



Virginia Criminal Sentencing Commission

100 North Ninth Street • Richmond, Virginia 23219 • Tel.: 804.225.4398 • Fax: 804.786.3934

Meeting of the Virginia Criminal Sentencing Commission

June 10, 2024

10:00 am – 12:03 pm

Meeting held at the Virginia Supreme Court Building

Meeting Minutes

Members Attending in Person: **Judge Edward L. Hogshire** (Chairman), **Judge Dennis Hupp** (Vice Chairman), **Delegate Rae C. Cousins**, **Timothy S. Coyne**, **Marcus Elam**, **Bethany Harrison**, **Judge Robert J. Humphreys**, **Judge Patricia Kelly**, **K. Scott Miles**, **Judge Stacey Moreau**, **Senator Russet Perry**, **Judge Bryant L. Sugg**, **Robert Tracci (for Theo Stamos)** and **Judge Victoria A.B. Willis**

Members Attending Virtually*: **Judge Jack S. Hurley, Jr.**, – Reason cited: Principal residence is more than 60 miles from the meeting location / Participation location: Tazewell, Va.

Members Absent: **Judge Steven C. Frucci** and **Dr. Michon Moon**

WELCOME

Before calling the meeting to order, Judge Hogshire, Chairman, welcomed Commission members. Judge Hogshire introduced one new member. As Delegate Adams has been selected for a General District Court judgeship, the Chairman of the House Courts of Justice Committee has appointed Delegate Rae Cousins to serve on the Commission. Delegate Cousins represents the 79th House District (Richmond City).

AGENDA

The meeting agenda is available at: <http://www.vcsc.virginia.gov/2024Meetings/AgendaJun102024.pdf>.

APPROVAL OF MINUTES FROM LAST COMMISSION MEETING

Minutes from the meeting held on March 25, 2024, were approved with corrections. The minutes are available at: <http://www.vcsc.virginia.gov/2024Meetings/MinutesMar252024.pdf>

POST-RELEASE SUPERVISION VIOLATIONS AND RECENT STATUTORY CHANGES

Presentation link: <http://www.vcsc.virginia.gov/2024Meetings/PostReleaseSupervision6102024.pdf>

Retired Circuit Judge Patricia West, who is now the Chair of the Virginia Parole Board, provided the Commission with an overview of post-release supervision requirements (§ 19.2-295.2) as well as legislation adopted by the 2023 General Assembly (House Bill 2230) regarding the arrest and return of post-release violators. Judge West was accompanied by Helen Morton of the Parole Board staff and Dick Vorhis of the Attorney General's Office.

Alisa Padden from the Office of the Executive Secretary of the Supreme Court was also available to answer questions about the issuance of capiases by the court and the forms used by the court for post-release violators.

Judge West began by saying that the 2023 changes to the post-release supervision statute have caused some confusion regarding the procedures for handling post-release supervision violators. Judge West asked Mr. Vorhis to explain the history of post-release supervision, including its origins in 1995 and the shift of responsibilities from the courts to the Parole Board. Prior to 2023, post-release violations were handled exclusively by the Parole Board. With the 2023 change, the circuit court of the sentencing jurisdiction may issue a warrant for the arrest and return of the felon serving a period of post-release supervision to the institution from which he was released or to any other correctional facility that may be designated by the court. Commission members discussed the confusion surrounding the implementation of the new provision, particularly the court's responsibilities. Local and regional jails are also experiencing some challenges with the new provision. There was general consensus that the statute should be further amended to clarify the legislature's intent. Senator Perry commented that she was not in the General Assembly when the 2023 change was made but she understood the problem. Judge West believed the intent was to shift oversight of post-release supervision and post-release terms from the Parole Board back to the courts, as the current law presents challenges for both judges and individuals being supervised. Judge West indicated that the Parole Board would recommend changes to the statute for the 2025 General Assembly.

