



Virginia Criminal Sentencing Commission

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Meeting of the Virginia Criminal Sentencing Commission

September 4, 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), Delegate Rae C. Cousins, Timothy S. Coyne, Marcus Elam, Bethany Harrison, Judge Robert J. Humphreys, Judge Jack S. Hurley, Jr., K. Scott Miles, Dr. Michon Moon, Judge Stacey Moreau, Senator Russet Perry, Judge Tania Saylor, Judge Bryant L. Sugg, Robert Tracci (for Theo Stamos) and Judge Victoria A.B. Willis

Members Absent: Judge Steven C. Frucci

WELCOME

Before calling the meeting to order, Judge Hogshire, Chairman, welcomed Commission members. Judge Hogshire introduced one new member. Chief Justice Goodwyn appointed Judge Tania Saylor of the 19th Circuit (Fairfax) to fill the seat of Judge Patricia Kelly, who retired. Judge Hogshire announced that his term was expiring at the end of 2024 and Judge Hupp, currently Vice-Chairman, had been appointed by Chief Justice Goodwyn to be the new Chairman.

AGENDA

The meeting agenda is available at: <http://www.vcsc.virginia.gov/2024Meetings/AgendaSep4.pdf>.

APPROVAL OF MINUTES FROM LAST COMMISSION MEETING

Minutes from the meeting held on June 10, 2024, were approved as submitted. The minutes are available at: <http://www.vcsc.virginia.gov/2024Meetings/MinutesJun102024.pdf>

POSSIBLE RECOMMENDATIONS FOR SENTENCING GUIDELINES REVISIONS

Presentation link: <http://www.vcsc.virginia.gov/2024Meetings/PossGuidelinesRev0942024.pdf>

Mr. Marc Leslie, Research Associate, indicated that staff had four proposals 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. He reminded members that all proposals are based on empirical analysis and reflect the best fit for the historical data.

Analysis Not Resulting in a Recommendation

Mr. Leslie presented the results of a recent analysis of defendants convicted of possession of a firearm while in possession of certain substances. The analysis revealed that this offense is not often the true primary, or most serious, offense in a case. For example, this offense appears to be the primary offense in cases in which a charge for possession of a Schedule I/II drug was deferred, taken under advisement,

or resulted in a First Offender disposition (§ 18.2-251). Because this charge is most often either the remainder after other charges are deferred, or the result of dropped or amended charges, it is more a companion charge than a true primary offense. Staff found only 55 cases where the offense was the true primary offense. According to Mr. Leslie, staff did not recommend adding this crime as a Guidelines offense at this time.

Judge Humphreys made a motion to defer action on this offense. The motion was seconded by Judge Moreau. With no further discussion, the Commission voted 15-0 in favor.

Proposed Recommendation 1 – Amend Miscellaneous/Person and Property Guidelines to add Resist Arrest/Obstruct Justice by Threats or Force (§ 18.2-460(C)) as a Guidelines offense.

Ms. Cassie Wright, Research/Training Associate, presented the staff’s proposal for adding Resisting Arrest/Obstruct Justice by Threats or Force (§ 18.2-460(C)) as a Guidelines-covered offense. She reviewed the current provisions of (§ 18.2-460(C)) and summarized recent sentencing patterns for this offense. For example, during the five-year period examined, 22.6% of defendants convicted of resisting arrest by threats or force were given an incarceration term of more than six months; for these offenders, the median sentence was 12 months.

Ms. Wright displayed the proposed Guidelines Section A, B, and C worksheets. As presented by Ms. Wright, the proposed Guidelines produced recommendations that aligned well with actual sentencing practices during the period analyzed. Mr. Coyne questioned if the number of cases (124) were enough to model guidelines. Ms. Wright responded that the number of cases was sufficient.

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.

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, the most common disposition for defendants convicted of this crime (as the primary offense) was a jail term ranging from one day up to six months, received by 43.8% of defendants.

Mr. Barnes displayed the proposed Guidelines worksheets and explained how the factors would be scored for this offense. The proposed Guidelines produced recommendations that aligned well with actual sentencing practices during the study period. Mr. Coyne commented that, based on the proposal, the median prison sentence recommendation was slightly higher than the median of actual prison sentences (1.1 years versus 1.0 year).

Judge Moreau made a motion to adopt this recommendation. The motion was seconded. With no further discussion, the Commission voted 14-1 in favor.

