



# Virginia Criminal Sentencing Commission

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## Meeting of the Virginia Criminal Sentencing Commission

March 25, 2024

10:00 am – 12:30 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), Timothy S. Coyne, Marcus Elam, Judge Steven C. Frucci, Bethany Harrison, Judge Robert J. Humphreys, Judge Jack S. Hurley, Jr., Judge Patricia Kelly, K. Scott Miles, Judge Stacey Moreau, Senator Russet Perry, Robert Tracci (for Theo Stamos) and Judge Victoria A.B. Willis

Members Absent: Dr. Michon Moon and Judge Bryant L. Sugg

#### WELCOME

Before calling the meeting to order, Judge Hogshire, Chairman, welcomed Commission members. Judge Hogshire introduced one new member. With the retirement of Senator Edwards, the new Chairman of the Senate Courts of Justice Committee has appointed Senator Russet Perry to the Commission. The House Courts of Justice representative has not been announced at this time.

Ms. Theo Stamos has been designated to represent the Attorney General's Office. Ms. Stamos is the new Deputy Attorney General for Criminal Justice and Public Safety. Robert Tracci represented the Attorney General's Office for this meeting.

Judge Steven Frucci has been selected by the General Assembly to fill the opening on the Court of Appeals created by Judge Robert Humphreys' retirement. Judge Frucci can continue to serve on the Commission.

#### AGENDA

The meeting agenda is available at: <http://www.vcsc.virginia.gov/2024Meeting/agendaMar25.pdf>.

#### APPROVAL OF MINUTES FROM LAST COMMISSION MEETING

Minutes from the meeting held on November 1, 2023, were approved with corrections. Judge Hurley requested that his name be added to the list of members attending in person. The minutes are available at: <http://www.vcsc.virginia.gov/2023Meetings/MinutesNov12023.pdf>.

#### RECENT CASES FROM THE COURT OF APPEALS OF VIRGINIA RELATED TO PROBATION VIOLATIONS

Presentation link: <http://www.vcsc.virginia.gov/2024Meetings/ProbViolUpdateMar25.pdf>

The Virginia Court of Appeals has issued a number of opinions regarding the applicability of § 19.2- 306.1, which became effective on July 1, 2021 (see House Bill 2038, 2021 General Assembly, Special Session I).

Judge Robert J. Humphreys, judge on the Court of Appeals and a Sentencing Commission member, provided an overview of recent Supreme Court and Court of Appeals opinions pertaining to § 19.2-306.1.

***Commonwealth v. Delaune*** (Supreme Court of Virginia)

In this case, the Supreme Court agreed with the Court of Appeals that a ‘special condition’ that was substantively the same as a technical violation was subject to the punishment limitation set by the General Assembly.

The Court approved the rationale of *Diaz-Urrutia v. Commonwealth* holding that “another condition must be wholly independent of conduct defined as a technical violation” and *Thomas v. Commonwealth*, holding that a special condition that was more restrictive than the technical violation language was not punishment restricted. He noted that the *Thomas* case dealt with sex offender special conditions.

***Hamilton v. Commonwealth*** (Court of Appeals)

Judge Humphreys said that, per *Code* § 19.2-303.1, “[the court] may fix the period of suspension for up to the statutory maximum period for which the defendant might originally have been sentenced to be imprisoned.” If a trial court does not explicitly fix a period of suspension for the defendant’s suspended sentence, then the period of suspension is the maximum period for which the defendant might originally have been sentenced to be imprisoned. He added that multiple sentences are presumptively consecutive.

***Reese v. Commonwealth*** (Court of Appeals) (Unpublished)

The five-year limitation on supervised probation is measured from the original sentencing order but is not retroactive to those previously placed on probation before the amendment for a longer time.

Judge Moreau asked if there were any inquiries about the *Canales* case (relating to single course of conduct and multiple violation hearings based on a single Major Violation Report). Mr. Jody Fridley, the Commission’s Deputy Director, said preparers have asked how to complete the Probation Violation Guidelines when the court decides to hold separate hearings for multiple courses of conduct based on a single Major Violation Report (MVR). He stated that probation officers will have to clone the Guidelines worksheet and submit the same Guidelines for each hearing. Judge Humphreys concluded by saying that the recent statutory changes may have unintended consequences.