IMPACT OF RECENT COURT CASES AND THE APPROPRIATION ACT ON EARNED SENTENCE CREDITS

Presentation link: <http://www.vcsc.virginia.gov/2024Meetings/EarnedSentenceCredits.pdf>

Ms. Donna Shiflett, Court and Legal Unit Manager at the Virginia Department of Corrections (DOC), discussed the impact of recent Supreme Court cases and the newly-adopted Appropriation Act on earned sentence credits that may be earned by individuals serving time for felony offenses. Felony offenders serving time for offenses enumerated in § 53.1-202.3 may earn a maximum of 4.5 days for every 30 days served. For all other offenses, individuals may earn up to 15 days for every 30 days served. Recent Supreme Court cases have clarified the way in which inchoate offenses (e.g., attempted and conspired crimes) are to be handled for purposes of applying sentence credits. In *Vasquez v Dotson* (2024), the Supreme Court of Virginia ruled that all inchoate offenses are not limited to the 4.5 day maximum and may earn at the higher 15 days for every 30 days served. The Appropriation Act, effective July 1, 2024, changed the way in which felony offenders serving time for a combination of violent and nonviolent offenses earn sentence credits. Prior to the change, language in the Appropriation Act specified that an individual was limited to 4.5 days for every 30 served for an offense if, during the same term of incarceration, he was also serving time for one or more of the felonies listed in § 53.1-202.3(A). This restriction has been eliminated from the Appropriation Act, effective July 1, 2024. Therefore, individuals serving time for a combination of offenses may receive the higher rates of sentence credits for the nonviolent offenses (i.e., offenses not listed in § 53.1-202.3) in their current incarceration term. Ms. Shiflett also discussed the need for detail in sentencing/commitment orders sent to the DOC. She suggested that, in cases involving multiple offenses and/or concurrent sentences, judges specify to which offense(s) the time served should be applied. Ms. Shiflett indicated that, if no detail is provided from the court, DOC will apply the pretrial time served to the offense that will provide the most earned sentence credits for the incarcerated person.

PROPOSED ANALYSIS FOR POSSIBLE GUIDELINES REVISIONS

Presentation link: <http://www.vcsc.virginia.gov/2024Meetings/PossibleGuidelines6102024.pdf>

Mr. Jody Fridley, Deputy Director, reminded members that the Commission closely monitors the Sentencing Guidelines system and, each year, members deliberate upon possible modifications to enhance the usefulness of the Guidelines as a tool for judges. Topics for possible Guidelines revisions are suggested by Commission members, prosecutors, defense attorneys, and other Guidelines users. In addition, staff closely examine compliance with the Guidelines and departure patterns in order to pinpoint specific areas where the Guidelines may need adjustment to better reflect current judicial thinking. The reasons judges write for departing from the Guidelines are very important in guiding the

analysis. He noted that the staff's proposals represent the best fit for the available sentencing data. Any modifications to the Guidelines adopted by the Commission must be presented in its *Annual Report*, submitted to the General Assembly each December 1. Staff sought approval for the topics proposed for this year's Guidelines analyses. The results of any analyses would be presented at the Commission's September 4 meeting for the members' consideration and vote.

Mr. Fridley first reviewed the staff's proposal to develop new Guidelines for robbery offenses. He discussed changes to the penalties for the crime of robbery. In 2021, the General Assembly enacted legislation that created classes of robbery with maximum penalties ranging from five years to life based on the elements of the offense. The new categories of robbery are very different from the way robbery was delineated in Guidelines prior to the change (which was by location – street, business, residence, bank - and whether or not a firearm/simulated firearm was used). At the time the legislation became effective, data were insufficient to perform the analysis necessary to develop guidelines based on the proposed classes. The Commission suspended the Robbery Guidelines until a full analysis of sentencing under the new penalty structure could be completed. Mr. Fridley presented the staff's proposed plan to conduct a special data collection effort during the summer to gather additional details on robbery cases. Staff would also request criminal history data from the Virginia State Police. Staff would then analyze the robbery data with the goal of developing new Robbery Guidelines. Any proposed Guidelines would be presented at the next Commission meeting.

Mr. Fridley then listed four other crimes that could be analyzed for possible addition as new Guidelines offenses. He discussed current sentencing patterns for each offense. If approved, research of these offenses would proceed and results of the analysis would be presented at the next meeting. The offenses were:

- Prisoner Possess, Sell, Secrete, Etc., Unlawful Chemical (§ 53.1-203(5))
- Resist Arrest/Obstruct Justice by Threats or Force (§ 18.2-460(C))
- Possess Schedule I/II Drug while Possessing Firearm - Not on or about Person (§ 18.2-308.4(A))
- Unlawfully Shoot or Throw Missile at Train, Car, Etc. (§ 18.2-454)

Mr. Fridley next presented a proposal to develop formal standards or criteria for the modification of the Guidelines recommendation for the defendant's substantial assistance, acceptance of responsibility, or expression of remorse. This approach had been suggested by some circuit court judges.