Recommendation 3 - Amend Miscellaneous/Other Sentencing Guidelines to add Unlawfully Shoot or Throw Missile at Train, Car, Etc. (§ 18.2-154) as a Guidelines offense and to modify current Guidelines for Maliciously Shoot or Throw Missile at Train, Car, Etc. (§ 18.2-154) to better reflect current sentencing practices.

Mr. Jody Fridley, Deputy Director, reviewed the provisions of § 18.2-154, related to shooting or throwing a missile at a train or vehicle, and the two felonies defined in this section. One, a Class 4 felony, is a malicious act and the other, a Class 6 felony, is an unlawful act without malicious intent. The unlawful

act under § 18.2-154 is not currently covered by the Guidelines as a primary offense. The malicious act of shooting or throwing a missile at a train or vehicle is covered by the Guidelines. Mr. Fridley summarized recent sentencing patterns for both offenses. During the five-year period examined, approximately half (48.9%) of the offenders convicted for unlawfully shooting or throwing a missile at a train, car, etc. were sentenced to no incarceration or received a probation-only sentence. In contrast, more than half (57.8%) of defendants convicted for maliciously committing such acts received incarceration terms of greater than six months.

Mr. Fridley noted that developing Guidelines for the unlawful version of this crime was best done in conjunction with the malicious version. Moreover, concurrence and departure rates suggested that Guidelines for the malicious crime may need revision to better reflect current sentencing practices. Mr. Fridley displayed the proposed Guidelines Section A, B, and C worksheets. The proposed Guidelines for both offenses produced recommendations that aligned well with actual sentencing practices.

Judge Hurley made a motion to adopt this recommendation, which was seconded by Judge Willis. With no further discussion, the Commission voted 16-0 in favor.

Recommendation 4 - Adopt Guidelines for Robbery (§ 18.2-58) that reflect sentencing practices under the revised penalty structure (effective July 1, 2021) and modify Guidelines for Carjacking (§ 18.2-58.1) to reflect current sentencing practices.

Ms. Meredith Farrar-Owens, the Commission's Director, presented the staff's proposal. In 2021, the General Assembly enacted legislation to create 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 existing Guidelines likely did not accurately reflect the typical or average robbery outcomes based on the new classifications. For these reasons, the Commission suspended the Robbery Guidelines until a full analysis of sentencing under the new penalty structure could be completed.

Before presenting the proposed Guidelines, Ms. Farrar-Owens discussed statutory requirements for Guidelines midpoint enhancements. Section 17.1-805 specifies various enhancements based on the defendant's current and prior convictions for felonies defined as violent; this section became effective January 1, 1995, and the size of the enhancements specified in this section have not been revised since that time. However, the 2022 General Assembly passed legislation giving the Commission the authority to set the size of midpoint enhancements based on the data rather than the artificially-set percentage increases found in § 17.1-805.

The staff's proposal for new Robbery Guidelines was based on a comprehensive analysis of available sentencing data. The proposal reflected the best fit for the historical data, and recommended dispositions were designed to closely match the historical rate of incarceration. To analyze sentencing under the new robbery penalty structure, staff identified sentencing events in which a robbery committed on or after July 1, 2021, was the primary, or most serious offense, in the event. Staff included sentencing events through March 30, 2024. In total, 451 sentencing events met the criteria. Although the penalty for carjacking was not amended by the 2021 legislation, the staff included carjacking in the analysis so the new Robbery Guidelines would also reflect recent sentencing practices for that offense. Staff performed additional data collection for the project and used input provided by judges as part of a 2022 survey.

Ms. Farrar-Owens displayed the proposed Guidelines Section A (incarceration in/out recommendation) and Section C (sentence length recommendation) worksheets. Enhancements for violent prior record

were based on analysis of the data and the size of the enhancement varied by the category of robbery. The proposed Guidelines produced recommendations that aligned well with actual sentencing practices for robbery offenses under the new penalty structure.

Mr. Coyne expressed his concern that the recommended sentences would be too high, as the median sentence recommendation under the proposed Guidelines was higher than the median actual sentence for some categories of robbery. He suggested that the recommendation be delayed for further study.

Judge Humphreys made a motion to adopt this recommendation. The motion was seconded. With no further discussion, the Commission voted 15-1 in favor.

POSSIBLE RECOMMENDATIONS FOR STATUTORY CHANGES/REQUESTS FOR LEGISLATION

Presentation link: <http://www.vcsc.virginia.gov/2024Meetings/PossRecomLegis09042024.pdf>

Mr. Fridley presented the remaining proposals, which pertained to possible requests for legislation for the 2025 General Assembly. First, he presented a proposal for legislation to modify § 19.2-390.01 to designate the Commission as the agency to develop, maintain and modify the Virginia Crime Codes (VCCs).