**REPORT ON THE 2024 GENERAL ASSEMBLY AND LEGISLATIVE IMPACT ANALYSIS**

Presentation link: <http://www.vcsc.virginia.gov/2024Meetings/2024GARReportMar25.pdf>

Dr. Chang Kwon, the Commission’s Senior Methodologist, described the many activities of Commission staff during the 2024 Session of the General Assembly. These activities included the preparation of fiscal impact statements, as required by statute, responding to legislators’ requests for supplemental information, monitoring legislation, observing the judicial interview process, and providing technical assistance to other agencies. He provided an overview of the requirements pertaining to fiscal impact statements that must be prepared by the Commission. Dr. Kwon then presented an overview of the number and kinds of impact statements prepared for the 2024 General Assembly. Staff produced 331 statements. Proposals requiring fiscal impact statements most frequently involved the expansion or clarification of an existing statute (85%) or the definition of a new crime (48%). He displayed a slide to show the diversity of topic areas among fiscal impact statements prepared. For the 2024 Session, the most common topic area was firearms/weapons. Commission staff also completed ad hoc analyses requested by legislators, the Department of Planning & Budget or other state agencies. As indicated by Dr. Kwon, legislators can ask the Joint Legislative Audit and Review Committee (JLARC) to conduct an independent review of any fiscal impact statement prepared by the Commission. The number of such requests has ranged from zero to two per year. During the 2024 Session, JLARC was asked to review one of the Commission’s fiscal impact statements ([House Bill 40](#)).

Ms. Farrar-Owens, Commission Director, highlighted a number of bills that related directly to the Commission, Sentencing Guidelines, criminal penalties, or the time to be served for felony offenses. She noted that her presentation was not intended to be comprehensive but would focus on the legislation most relevant to the Commission's work. First, she informed members that no legislation had been introduced during the 2024 General Assembly session pertaining to the recommendations in the Commission's *2023 Annual Report*. Therefore, the Commission's recommendations for Guidelines revisions would become effective on July 1, 2024.

The Commission had requested legislation (House Bill 1228) to require circuit court clerks to provide the Commission with read-only access to the live circuit court case management system (CMS). For many years, the Sentencing Commission had read-only access to the CMS used in circuit courts and general district courts. This included access to certain information not otherwise available to the public, such as complete birthdates, complete social security numbers, and identification of the sentencing judge. The Supreme Court's Office of the Executive Secretary (OES) eliminated the Commission's access to the system in 2023, stating that [§ 17.1-293](#) needed to be amended to address it. Therefore, the Commission requested legislation to restore read-only access to the live CMS. Other language in this bill would have allowed the Commission's Director to sign one OCRA agreement with each clerk that would cover all of the Commission's staff who need access to the OCRA system. The goal was to reduce the number of forms that must be completed. Because the Supreme Court assigned a fiscal impact to House Bill 1228, it was rereferred to the House Appropriations Committee, where it was passed by indefinitely. However, the OES and the Sentencing Commission agreed to a compromise that provides the Commission with more frequent (monthly) downloads of CMS data.

Ms. Farrar-Owens stated that, currently, the Commission does not have any access to CMS records for juvenile defendants (see [§ 16.1-305](#) for confidentiality of juvenile data). Budget language approved by the House and Senate would require the OES to send the Commission periodic downloads of CMS data for juvenile defendants. The Commission must ensure the confidentiality of the data and may only use the data for research, evaluation, or other limited purposes. As of the meeting date, the Governor had not acted on the budget bill.

Ms. Farrar-Owens discussed House Bill 653, which would remove certain offenses from the list of violent felonies for the purposes of Sentencing Guidelines (§ 17.1-805). She reported that House Bill 653 had passed the General Assembly and was awaiting action by the Governor. The bill would remove:

- [18.2-92](#) - Burglary of occupied dwelling with intent to commit a misdemeanor;
- [18.2-474.1](#) - Delivery of narcotics/marijuana to prisoner;
- [18.2-477.1](#) - Specifies "felony" violation (only felonies are subject to enhancements); and
- [53.1-203](#) - Prisoner possess, sell, etc., unlawful chemical compound; Prisoner sell, etc., Schedule III drug or marijuana.

Before concluding, Ms. Farrar-Owens reviewed a number of other bills pertaining to sentencing for certain offenses, expungement of records, expansion of the definition of "family or household member" for certain provisions, probation violations, penalties for failing to appear in court, and earned sentence credits.

## **REVIEW OF SENTENCING GUIDELINES WORKSHEETS SUBMITTED BY JURISDICTION**

Presentation link: <http://www.vcsc.virginia.gov/2024Meetings/SGWorksheetsMar25.pdf>

Mr. Jody Fridley informed members that, at the request of two circuit court clerk's offices, the staff recently assisted in a review of FY2022 and FY2023 Sentencing Guidelines worksheets received by the Commission. The objective was to assist the localities in identifying Guidelines worksheets that 1) had not been prepared for the sentencing event, or 2) had not yet been submitted to the Commission.

Commission staff worked with the clerks in those jurisdictions to support their efforts to identify and submit all Guidelines worksheets.

To identify unsubmitted Guidelines worksheets, data from the Circuit Court Case Management System (CMS) was used to identify the total number of felony sentencing events in each circuit court. Commission staff compared these data to the Guidelines worksheets received from each court and identified the sentencing events for which no corresponding Guidelines worksheet was found in the Commission's data system.