Finally, Mr. Fridley presented staff's proposal to request legislation to modify § 19.2-390.01. Since 2003, § 19.2-390.01 has required criminal justice agencies and courts to use Virginia Crime Codes (VCCs) to identify offenses in their respective information systems. Since 1995, the Sentencing Commission has administered the VCC system, including the creation or modification of VCCs. Although the Commission has maintained the VCC system since 1995, the statute does not explicitly assign the function to any agency. If desired, the Commission could seek legislation to amend § 19.2-390.01 to designate the Commission as the agency to oversee the VCCs.

After some discussion, most members did not wish to develop formal criteria/standards for the Modification of Recommendation factor. The members approved the other proposed items and directed staff to proceed.

VIRGINIA'S PRETRIAL DATA PROJECT – 2021 AND 2022 COHORTS

Presentation link: <http://www.vcsc.virginia.gov/2024Meetings/PretrialDataProjectJune%20102024.pdf>

Dr. Kwon provided a brief overview of the Pretrial Data Project and status update. 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 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 years 2021 and 2022. 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 provided an overview of the number of cases and the demographics and indigency status of defendants in the CY2020, CY2021 and CY2022 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. Assault remained the most common misdemeanor offense.

Dr. Kwon concluded by describing the next steps. Staff will continue to expand the database as data is received from other agencies, continue to improve data quality, and conduct research using the final dataset. Two staff members have been asked to present at the next conference of the American Society of Criminology (ASC).

FEE WAIVERS FOR TRAINING AND MANUALS

Presentation link: <http://www.vcsc.virginia.gov/2024Meetings/FeeWaiver6102024.pdf>

Mr. Jody 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 for 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 were previously approved by the Commission. He presented the FY2024 program report, describing the characteristics of the applicants and approvals for fee waivers. Mr. Fridley asked if the Commission wished to approve funds for waivers for FY2025. If so, Mr. Fridley asked members if they desired to modify the application, scoring sheet, or procedures. Judge Willis suggested that the Commission expand the program by waiving fees for law school students.

Judge Kelly made a motion to increase the funds from \$3,000 to \$5,000, which was seconded by Judge Willis. With no further discussion, the Commission voted 15-0 in favor.

MISCELLANEOUS ITEMS

Ms. Farrar-Owens discussed a matter related to the reports the Commission must submit to the General Assembly regarding judges coming up for re-appointment. The report includes Guidelines concurrence and departure rates and the number of missing departure reasons. In 2023, the reported concurrence rates were based on the modified Sentencing Guidelines range in cases in which the judge indicated the defendant's substantial assistance, acceptance of responsibility, or expression of remorse. When a judge checks the box to indicate substantial assistance, acceptance of responsibility, or expression of remorse and then sentences within the expanded range, the case is considered in concurrence with the Guidelines and not a downward departure. Judges have expressed concern that reporting concurrence

and departures in this way gives the appearance of more upward departures than downward departures (i.e., departures appear unbalanced). Ms. Farrar-Owens presented two options for addressing this issue in the General Assembly report: 1) continue to calculate concurrence in the new way, or 2) revert to the old method and provide a separate column for modified concurrence.

Members indicated that they would like to defer the topic to the September 4 meeting.

Next, Ms. Farrar-Owens reported that the National Association of Sentencing Commissions (NASC) will hold its 2024 conference in Raleigh, North Carolina, on August 6-8. She asked that any member who would like to attend contact her by the end of the week.

Ms. Farrar-Owens reminded members of the remaining 2024 meeting dates: Wednesday, September 4, and Thursday, November 7.

PUBLIC COMMENT

No member of the public wished to provide comment.

With no comments and there being no further business, the Commission adjourned at 12:10 p.m.

Sentencing Commission Meeting Recording

NEXT VCSC MEETING:

Date: Wednesday, September 4, 2024

Time: 10:00 a.m.

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

Respectfully submitted by:

Carolyn Williamson, Research Associate

Minutes Reviewed by:

Meredith Farrar-Owens, Director