

Virginia Criminal Sentencing Commission
November 6, 2013
Meeting Minutes

Members Present:

Judge F. Bruce Bach (Chairman), Judge Rossie D. Alston, Jr., Judge Bradley B. Cavedo, John F. Childrey, Delegate Benjamin L. Cline (arrived late), Marsha L. Garst, Judge Lisa Bondareff Kemler, Judge Michael Lee Moore, Senator Bryce Reeves (for Senator Thomas K. Norment, Jr.), Judge Charles S. Sharp, Judge Malfourd W. Trumbo (Vice-Chairman), Esther J. Windmueller, and Judge James S. Yoffy

Members Absent:

Harvey L. Bryant, Linda D. Curtis, and Debbie Smith

The meeting commenced at 10:05 a.m.

Agenda

I. Approval of Minutes

Judge Bach asked the Commission members to approve the minutes from the previous meeting, held on September 9, 2013. The Commission unanimously approved the minutes without amendment.

II. Possible Recommendations for Guidelines Revisions

Ms. Meredith Farrar-Owens, the Commission's Director, first summarized the process by which proposals for sentencing guidelines revisions are developed. She explained that topics for possible guidelines revisions had been suggested by Commission members, judges, guidelines users (via the hotline or in training seminars), and staff. Based on detailed analysis of available data, six possible recommendations were developed this year for the members' consideration. Ms. Farrar-Owens emphasized that the proposals reflected the best fit to the historical data. Moreover, the proposals were designed to maximize compliance and balance mitigation and aggravation rates, to the extent possible.

Background Information for Proposed Recommendations 1 and 2

Ms. Farrar-Owens provided background information before presenting the first two proposals. In 2006, after detailed analysis, the Commission recommended adding electronic/online solicitation of a child and certain child pornography offenses to the sentencing guidelines. This recommendation, submitted in the Commission's *2006 Annual Report*, was accepted by the 2007 General Assembly. However, the 2007 General Assembly also enacted new legislation elevating penalties and adding mandatory

minimum sentences for certain electronic solicitation and child pornography crimes. The guidelines that became effective on July 1, 2007, were implemented as approved and, therefore, did not account for the new penalty structures. With five years of sentencing data now available for cases falling under the new penalty structures, the staff re-evaluated the guidelines for electronic/online solicitation and child pornography offenses.

Proposed Recommendation 1 – Modify the sentencing guidelines for electronic/online solicitation of a child (§ 18.2-374.3) to more closely reflect judicial sentencing practices for these offenses.

According to Ms. Farrar-Owens, sentencing guidelines data for fiscal (FY) 2009 through FY2013 reveal that judicial compliance with the guidelines for electronic/online solicitation of a child (§ 18.2-374.3) was 59.2%. She noted that this was well below the overall average compliance rate of 79%. Furthermore, when judges departed from the recommendation, they were much more likely to give the offender a sentence above the guidelines range (32%) than below it (8%).

Judge Alston commented that he felt § 18.2-374.3 could be amended by the General Assembly to clarify how the provision should be applied, particularly in regards to how separate acts are defined for the purposes of prosecution and sentencing.

Data indicate that nearly two-thirds (64.5%) of the individuals sentenced for this offense (as the primary, or most serious, offense) were given a term of incarceration greater than six months; however, the current guidelines recommended only 44.2% of the offenders for that type of disposition. Thus, Ms. Farrar-Owens said, the current guidelines are not closely aligned to the actual incarceration rate for this crime.

Ms. Farrar-Owens stated that the proposal addresses this discrepancy by modifying Section A of the Other Sexual Assault guidelines worksheet to increase the likelihood that individuals convicted of this offense would be recommended for a prison term. Specifically, the staff recommended increasing the Primary Offense scores on Section A for certain types of electronic/online child solicitation offenses, such as those involving a child under the age of 15.

Similar changes were proposed for Section B of the Other Sexual Assault worksheet. Under the proposal, Primary Offense scores on Section B would increase for certain types of electronic/online solicitation. The proposal also included the addition of a new factor to Section B to account for any type of victim injury in these cases. The new factor, which would be scored only if the primary offense was electronic/online solicitation of a child, would assign five points for victim injury (for example, emotional or threatened injury). These changes would increase the likelihood that an individual would be recommended for a jail term instead of probation without any incarceration.

