



Virginia Criminal Sentencing Commission

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Meeting of the Virginia Criminal Sentencing Commission

November 2, 2022

10:00 am – 12:40 pm

Meeting held in the Virginia Supreme Court Building

Meeting Minutes

Members Attending In Person: Judge Edward L. Hogshire (Chairman), Judge Charles S. Sharp (Vice Chairman), Linda Brown, Judge Steven C. Frucci, Judge Dennis Hupp, Judge Patricia Kelly, Judge W. Revell Lewis, K. Scott Miles, Judge Stacey Moreau, Shannon Taylor, and Robert Tracci for Nicole Wittmann.

Members Attending Virtually: None

Members Absent: Delegate Les R. Adams, Timothy S. Coyne, Senator John Edwards, Marcus Elam, Judge Jack S. Hurley, and Dr. Michon Moon

WELCOME

Before calling the meeting to order, Judge Hogshire, Commission Chairman, welcomed Commission members. He informed members that Mr. Robert Tracci, from the Attorney General's office, was attending the meeting for Nicole Wittmann.

AGENDA

The meeting agenda is available at: <http://www.vcsc.virginia.gov/2022Meeting/AgendaNov222.pdf>

APPROVAL OF MINUTES FROM LAST COMMISSION MEETING

Minutes from the meeting held on September 13, 2022, were approved as submitted. The meeting minutes are available at: <http://www.vcsc.virginia.gov/2022Meeting/MinutesSept182022.pdf>

PROPOSED POLICY FOR VIRTUAL MEETINGS AND REMOTE PARTICIPATION BY MEMBERS

Ms. Farrar-Owens, the Commission's Director, reviewed the current statutory requirements for public bodies regarding the use of virtual meetings and remote participation by board members (see § 2.2-3708.3). The *Code of Virginia* now requires public bodies to adopt a formal policy addressing such matters. A draft of the proposed policy was sent to members in advance of the meeting for their review. Ms. Farrar-Owens summarized the proposed policy, which incorporated all of the statutory requirements of § 2.2-3708.3. Members discussed the proposed policy.

Ms. Taylor asked if, under the proposed policy, the public may participate remotely in Commission meetings. Ms. Farrar-Owens responded that, if the meeting is held entirely in-person, a public body is not required to set up remote access for the public; however, if any Commission member participates in the meeting remotely, then the Commission must have an option for remote access for the public. Ms. Taylor asked if all future Commission meetings could include remote access for the public. Judge Moreau commented that § 2.2-3708.3(A) states that public bodies are encouraged to provide public access to meetings both in person and through electronic communication means, but it is not mandatory to provide electronic access for the public when meetings are held entirely in-person. Judge Moreau was concerned that, if public electronic access was required by the policy, any technical glitches could force the Commission to cancel in-person meetings at the last moment.

Judge Hupp made a motion to adopt the proposed policy for virtual meetings and remote participation by members. Judge Moreau seconded the motion. With no further discussion, the Commission voted 11-0 in favor.

The Commission's policy is available at: <http://www.vcsc.virginia.gov/meetings.html>

POSSIBLE RECOMMENDATIONS FOR THE 2022 ANNUAL REPORT

Presentation link: <http://www.vcsc.virginia.gov/2022Meeting/GuidelinesRevisionsNov2022.pdf>

Mr. Jody Fridley, the Commission's Deputy Director, stated 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 reflect the best fit for the historical data.

Proposed Recommendation 1 – Request legislation to modify § 19.2-298.01 to specify that Sentencing Guidelines worksheets for cases resulting in deferred dispositions must be submitted to the Commission.

Mr. Fridley described the proposal whereby the Commission would request legislation for the 2023 General Assembly that would 1) clarify that Sentencing Guidelines must be reviewed and considered in cases in which the court may defer the disposition as authorized in §§ 18.2-251, 18.2-258.1, 19.2-298.02, or 19.2-303.6, and 2) specify that the Guidelines worksheets for cases resulting in a deferred disposition must be submitted to the Commission.

The General Assembly recently expanded judicial options for deferred dispositions. There are now four *Code* sections that explicitly provide for deferred dispositions. These are:

- § 18.2-251 – First Offender for drug possession;
- § 18.2-258.1 – Obtain controlled substance by fraud or deceit;
- § 19.2-303.6 – Deferred dispositions in certain cases for defendants diagnosed with autism or intellectual disabilities (2020 General Assembly); and
- § 19.2-298.02 – Deferred disposition with agreement of defendant and Commonwealth (2020 General Assembly, Special Session I).