Since 2003, criminal justice agencies and courts have been required to use Virginia Crime Codes (VCCs) to identify offenses in their respective information systems (§ 19.2-390.01). The VCCs are a short-hand offense identification system. VCCs are used for administration and research purposes only. Since 1995, the Commission has administered the VCC system, including the creation or modification of VCCs. Although the Commission has administered the VCC system since 1995, § 19.2-390.01 does not explicitly assign the function to any agency. Mr. Fridley emphasized the importance of maintaining the integrity of VCCs. Staff proposed adding language to § 19.2-390.01 to designate the Commission as the agency to oversee the VCC system.

Judge Humphreys made a motion to support the proposed legislation. Judge Hupp seconded the motion. Delegate Cousins asked for an example of other organizations using or generating the codes outside of the Commission and Mr. Fridley provided examples. Senator Perry stated she needed additional background information on the proposal before she could comment on the issue.

With no further discussion, the Commission voted 16-0 in favor.

Next, Mr. Fridley introduced a proposal to request legislation that would expand the membership of the Commission and designate a seat for a defense attorney. This proposal had been submitted by a Commission member. Mr. Fridley reviewed the current membership of the Commission. Mr. Coyne indicated that he had submitted the proposal for the Commission's consideration. Mr. Coyne noted that he is currently the only Commission member who is a defense attorney and, in some years, there have not been any defense attorneys on the Commission. The current *Code* does not require it. Mr. Coyne stressed the importance of having the defense perspective at the table and he made a motion to recommend legislation to add the Director of the Virginia Indigent Defense Commission or his/her designee as a permanent member of the Commission.

Judge Humphreys noted that the Commission had defense attorneys on and off throughout the years, but it was not mandatory. He stated that the Commission was not a policy making body and he would not support the proposed change to the *Code* at this time. Mr. Tracci supported the neutrality of the Commission and indicated he would oppose the recommendation. Several members commented that such a change should come from the General Assembly. Mr. Coyne ultimately withdrew his motion.

SCORING PRIOR RECORD ON VIRGINIA'S SENTENCING GUIDELINES

Presentation link: <http://www.vcsc.virginia.gov/2024Meetings/ScoringPriorRec09042024.pdf>

Ms. Farrar-Owens stated that the issue of prior record scoring had been added as a topic on the agenda at the request of Judge Humphreys. Ms. Farrar-Owens provided background information before the members' discussion. On the Guidelines, statutory maximum penalties are used as a proxy for measuring previous criminal behavior. Preparers are instructed to use Virginia's current penalty structure to determine the statutory maximums for a defendant's prior convictions/adjudications. By using the current statutory maximums to score priors, all prior convictions/adjudications are given the same weight regardless of when the offense was committed or where the defendant was convicted. This approach to scoring prior record has been utilized since the late 1980s. Ms. Farrar-Owens discussed two alternative approaches to scoring prior record that had been proposed since 1995. One proposed alternative, considered in 2018, would use the penalty structure in place at the time and in the state where the prior offense was committed. The Commission concluded that no action should be taken at that time.

Ms. Farrar-Owens presented potential issues the Commission may wish to consider in its deliberations. For example, she noted that rap sheets do not always contain sufficient detail to determine the statutory maximum penalty in effect when/where the offense was committed. She also summarized Virginia Court of Appeals and Supreme Court opinions related to Sentencing Guidelines. Ms. Farrar-Owens listed several possible options for the Commission.

Commission members briefly discussed issues related to prior record scoring.

Judge Willis made a motion to defer this topic to the November meeting. The motion was seconded. With no further discussion, the Commission voted 16-0 in favor.

UPDATE ON VIRGINIA'S PRETRIAL DATA PROJECT

Presentation link: <http://www.vcsc.virginia.gov/2024Meetings/PretrialDataProject09042024.pdf>

This agenda item was moved to the November meeting.

MISCELLANEOUS ITEMS

Ms. Farrar-Owens reminded members of the remaining 2024 meeting date: 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 12:30 p.m.

Sentencing Commission Meeting Recording

NEXT VCSC MEETING:

Date: Thursday, November 7, 2024

Time: 10:00 a.m.

Members of the public may request remote access or sign up for public comment by sending an e-mail to: Cwilliamson@vacourts.gov.

Respectfully submitted by:

Carolyn Williamson, Research Associate

Minutes Reviewed by:

Meredith Farrar-Owens, Director