Judge Alston asked if there are cases that do not involve some type of emotional injury to the child. Ms. Farrar-Owens responded that emotional injury is scored on the guidelines based on whether or not the child received some sort of mental health counseling. Judge Cavedo asked if information about injury comes from the police report. Ms. Farrar-

Owens stated that the information would come from the police report or other official court document. Judge Cavedo felt that scoring of this factor could lead to litigation where it is contested. Judge Alston was curious as to how trial judges feel about getting involved in litigation related to sentencing guidelines issues. Judge Alston expressed a desire for consistency as to how judges handle these issues. Judge Cavedo stated that judges must make a ruling in court when there is disagreement about the guidelines scoring, and the guidelines are revised accordingly.

Ms. Farrar-Owens then described the proposed changes to Section C of the Other Sexual Assault guidelines. Under the proposal, the Primary Offense score would increase in cases involving a child under age 15 and an offender who is at least seven years older than the child. The proposal would also increase the points on the Additional Offense factor in certain instances. Finally, the proposal would split the Victim Injury factor on Section C and increase the points scored for electronic/online solicitation cases. For offenders affected by the proposed Section C changes, the recommended prison sentence would increase.

Ms. Farrar-Owens stated that amending the Other Sexual Assault guidelines as proposed was expected to increase the judicial compliance rate with the guidelines for electronic/online solicitation of a child. Given judicial sentencing practices during FY2009-FY2013, compliance was expected to increase slightly to 60.1%, with the mitigation rate and aggravation rate balanced at 20.1% and 19.8%, respectively. The reduction in aggravating sentences and a better balance between mitigation and aggravation would bring recommendations more in line with current judicial sentencing practices for this offense.

Ms. Windmueller inquired if any of the crimes falling under electronic solicitation had less than 15 cases. Ms. Farrar-Owens responded that one crime did have a small number of cases for analysis: a second or subsequent conviction for proposing a sex act with a child at least 15 years old when the offender was at least seven years older than the child.

Judge Trumbo commented that the proposed scoring changes were driven by analysis of existing practice and not by policy.

Judge Trumbo made a motion to adopt this recommendation. The motion was seconded. Judge Bach called for the vote. The Commission voted 12-0 in favor by voice vote.

Proposed Recommendation 2 – Modify the sentencing guidelines for child pornography (§§ 18.2-374.1 and 18.2-374.1:1) to bring the guidelines more in sync with sentencing practices for these offenses.

Ms. Farrar-Owens stated that, with five years of sentencing data available for cases falling under the penalties adopted by the 2007 General Assembly, the staff also re-evaluated the guidelines for child pornography offenses.

According to available sentencing guidelines data for FY2009 through FY2013, the rate of compliance with the guidelines for child pornography offenses was much lower than

the average compliance rate for all offenses. Compliance rates for both production and possession/reproduction of child pornography were between 64% and 65% during that time. However, the departure patterns are quite different. In production cases, the aggravation rate was much higher than the mitigation rate (24.6% versus 10.5%). For possession/reproduction cases, judges were more likely to sentence below the guidelines range than above it (mitigation rate of 22.9% versus aggravation rate of 13.0%).

For offenders convicted of production of child pornography (including sales-related offenses), the existing guidelines recommended 80.7% of the offenders for more than six months incarceration; however, judges sentenced 87.7% of the offenders to that type of disposition. For possession/reproduction of child pornography, existing guidelines recommended 69.1% of the offenders to incarceration in excess of six months, compared to 66.6% who received incarceration of that length. Ms. Farrar-Owens stated that the relatively low compliance rates and the differences between the recommended and actual dispositions for child pornography cases suggested the guidelines could be refined to more closely reflect judicial thinking in these cases.

Ms. Farrar-Owens presented the proposed changes to Section A of the Other Sexual Assault guidelines. Under the proposal, the Primary Offense scores for production/sale of child pornography would increase from five to six points; as a result, offenders convicted of production/sale would be more likely to be recommended for a term of incarceration longer than six months. Primary Offense points for first-time possession of child pornography would be decreased from six to five points. The proposal included another change on Section A: the Primary Offense Additional Counts factor would be split so that offenders convicted of production/sale or possession of child pornography would receive higher points when convicted of multiple counts. No modifications to the Section B worksheet were proposed.

