \$1,000 or more (§ 18.2-23(B)). Based on analysis of recent sentencing data, the majority of defendants convicted of this offense received a period of incarceration. Nearly 41% were sentenced to incarceration of one day to six months and approximately 36% were sentenced to incarceration greater than six months. For the latter cases, the median sentence was one year.

Mr. Fridley displayed the proposed Guidelines worksheets. He compared the proposed sentencing recommendations for defendants convicted of this offense with actual dispositions and median sentences in these cases. The proposed Guidelines recommend 44% of the defendants for an

incarceration sanction of six months or less (compared to the actual percentage of nearly 41%) and 29% for a sentence in excess of six months (compared to approximately 36% in actual practice). The proposal reflects the best fit that could be achieved given the available data.

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

Recommendation 6 - Modify the Nonviolent Offender Risk Assessment to exclude any defendant who commits a specified felony offense while serving a state-responsible term.

Mr. Fridley described what he called a “face validity” issue related to the Nonviolent Offender Risk Assessment instrument that is incorporated into the Guidelines for drug, larceny and fraud offenses. The issue occurs when the Risk Assessment instrument recommends an alternative sanction (a sanction other than incarceration) for a crime that was committed while the individual was serving a prison term. In such circumstances, the Risk Assessment is not relevant because the defendant must remain in prison to serve out the sentence ordered in a previous case. Mr. Fridley noted that cases involving incarcerated defendants were not included in the development of the Risk Assessment instrument. To resolve the face validity issue, staff proposed expanding the ineligibility conditions for Risk Assessment evaluation. Under the proposal, a defendant would be ineligible for Risk Assessment evaluation, and consideration for an alternative sanction, if the offense was committed while the defendant was serving a prison term.

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

Analysis Not Resulting in a Recommendation

Mr. Marc Leslie, Research Associate, presented an analysis of robbery offenses sentenced before and after statutory changes made by the 2021 General Assembly. In 2021, the General Assembly adopted legislation to create degrees of punishment for robbery based on the elements of the offense. As a result, the Commission voted to suspend the Robbery Guidelines, effective July 1, 2021, until a full analysis of sentencing under the new penalty structure could be completed. Mr. Leslie noted that staff would continue to monitor sentencing patterns in robbery cases, resolve data issues, and promote the completion of the Case Details worksheet before proposing new Robbery Guidelines.

ISSUES FROM THE FIELD

Presentation link: <http://www.vcsc.virginia.gov/2023Meetings/IssuesField11012023.pdf>

Mr. Jody Fridley reported that a variety of issues had arisen in the field recently. He noted that staff would like guidance from members on certain matters.

Crime Victim and Witness Rights Act. Mr. Fridley stated that Commonwealth’s attorneys and representatives of the Attorney General’s Office had asked that the Guidelines Coversheet be modified to capture, in each case, whether or not the provisions of § 19.2-11.01 had been applied. This statute requires the attorney for the Commonwealth to consult with the victim either verbally or in writing (i) to inform the victim of the contents of a proposed plea agreement and (ii) to obtain the victim's views about the disposition of the case, including the victim's views concerning dismissal, pleas, plea negotiations and sentencing.

According to Mr. Fridley, one approach would be to place a check box on the Guidelines disposition page that would state: *the Attorney for the Commonwealth did make a good faith effort to communicate the*

terms of the plea agreement with the victim defined in § 19.2-11.01. The attorney stated on the record that the victim either supports, opposes, or has the following views about the disposition. The judge would be responsible for completing that section and checking the box.

Judge Humphreys commented that this proposal was outside of the Commission's statutory mandates. Judge Willis agreed.

Judge Humphreys made a motion to not adopt this recommendation. The motion was seconded by Judge Willis. With no further discussion, the Commission voted 14-1 in favor.

Fiscal Impact Statements and Earned Sentence Credits/Definition of Violent Offenses. Section 30-19.1:4 of the *Code of Virginia* requires the Commission to prepare fiscal impact statements for any proposed legislation that may result in a net increase in the state's prison population.

Recently, the General Assembly adopted legislation to increase the rate at which individuals convicted of certain felonies may earn sentence credits, effective July 1, 2022. Previously, pursuant to § 53.1-202.3, all felons earned a maximum of 4½ days off for every 30 days served, meaning that individuals served a minimum of 85% of the sentence ordered by the court. Since July 1, 2022, persons serving time for certain nonviolent felonies have been eligible to earn as much as 15 days off for every 30 days served, based on their participation in programs and record of institutional infractions during confinement. If a nonviolent felon earns at the highest rate throughout his sentence, he will serve a minimum of 67% of the court-ordered sentence. The rate at which sentence credits are earned affects the offender's length of stay in prison or jail.