Mr. Fridley noted that, for a number of years, it has been the Commission's policy that Guidelines for defendants placed under First Offender (§ 18.2-251) and other deferred cases be submitted to the Commission. Given the current statutory language found in § 19.2-298.01(E), submission of Guidelines worksheets in deferred disposition cases is not consistent across courts. Moreover, with the expansion of deferred disposition options, it is difficult to track defendants who fail to comply with the conditions of the deferral and to examine differences in sentencing patterns after a deferral failure.

Mr. Fridley presented language recommended by staff for the proposed legislation. The members discussed the recommendation.

Judge Moreau made a motion to adopt this recommendation. The motion was seconded. With no further discussion, the Commission voted 11-0 in favor.

Proposed Recommendation 2 – Modify the Sentencing Guidelines Cover Sheet to identify convictions that are the result of violations of the conditions of deferred dispositions (§§ 18.2-251, 18.2-258.1, 19.2-298.02, or 19.2-303.6)

Mr. Fridley presented a second recommendation, also associated with deferred dispositions. He advised members that, currently, the Sentencing Guidelines Cover Sheet does not provide a way to identify convictions that are the result of violations of the conditions of deferred dispositions. To address this lack of information, the staff recommended adding check boxes to the Guidelines Cover Sheet to clearly identify felony convictions that are based on the defendant’s failure to complete the deferred disposition. The recommended changes to the Cover Sheet were shown. The proposed new check boxes would be completed by the individual preparing the Guidelines for the court.

A motion was made to adopt the recommendation, which was seconded by Judge Moreau. With no further discussion, the Commission voted 11-0 in favor.

Proposed Recommendation 3 – Modify the Virginia Crime Codes (VCCs) used by criminal justice agencies in order to identify convictions resulting from the failure of a defendant to satisfy conditions of a deferred disposition (as authorized in §§ 18.2-251, 18.2-258.1, 19.2-298.02, or 19.2-303.6).

Mr. Fridley stated that, while the *Code of Virginia* requires criminal justice agencies to utilize Virginia Crime Codes (VCCs) to identify offenses with specificity, there is currently no way to readily identify convictions that are based on violations of the conditions of deferred dispositions.

The staff recommended adding an offense modifier to the VCC system to identify convictions that are the result of violations of the conditions of deferred dispositions (as authorized in §§ 18.2-251, 18.2-258.1, 19.2-298.02, or 19.2-303.6). With this approach, the eighth character position would change from an “F” or “M” to a “D” if the individual is convicted of the crime after failing to satisfy the terms and conditions of a deferred disposition. This way of designating deferred disposition failures would apply in all criminal justice data systems that use the VCCs and would make the circumstances of the conviction clear to all criminal justice stakeholders.

Example: LAR-2359-F9 would be modified to LAR-2359-D9

Judge Kelly asked if the change in the VCCs would include failures of First Offender status (§ 18.2-251). Mr. Fridley confirmed it would. Judge Kelly then asked what criminal history records (maintained by the Virginia State Police) would specify if the proposed modifier were applied. Mr. Fridley said that the VCC would have the “D” but he was unsure what verbiage the State Police would use in the record. Ms. Farrar-Owens said she would reach out to the State Police, if needed.

A motion was made to adopt the recommendation, which was seconded. With no further discussion, the Commission voted 11-0 in favor.

Proposed Recommendation 4 – Modify the Sentencing Guidelines Case Details Worksheet to identify defendants and victims diagnosed with autism spectrum disorder and other intellectual disabilities

Mr. Fridley reviewed legislation adopted by the 2020 General Assembly to allow for deferred dispositions in certain cases involving defendants diagnosed with autism spectrum disorder or intellectual disabilities (see § 19.2-303.6). According to Mr. Fridley, there is currently no way to track how often this provision is applied, or could be applied, in circuit court, or how often victims of felony offenses have such conditions.

Mr. Fridley showed members the Sentencing Guidelines Case Details Worksheet. To address the critical need for information, the Commission approved the Case Details Worksheet, which was incorporated into the Sentencing Guidelines system beginning July 1, 2021. This one-page worksheet is designed to provide vital and essential information for the court, the Commission, and state policy makers. The information captured on the Case Details Worksheet is not consistently available in other criminal justice data systems in Virginia. The Case Details Worksheet is completed by the individual preparing the Sentencing Guidelines and is included in the Guidelines packet submitted to the court.

The Case Details Worksheet captures certain defendant and victim characteristics, such as race, gender, ethnicity, age, and whether the individual is physically handicapped. The staff recommends expanding the demographic questions to identify defendants and victims who have been diagnosed with autism spectrum disorder or other intellectual disabilities (§ 37.2-100), as defined in the *Code of Virginia*. The revised worksheet was included in the members materials for their review.