Ms. Farrar-Owens stated that the proposal included several modifications to Section C. The Primary Offense factor on Section C would be revised to increase the number of points received by offenders who were convicted of at least two counts of production of child pornography. Primary Offense points for attempted or conspired production of child pornography would increase so that attempted and conspired cases would be scored the same as completed acts of production.

Ms. Farrar-Owens continued by saying that, on Section C, the Primary Offense points for possession of child pornography would be reduced. As proposed, the points for first-time possession would change from 17, 34, or 68 (depending on the offender's prior record) to 12, 24, or 48. The points for second or subsequent possession would change from 25, 50, or 100 (depending on the offender's prior record) to 19, 38, or 76. Ms. Farrar-Owens emphasized that the proposed changes were based on detailed analysis of actual sentencing practices in these cases.

Ms. Farrar-Owens concluded by saying that the proposed changes to the guidelines for child pornography offenses were expected to increase compliance rates. Given judicial sentencing practices during FY2009-FY2013, compliance with the guidelines for child pornography offenses was expected to increase from 64.9% to 66.7% for production-

related offenses and from 64.1% to 66.3% for possession/reproduction offenses and result in a better balance between mitigation and aggravation departures.

A motion was made to adopt this recommendation, which was seconded. Judge Bach called for the vote. The Commission voted 12-0 in favor by voice vote.

Proposed Recommendation 3 – Split obscenity offenses from the Other Sexual Assault guidelines into a new offense group.

Ms. Farrar-Owens explained that the Other Sexual Assault guidelines cover offenses ranging from indecent liberties, carnal knowledge, aggravated sexual battery, and incest to production or possession of child pornography and electronic solicitation of a child. The number and variety of offenses covered has resulted in worksheets that are very tightly spaced and complex to score. Given the current worksheets for Other Sexual Assault, there was little room to add new guidelines offenses or to add or expand factors.

To allow for future refinement and improvement of the guidelines for offenses currently listed in the Other Sexual Assault offense group, the staff recommended splitting the obscenity offenses (those involving child pornography under §§ 18.2-374.1 and 18.2-374.1:1 and electronic/online solicitation of a child under § 18.2-374.3) into a new offense group. The change would not modify the guidelines scores, except as otherwise approved (see Recommendations 1 and 2), and would not otherwise change the sentence recommendations for offenders.

Judge Trumbo made a motion to adopt this recommendation. The motion was seconded. Judge Bach called for the vote. The Commission voted 12-0 in favor by voice vote.

Proposed Recommendation 4 – Modify the sentencing guidelines for aggravated malicious wounding (§ 18.2-51.2) to more closely reflect judicial sentencing practices for this offense.

Ms. Joanna Laws, Research Manager, presented the remaining proposals. She stated that recent guidelines data have shown a relatively low compliance rate and a high aggravation rate associated with aggravated malicious wounding cases. As a result, the staff conducted a thorough re-analysis and developed a proposal to increase compliance and reduce the aggravation rate in these cases.

Ms. Laws displayed the proposed modifications to the Assault guidelines. On Section A, offenders convicted of attempted or conspired aggravated malicious wounding would receive seven points, instead of three points, on the Primary Offense factor. On Section C of the proposed guidelines, Primary Offense points for aggravated malicious wounding would increase from 88, 176, or 264 (depending on the offender's prior record classification) to 107, 214, or 321 points. Based on offenders sentenced from FY2009 through FY2013, the recommended modifications to the Assault sentencing guidelines were expected to increase compliance for aggravated malicious wounding slightly from

59.6% to 61.5% and reduce the aggravation rate (resulting in a better balance between mitigation and aggravation departures).

A commission member made a motion to adopt this recommendation. The motion was seconded. With no further discussion, the Commission voted 12-0 in favor by voice vote.

Proposed Recommendation 5 – Modify the sentencing guidelines for Burglary in cases involving an additional offense of aggravated malicious wounding to more closely reflect judicial sentencing practices in these cases.