Staff proposed that, beginning with the 2024 General Assembly Session, information regarding rates of earned sentence credits be included in each fiscal impact statement prepared by the Commission. Information regarding sentence credits and the percent of sentence that an offender would serve may assist lawmakers as they consider legislation affecting statutory penalties for new or existing crimes. Mr. Fridley noted that the Commission does not take positions on such legislation and would include such detail for informational purposes only. Staff also proposed that the Commission's impact statements include a notation as to whether or not the offense affected by the bill is defined as violent under § 17.1-805 for the purposes of the Sentencing Guidelines.

Members concurred with the staff's proposal regarding fiscal impact statements. Members also discussed presenting information on earned sentence credits and the definition of violent offenses in the Commission's upcoming Annual Report.

Judge Humphreys made a motion that the Commission make information on earned sentence credits (§ 53.1-202.3) available in the *2023 Annual Report*. The motion was seconded. With no further discussion, the Commission voted 14-1 in favor.

Judge Hupp made a motion that the Commission include information about the definition of violent offenses (§ 17.1-805) in the *2023 Annual Report*, specifically including a list of new felonies added to the *Code* since the last amendment to § 17.1-805. The motion was seconded. With no further discussion, the Commission voted 14-1 in favor.

Probation Violation Guidelines. Mr. Fridley stated that state probation officers are required, in most cases, to attach draft Probation Violation Guidelines to the Major Violation Report sent to the court (reporting a probationer's noncompliance with conditions of community supervision). Once a capias or show cause has been issued and a docket number has been assigned, probation officers must submit updated Probation Violation Guidelines. Probation officers have indicated that this duplicates work.

According to Mr. Fridley, users in the field have suggested a possible solution. He described the Court Alert Subscription Service (CASS), which is a service that defendants, attorneys, witnesses, victims, media, etc., can subscribe to in order to receive a notification/reminder that a hearing for a particular case has been scheduled. The Probation District staff could subscribe to CASS for each docket number of interest and be notified of any change to the case. Once notified, an officer would have 24 hours to complete and finalize the Guidelines for the court. With this approach, draft copies of the Guidelines would not be attached to the Major Violation Report.

Judge Willis commented that having the draft Probation Violation Guidelines attached to the Major Violation Report was helpful. She felt that the absence of the Guidelines would slow down and clog the system. Judge Hurley and Judge Moreau agreed that having the draft Guidelines attached was helpful. Judge Willis asked the staff not to change the procedure.

Mr. Fridley briefly spoke about recent Court of Appeals decisions relating to probation violations. He then asked members if the Probation Violation Guidelines coversheet should reflect the numbering for the various types of technical violations found in § 19.2-306.1 or if the coversheet should reflect the numbering for violations used in DOC's Conditions of Probation. Currently, the coversheet is based on the latter. Judge Moreau felt that the Commission should not revise the coversheet because it may confuse users. Members concurred.

Access to Court Records. Mr. Fridley discussed two issues related to access to court records. First, Commission staff no longer had access to automated court case management systems. For many years, the Commission had read-only access to case management systems used in circuit and general district courts through a system known as TPX. This included access to certain information not otherwise available to the general public. In 2023, the Office of the Executive Secretary (OES) eliminated the Commission's access to the system, as well as access by state probation officers, citing § 17.1-293. Mr. Fridley asked members if the Commission should request legislation for the upcoming 2024 General Assembly to amend § 17.1-293 so that staff could once again have access to case management systems.

Second, in order to use the Officer of the Court Record Access (OCRA) system, Commission staff must complete hundreds of applications and have them notarized. Mr. Fridley stated that circuit court clerks, in most jurisdictions, have granted Commission staff access to OCRA, which allows staff to access nonconfidential scanned court records. Using this system, staff can quickly resolve case-by-case Guidelines or research issues without contacting the clerks. Currently, each Commission staff member has to sign an OCRA agreement with each individual clerk. This adds up to hundreds of OCRA agreements that must be completed and notarized, and many clerks require this be done annually. Mr. Fridley stated that it would be much more efficient to sign one OCRA agreement with a clerk that covers all of our staff who need access.