Ms. Taylor was reluctant to add more information to the Case Details Worksheet. Judge Kelly agreed and felt that the worksheet is becoming unwieldy. She commented that preparers rarely answer Question 21.

Judge Kelly made a motion that the staff should limit the recommendation to two categories: autism spectrum disorder and intellectual disability under §19.2-303.6.

Judge Sharp made a motion to adopt the revised recommendation, which was seconded by Judge Frucci. With no further discussion, the Commission voted 11-0 in favor.

Update 1 – Missing responses to factors on the Case Details Worksheet

Mr. Fridley advised members that the next two items to be presented were updates from previous meetings. The staff has received considerable feedback from Guidelines users regarding Question 21 on the Case Details Worksheet, with the majority indicating that this question is problematic. Based on input from Guidelines users, concerns about Question 21 may result in other questions, or the entire Worksheet, being left blank.

The majority of the Case Details Worksheet captures demographic information, details of the offense(s) that must be known to accurately score the Guidelines, prior record, and other elements that judges have indicated as relevant in the sentencing decision. The remainder of the worksheet (Question 21) captures other factors that may be known at the time of sentencing, such as a defendant's substance abuse issues, alcohol abuse, mental health issues, recent employment history, housing, education, and military service, which the judge may wish to consider in the sentencing decision.

According to Mr. Fridley, users have suggested that Question 21 is difficult to complete unless the information is provided by the defendant or defense attorney. In cases involving plea agreements, the Commonwealth's attorney is unlikely to know the information needed to respond to Question 21.

Furthermore, defense attorneys are often hesitant to provide information that may be detrimental to the client's case. As a result, Question 21 is left blank in the majority of cases, but factors in other sections, which are critical for future analysis, are often left blank, as well. Concerns about Question 21 may be causing Guidelines users to doubt the validity and utility of the entire Case Details Worksheet. The staff recommended removing Question 21 from the Case Details Worksheet or labeling the question as optional.

Judge Moreau made a motion to remove Question 21 from the Case Details Worksheet, which was seconded. With no further discussion, the Commission voted 11-0 in favor.

Ms. Farrar-Owens commented that this change would be added to the upcoming Newsletter. A member asked when this change would go into effect. Mr. Fridley stated the change could be made quickly through SWIFT (the Commission's web-based application for completing Guidelines). Mr. Tracci asked if that recommendation should be submitted to the General Assembly. Mr. Fridley indicated that the recommendation should be included in the report since the Case Details Worksheet had been approved by the General Assembly. The recommendation would be added to the *2022 Annual Report* and submitted on December 1 to the General Assembly.

Update 2 – Continue to monitor sentencing patterns in probation revocation cases to determine if a factor based on substantial assistance, acceptance of responsibility, or expression of remorse is supported by the data

A Commission member had previously asked staff to examine the possibility of adding a factor to the Probation Violation Guidelines similar to the Modification of Recommendation factor on the Sentencing Guidelines. The Sentencing Guidelines factor was developed using judicial departure reasons that cited the defendant's substantial assistance, acceptance of responsibility, or expression of remorse. Mr. Fridley discussed preliminary analysis conducted by staff. Staff recommended that study of this issue be continued to determine if, for the Probation Violation Guidelines, a Modification of Recommendation factor based on substantial assistance, acceptance of responsibility, or expression of remorse was supported by the available data. Members concurred with the staff's recommendation.

SENTENCING GUIDELINES JUDICIAL SURVEY RESULTS

Presentation link: <http://www.vcsc.virginia.gov/2022Meeting/PVGJudicialSurveyNov2022.pdf>

Ms. Farrar-Owens reviewed the Commission's upcoming Guidelines re-analysis project. The objective of the study is to re-benchmark the Guidelines so that they reflect current sentencing practices as accurately as possible. At a previous meeting, staff recommended conducting a survey of circuit court judges to obtain input and guidance for the re-analysis project. Survey results may be useful in pointing staff to areas of the Guidelines that are in need of revision and to factors most important to judges.

The survey was administered in October 2022 through the Survey Monkey web-based application. The survey was sent to all active circuit court judges (175) and all retired judges who still sit (109). Overall, 148 judges responded to the survey.