Ms. Laws began by describing revisions to the Burglary guidelines adopted in 2012. In 2012, the Commission recommended adding a factor to the Burglary worksheets for cases involving completed burglary with a deadly weapon with an additional offense of murder or malicious wounding. The staff's analysis indicated that this change would improve the compliance rate in these cases, while providing a more balanced split between aggravation and mitigation departures. The recommendation, submitted in the Commission's *2012 Annual Report*, was accepted by the 2013 General Assembly.

Because there were no cases in five years of data involving completed burglary with a deadly weapon and an additional offense of aggravated malicious wounding, this scenario was not covered by the 2012 change. Since this presented a face validity issue, staff continued to review the data. Monitoring new FY2012-FY2013 data as it became available revealed two cases involving completed burglary with a deadly weapon and an additional offense of aggravated malicious wounding.

The current proposal would expand the existing factors on Sections A and C of the Burglary worksheets, which currently add points when the offender has an additional offense of murder or malicious wounding, so that burglary offenders with an additional offense of aggravated malicious wounding will also receive the points assigned for that factor. Judge Kemler asked if the worksheets should be changed, as only two cases fit the scenario described. Ms. Laws replied that, since the current worksheets present a face validity issue by not including aggravated malicious wounding, the staff recommended making the change, which could then be monitored in the future.

A commission member made a motion to adopt this recommendation. The motion was seconded. With no further discussion, the Commission voted 12-0 in favor by voice vote.

Proposed Recommendation 6 – Modify the sentencing guidelines for daytime burglary of a dwelling without a deadly weapon (§ 18.2-91) to bring the guidelines more in sync with judicial sentencing practices.

Ms. Laws stated that, according to FY2009-FY2013 Sentencing Guidelines data available at the time of the analysis, there were a total of 3,911 cases in which daytime burglary of a dwelling without a deadly weapon was the primary offense at sentencing. The compliance rate in these cases was 65.9%. Although the mitigation rate (17.6%) and the aggravation rate (16.5%) for these cases were relatively balanced, further analysis

indicated that modifying these sentencing guidelines would result in improved compliance.

Under the current Burglary guidelines, one factor (described in Proposed Recommendation 5 above) adds points in cases in which the offender was convicted of burglary with a deadly weapon and an additional offense of murder or malicious wounding. Under the proposal, this factor (which appears on Section A and Section C worksheets) would be expanded to apply to all burglary offenses, not only those involving a deadly weapon. If expanded to apply to all burglary cases, this factor would increase the likelihood that offenders convicted of this combination of offenses will be recommended for more than six months incarceration and, if recommended for that type of disposition, the expanded factor will increase the sentence length recommendation for affected offenders.

Ms. Laws described another proposed change to Section C of the Burglary guidelines. On Section C, cases involving completed daytime burglary of a dwelling without a deadly weapon currently receive Primary Offense points of 18, 36, or 54 points (depending on the offender's prior record classification). Based on analysis of FY2009-FY2013 sentencing practices, the staff recommended slightly reducing the Primary Offense points for completed acts of daytime burglary of a dwelling without a deadly weapon to 17, 34, or 51. The Primary Offense scores for cases involving attempted or conspired burglary of a dwelling without a deadly weapon would not be modified. Based on offenders sentenced from FY2009 through FY2013, the proposed modifications to the Burglary sentencing guidelines are expected to increase compliance with the guidelines for daytime burglary of a dwelling without a deadly weapon slightly (from 65.9% to 66.7%).

Judge Alston made a motion to adopt this recommendation. The motion was seconded. With no further discussion, the Commission voted 12-0 in favor.

Ms. Laws concluded by reviewing several analyses conducted by staff that did not result in proposals for revisions to the guidelines.

III. Probation/Suspended Sentence Violations Scored on the Felony Sentencing Guidelines – Proposed Study

Mr. Jody Fridley, Manager of the Training/Data Quality Unit, introduced the staff's proposal for a special study on probation and suspended sentence violations. The study would examine how and when such violations are scored on the sentencing guidelines and the impact on sentencing outcomes. Based on anecdotal information, practices for handling probation and suspended sentence violations vary considerably across the Commonwealth. Mr. Fridley explained that such variation in practices (which, in turn, results in variation in guidelines scoring) may result in unwarranted sentencing disparity.