Mr. Fridley stated that the Commission could consider a similar statewide electronic audit. Staff compared CMS data and Guidelines worksheets received from each locality in Virginia. The analysis revealed that Guidelines worksheets had not been received for up to 17% of FY2022-FY2023 felony sentencing events. Materials included a table showing preliminary results by locality. Mr. Fridley asked members if they wished staff to share the results with clerks, Commonwealth attorneys and/or judges in each jurisdiction (i.e., should a list of missing Guidelines worksheets be provided to stakeholders in each locality?). Mr. Fridley stressed that the numbers presented at this meeting were preliminary and, if the Commission wished to proceed with a statewide audit, staff would update the numbers before sending out any lists.

After discussion from members, Judge Moreau made a motion to direct staff to provide a list of cases that could not be identified in the Commission's system to each circuit court clerk and Commonwealth's Attorney. Judges will also receive a copy of the list for their jurisdiction.

The motion was seconded by Judge Hupp. With no further discussion, the Commission voted 9-4 in favor.

#### **SENTENCING GUIDELINES MATTERS**

Presentation link: <http://www.vcsc.virginia.gov/2024Meetings/SGMattersMar25.pdf>

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

A judge recently contacted the Commission with concerns. According to the judge: 1) the Guidelines are often not available in the Judicial Information System (JIS) on the day of sentencing and the Court must ask the clerk to track down missing submissions from either the probation officer or the Commonwealth; and 2) the electronic Guidelines form constrains the detailed reporting of sentencing outcomes (e.g, sentences that are concurrent with certain offenses but not others, or differing periods of good behavior), while the judge can write the details on the paper Guidelines.

Mr. Fridley noted that the Guidelines are based on sentencing events and the form was never designed to capture sentencing details for each count. The Guidelines form captured the sentencing for the event as a whole. Staff proposed additional labeling on the disposition page to clarify that the information entered is to reflect the entire sentencing event. Mr. Fridley displayed the proposed changes. Similar labeling modifications would also be made to the Probation Violations Guidelines disposition page.

Judge Hurley made a motion to approve the proposed changes to the cover sheet disposition pages. The motion was seconded by Judge Moreau. With no further discussion, the Commission voted 13-0 in favor.

Mr. Fridley discussed another concern of judges. Some judges had indicated that they had trouble finding the electronic Guidelines worksheets in the Judicial Information System (JIS). This may occur when the sentencing event will include multiple offenses but the Guidelines are attached to only one of the docket numbers. Mr. Fridley proposed adding an icon (link) next to each docket number in the sentencing event, which would allow the judge to click next to any of the docket numbers in the event to pull up the Guidelines. Judges on the Commission generally commented that they did not have a problem finding the Guidelines in JIS. Judge Willis felt that adding a link on every count would clutter the docket viewer.

Mr. Fridley then proposed that Commission staff be given access to JIS so that they can assist judges with Guidelines issues in JIS as they arise. He reported that the Commission was denied access to JIS because it is at the sole discretion of the clerk. Mr. Fridley indicated he could reach out again to the Office of the Executive Secretary of the Supreme Court to inquire about access. Commission members supported this approach.

Mr. Fridley then reviewed changes to Guidelines worksheet labels that were proposed by staff. The goal is to reduce scoring errors by improving the labels. The changes affected labels for the Additional Offense factor on some worksheets and the Victim Injury factor. Changes would also include the addition "12 months = 1 Year" on each worksheet to remind preparers that offenses with statutory maximum penalties of 12 months are scored on the Guidelines as statutory maximums of one year.

Commission members did not support making changes to the Victim Injury factor labels at this time.

Mr. Fridley advised members that legislation passed by the General Assembly regarding sealing and expungement of prior record offenses would become effective on July 1, 2025. Guidelines are public records and subject to release (Commission staff do not release Guidelines records with the full social security number or date of birth).

Mr. Fridley indicated that staff were considering the best approach for releasing Guidelines records once the sealing/ expungement law takes effect. One option could include releasing the Guidelines only after redacting/removing sealed offenses that were part of the original sentencing event. Mr. Fridley noted that accurately identifying sealed or expunged offenses in every case may be challenging. Another option could involve staff developing a summary sheet with only the Guidelines recommendation, sentence, and departure reason (specific offenses would not be included).

Judge Humphreys stated that, from his perspective, the Guidelines coversheet should remain public record except for personally identifying information. Judge Moreau said that the summary sheet seemed like a good option.

Mr. Fridley indicated that staff would continue to explore options to address the sealing/expungement issue.

#### **MISCELLANEOUS ITEMS**

Ms. Farrar-Owens informed members that, as part of the Pretrial Data Project, staff were preparing a request to the Federal Bureau of Investigation for special access to out-of-state criminal records for defendants included in the study. She hoped that she would have news by the June meeting.

Ms. Farrar-Owens reported that staff would have a presence at the upcoming Judicial Conference and would have a table where judges could ask any Guidelines questions they may have.

Ms. Farrar-Owens reminded members of the remaining 2024 meeting dates: June 10, September 4, and 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 12:30 p.m.

**Sentencing Commission Meeting Recording**

**NEXT VCSC MEETING:**

Date: Monday, June 10, 2024

Time: 10:00 a.m.

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