Judge Hogshire commented that the staff should include these issues in the *2023 Annual Report* and/or present these issues to the General Assembly. Delegate Adams advised that the Commission should request legislation to address these issues.

Judge Humphreys made a motion to direct staff to request draft legislation to amend § 17.1-293 to require OES to provide the Commission with the necessary access to case management systems, so that the Commission is able to fully meet its statutory mandates. The motion was seconded by Judge Willis. With no further discussion, the Commission voted 15-0 in favor.

VIRGINIA'S PRETRIAL DATA PROJECT – FINDINGS FROM RECENT RESEARCH

Presentation link: <http://www.vcsc.virginia.gov/2023Meetings/PretrialProject11012023.pdf>

Dr. Kwon provided a brief overview of the Pretrial Data Project. The Project was established in 2018 to address the significant lack of data readily available to answer many important questions regarding Virginia's pretrial system. The Project was an unprecedented, collaborative effort between numerous state and local agencies representing all three branches of government. The 2021 General Assembly passed legislation directing the Sentencing Commission to continue this work annually. Data for the Project is obtained from numerous agencies and more than 500 data elements are captured for each defendant.

Dr. Kwon explained that, for the most recent study, staff selected individuals with pretrial contact events during calendar year (CY) 2019 and CY2020. A contact event is the point at which an individual comes into contact with the criminal justice system and he or she is charged with a criminal offense, thus beginning the pretrial process. For individuals with more than one contact event in a calendar year, only the first event occurring within the calendar year was selected. Individuals were tracked for a minimum of 15 months or until disposition of the case, whichever occurred first.

Dr. Kwon then presented key findings from recent analysis conducted by staff. He provided an overview of the number of cases analyzed and the demographics and indigency status of defendants in the CY2019 and CY2020 cohorts. The largest share of defendants were male, white, between the ages of 18 to 35, and indigent. The most common felony charge continued to be a drug offense. In CY2020, assault became the most common misdemeanor offense.

Dr. Kwon discussed the two primary outcome measures for the Pretrial Data Project: court appearance and public safety. For court appearance, a released defendant has failed to appear if he was charged with failure to appear or contempt of court for failure to appear during the pretrial period. The public safety outcome is based on whether the released defendant had a new in-state arrest for an offense punishable by incarceration during the pretrial period (excluding failure to appear and probation violations). Dr. Kwon noted that both the failure-to-appear rate and the new-arrest rate increased between 2018 and 2020.

Dr. Kwon gave a brief overview of the Public Safety Assessment (PSA), a research-based pretrial risk assessment tool used in various localities around the country and soon to be pilot-tested in Virginia. As described by Dr. Kwon, the percentage of released defendants charged with failure to appear or who were arrested for a new in-state offense punishable by incarceration during the pretrial period increased as the defendants' PSA scores increased, suggesting that the PSA may be a useful tool in pretrial release decision making.

Dr. Kwon concluded by saying that the Commission's next Pretrial Data Project report was due to the General Assembly on December 1, 2023. The data dashboard tool will be updated and the final data set will be available on the Commission's website on December 1, as required by statute. He then asked Ms. Catherine Chen, Research Associate, to present a brief demonstration of the pretrial data dashboard.

MISCELLANEOUS ITEMS

Ms. Farrar-Owens reminded members that the Commission's Annual Report was due to the General Assembly on December 1, 2023. 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 2024 meetings. After some discussion, meetings were tentatively set for March 25, June 10, September 4, and November 6. Commission members revised the November meeting date to Thursday, November 7.

Judge Hogshire recognized Senator John Edwards and noted that this meeting would be his last with the Commission. He thanked him for his commitment and service to the Commission.

ADJOURNMENT

With no comments and there being no further business, the Commission adjourned at 12:30 p.m.

LINK TO MEETING RECORDING

[www.vcsc.virginia.gov/2023Meetings/Virginia Criminal Sentencing Commission - November 1, 2023 1000 AM-20231101 1335-1.mp4](http://www.vcsc.virginia.gov/2023Meetings/Virginia%20Criminal%20Sentencing%20Commission%20-%20November%201,%202023%201000%20AM-20231101%201335-1.mp4)

NEXT VCSC MEETING:

Tentative Date: Monday, March 25, 2024

Time: 10:00 a.m.

Members of the public may request participation by sending an email to: cwilliamson@vacourts.gov.

Respectfully submitted by:

Carolyn Williamson, Research Associate

Minutes Reviewed by:

Meredith Farrar-Owens, Director