Mr. Fridley described the different ways in which probation and suspended sentence violations are handled in terms of the guidelines. In cases in which an offender is being sentenced for a probation/suspended sentence violation at the same time as a new felony offense, the Sentencing Revocation Report (SRR) and the appropriate felony sentencing

guidelines should be completed. In these cases, the probation/suspended sentence violation is scored as an additional offense to the felony and is weighted based on the highest statutory maximum penalty for the underlying offense(s) for which the offender is on probation or under the suspended sentence. However, if an offender is being sentenced for the violation separately from any felony, and the violation is a technical violation of the conditions of probation (i.e., the offender has not been convicted of a new crime), the preparer is instructed to complete the SRR and the Commission's Probation Violation Guidelines. These two approaches typically do not yield similar recommendations for the violations. Finally, if the offender is being sentenced for a probation or suspended sentence violation generated as the result of a new criminal conviction, the preparer only completes the SRR and there are no guidelines that apply; in such cases, the judge sentences the offender for the violation in the absence of guidelines.

Mr. Fridley stated that this is a complex issue because it involves the Department of Correction's community corrections policies, local court procedures and scheduling, as well as the scoring of guidelines. Based on feedback from the field, guidelines preparers are often confused as to which forms to prepare.

Ms. Laws then spoke about the proposed research. She noted that staff are interested in examining various options for modifying the guidelines rules for scoring probation and suspended sentence violations. This may allow for more consistency in guidelines recommendations across jurisdictions, regardless of variations in local court procedures and scheduling. As part of the study, staff would estimate the impact each option might have on guidelines compliance rates and departure patterns. Findings of the study would be presented to the Commission members at a future meeting.

Members discussed how different jurisdictions handle their probation and suspended sentence violation hearings. Judge Cavedo felt that this was primarily a procedural matter for the local courts and he was uncertain if changes to the guidelines rules could address the potential disparity. Mr. Childrey stated that guidelines recommendations should not depend upon the timing in which those two events are scheduled to be resolved. Mr. Childrey said he believed the proposed research would assess the degree to which these things are occurring. Judge Kemler expressed concern that Probation Violation Guidelines forms are not being filled out and submitted to the court in all cases in which they should be. Mr. Fridley responded that he is trying to address that particular issue during the Commission's training seminars.

Judge Alston made a motion to study and monitor the issue. The motion was seconded. With no further discussion, the Commission agreed.

IV. Reporting to the Child Protection Accountability System – Status Update

Mr. Fridley provided members with an update on the Commission's reporting to the Child Protection Accountability System. Mr. Fridley summarized the statutory requirements. The Child Protection Accountability System was created through legislation adopted by the 2009 General Assembly; the legislation required Virginia's

Department of Social Services (DSS) to publish information regarding the handling of child abuse and neglect cases and to maintain the information on a website available to the public. In 2010, the General Assembly expanded the requirements to include reports from the State Police and the Virginia Supreme Court. In 2012, the General Assembly further expanded the provisions to include reporting from the Sentencing Commission. 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.

Mr. Fridley presented a sample of the Commission's most recent report to the Child Protection Accountability System. The FY2013 report will be completed and submitted to DSS in December 2013. As a result of the legislation, for FY2013 cases, staff have begun typing the exact wording of the judge's departure reason(s). Thus, the FY2013 report will reflect the exact wording of the departure reason (instead of the general category of the departure reason, as in years past). Mr. Fridley commented that this has added to the staff's workload. In addition, when a judge does not provide a complete or legible departure reason, the staff returns the guidelines form to the sentencing judge with a letter explaining the requirements of the legislation.

Mr. Fridley advised that each judge will receive a copy of his or her FY2013 report for review before it is submitted to DSS. Judge Bach asked that a cover letter be included to inform judges that the report is a legislative mandate. Judge Alston suggested that Ms. Farrar-Owens present a short overview about this requirement at the next Judicial Conference.