Ms. Farrar-Owens presented the survey results. Major findings included:

- When determining a sentence, the majority of responding judges decide whether or not a defendant should be incarcerated (jail or prison) and then they decide on the sentence length;
- The majority of responding judges will consider the length of time or proportion of time the defendant will serve on the sentence ordered by the court;

- Responding judges identified which factors are weighed more heavily in the sentencing decision (e.g., victim injury, prior violent record/crimes against person, previous convictions for the same type of offense, use of a firearm);
- The vast majority of responding judges felt that, in cases involving the sale, distribution, etc., certain drugs warrant a harsher sentence (fentanyl and heroin were cited most often);
- According to nearly half of responding judges, certain types of convictions should always be given full weight on the Guidelines (e.g., murder, robbery, or rape) regardless of how long ago they occurred, even if other types of prior record convictions are discounted or weighed less;
- Nearly one-third of responding judges felt that older prior record should be discounted or weighed less on the Guidelines if the defendant has been relatively crime-free for a period of time; and
- More than half of responding judges felt that juvenile record should be scored on the Guidelines but weighed less than adult convictions.

Ms. Farrar-Owens advised the members that the survey results were very informative and would be used as the staff moved forward with the Sentencing Guidelines re-analysis project.

PRETRIAL DATA PROJECT – SUMMARY OF FINDINGS

Presentation link: <http://www.vcsc.virginia.gov/2022Meeting/PretrialDataProjectNov2022.pdf>

Ms. Farrar-Owens gave a brief overview of the Pretrial Data Project. The Pretrial Data Project was established in 2018 to address the significant lack of data available to answer questions regarding Virginia’s pretrial system. The General Assembly passed legislation, effective July 1, 2021, requiring the Commission to continue the Project. The Commission must submit a report each December 1, with the first report due on December 1, 2022. The Commission must also maintain a data dashboard on its website and make the final data set (with personal/case identifiers removed) available for download.

For the most recent study, staff selected individuals with pretrial contact events during Calendar Year (CY) 2018. 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. CY2018 was selected for the study in order to establish a pre-COVID baseline of pretrial data. For individuals with more than one contact event during CY2018, only the first event was selected. Individuals were tracked for a minimum of 15 months (until the disposition of the case or March 31, 2020, whichever occurred first).

Ms. Farrar-Owens then presented key findings for the 96,115 adult defendants whose contact event in CY2018 included a charge for a criminal offense punishable by incarceration where a bail determination was made by a judicial officer (i.e., a magistrate or judge). These included:

- The majority of defendants (86.8%) were ultimately released from custody during the pretrial period; only 13.2% of the defendants were detained throughout the pretrial period;
- Approximately one-third of defendants were released on a secured bond;
- Whites were more likely to be released than blacks (88.0% v. 85.2%) and non-indigent defendants were more likely to be released than indigent defendants (94.6% v. 81.4%);
- A large majority of released defendants (87.6%) were not charged with failure to appear at court proceedings for the offense(s) in the CY2018 contact event; and
- Fewer than one in four (22.4%) of released defendants had a new in-state arrest for an offense punishable by incarceration during the pretrial period.

Dr. Kwon, the Commission's Chief Methodologist, then demonstrated the Pretrial Data Project data dashboard for the members.

The full report can be found at <http://www.vcsc.virginia.gov/pretrialdataport.html>

RECENT COURT OF APPEALS DECISIONS RELATED TO PROBATION VIOLATIONS (§ 19.2-306.1)

Presentation link: <http://www.vcsc.virginia.gov/2022Meeting/PVGCourtDecisionsNov2022.pdf>

Mr. Fridley presented several recent court decisions from the Court of Appeals of Virginia.

- Jessie Lee Green v. Commonwealth of Virginia
- Kristopher Ryan Smith v. Commonwealth of Virginia
- Devinceo Dontre Heart v. Commonwealth of Virginia

He then briefly discussed each court case decision. The court case opinions were included in the members materials.

MISCELLANEOUS ITEMS

Ms. Farrar-Owens provided members with an update on the required reporting to the Virginia Child Protection Accountability System. 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. The FY2022 report will be completed and submitted to the Department of Social Services (DSS) in December 2022. She advised that each circuit court judge would receive a copy of their FY2022 report for review prior to its submission to DSS.

Ms. Farrar-Owens reminded members that the Commission's *Annual Report* was due to the General Assembly on December 1, 2022. 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 2023 meetings. After some discussion, meetings were tentatively set for March 27, June 12, September 1, and November 1.

With no comments and there being no further business, the Commission adjourned at 12:39pm.

Sentencing Commission Meeting Recording

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

Respectfully submitted by:
Carolyn Williamson, Research Associate

Minutes Reviewed by:
Meredith Farrar-Owens, Director