V. Immediate Sanction Probation Pilot Project – Status Update

Ms. Farrar-Owens presented an update on the Immediate Sanction Probation pilot project. She informed members that Arlington and Harrisonburg/Rockingham County had agreed to become the third and fourth pilot sites, respectively. Pilot programs in both sites will become operational in January 2014. Ms. Farrar-Owens stated that Commission staff had organized and participated in multiple meetings, and would continue to do so, in order to brief officials and staff on the program and to facilitate implementation.

As of November 1, 2013, a total of 49 offenders had been placed into the Immediate Sanction Probation pilot program (25 in Henrico and 24 in Lynchburg). Ms. Farrar-Owens reminded members that the eligibility criteria had been expanded in April to allow offenders with a prior conviction for an offense listed in § 17.1-805 to be considered for the program. Roughly half (53%) of the participants have committed a violation in the program. Of those, the majority have committed only a single violation. Overall, more than half (57%) of the expedited hearings have been conducted by the court within three days following the commission of a violation. The average time between violation and arrest had been 1.5 days and the average time between arrest and the hearing had been 1.7 days. Ms. Farrar-Owens commented that the current pilot sites have been able to achieve

the swiftness aspect of the program model. For the first violation in the program, the average sanction had been 3.8 days. For the second violation, the average sanction had been 6.1 days, while the average sanction for the third violation had been 9.8 days.

Ms. Farrar-Owens informed Commission members that she had submitted a request to the Department of Planning and Budget to extend the pilot program. The 2012 General Assembly had adopted budget language to extend the provisions of § 19.2-303.5 of the *Code of Virginia* and to authorize the creation of up to four pilot sites. The provisions of § 19.2-303.5 were set to expire on July 1, 2014. Ms. Farrar-Owens asked that the end date specified in the budget language be changed from July 1, 2014, to July 1, 2015. This will give the two newest pilot sites, Arlington and Harrisonburg/Rockingham, sufficient time to adequately test the program.

VI. Sentencing Guidelines Automation Project

Mr. Fridley updated members as to the current status of the Commission's automation project. He reported that the Supreme Court's Department of Judicial Information Technology (DJIT) was making good progress in designing the online sentencing guidelines application, which would allow guidelines users to prepare, save, and submit guidelines worksheets in an automated fashion. Mr. Fridley displayed several of the application's data entry screens. Commission staff have been testing each component of the application as it is developed by DJIT. Mr. Fridley described the feature that would allow many data fields to be populated automatically with information from the Supreme Court's Case Management System (CMS), saving preparers significant time. Mr. Fridley concluded by saying that pilot testing should begin in Norfolk in the coming months.

VII. Miscellaneous Items

Judge Bach asked Ms. Farrar-Owens to discuss any miscellaneous items.

Ms. Farrar-Owens said that she had been contacted by representatives of the Ethiopian Supreme Court. The President of the Ethiopian Supreme Court and the Director of the Judicial Training Center were interested in learning about judicial performance reviews and the administration of sentencing guidelines. An Ethiopian delegation would be visiting the Virginia Supreme Court on Tuesday, November 12. Ms. Farrar-Owens invited Commission members to participate in the meeting should their schedules permit.

Ms. Farrar-Owens stated that she had been asked by the Chief Justice to participate on the Supreme Court's new Committee on Problem-Solving Dockets. In addition, Ms. Farrar-Owens had been asked to give a presentation on Virginia's sentencing guideline system to a special panel established by the Department of Defense to examine responses to sexual assault crimes in the military; that presentation would take place in February 2014.

Ms. Farrar-Owens announced that Virginia's truth-in-sentencing system would reach its 20th anniversary in 2014. She stated that staff would prepare a brochure or similar type of material to recognize the anniversary.

Ms. Farrar-Owens reminded members that the Commission's *Annual Report* was due to the General Assembly on December 1, 2013. Staff had already begun preparing a draft of the report. Ms. Farrar-Owens advised that the report draft would be sent to all members for their review and comment prior to its submission to the General Assembly.

Ms. Farrar-Owens announced the tentative dates for the Commission's 2014 meetings: April 14, June 9, September 8, and November 5. The meeting dates were approved.

With no further business on the agenda, the Commission adjourned at 12:00.