



# Virginia Criminal Sentencing Commission

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## Meeting of the Virginia Criminal Sentencing Commission

November 7, 2024

10:00 am – 12:15 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, 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 and Dr. Michon Moon

### WELCOME

Before calling the meeting to order, Judge Hogshire, Chairman, welcomed Commission members. Judge Hogshire announced that Chief Justice Goodwyn recently reappointed Judge Steven Frucci and Judge Jack Hurley to additional four-year terms on the Commission.

### AGENDA

The meeting agenda is available at: <http://www.vcsc.virginia.gov/2024Meetings/AgendaNov72024.pdf>

### APPROVAL OF MINUTES FROM LAST COMMISSION MEETING

Minutes from the meeting held on September 4, 2024, were approved as submitted. The minutes are available at: <http://www.vcsc.virginia.gov/2024Meetings/MinutesSept42024.pdf>

### SCORING PRIOR RECORD ON VIRGINIA'S SENTENCING GUIDELINES

Presentation link: <http://www.vcsc.virginia.gov/2024Meetings/ScoringPriorRecordNov72024.pdf>

Mr. Jody Fridley, the Commission's Deputy Director, provided background information on Virginia's Sentencing Guidelines and the scoring of prior record. Pursuant to § 17.1-803, Virginia's Guidelines must take into account historical sentencing practices. One of the primary goals of Virginia's Guidelines, dating back to 1985, has been the reduction of unwarranted sentencing disparity. 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. This approach to scoring prior record reflects present-day sentencing policy enacted by the General Assembly. Also, 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. Guidelines preparers are already familiar with existing penalty structures.

Mr. Fridley 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. After discussing this alternative in 2018, the Commission concluded that no action should be taken.

Mr. Fridley presented potential issues the Commission may wish to consider in its discussion of prior record scoring. For example, he noted that rap sheets do not always contain sufficient detail to determine the statutory maximum penalty in effect when/where the offense was committed. Guidelines preparers would have to conduct additional research to determine the correct penalty. Also, scoring priors based on statutory maximums in effect at the time of the offense would mean that the same prior criminal behavior could be weighed differently on the Guidelines, potentially increasing disparity. The Virginia Court of Appeals and Supreme Court opinions related to Sentencing Guidelines were included in members' packets.

While discussing the relevant issues, several members suggested that the approach to scoring prior record should be decided by the General Assembly.

Judge Moreau made a motion to retain the existing approach to scoring prior criminal record based on Virginia's current penalty structure. The motion was seconded by Senator Perry. With no further discussion, the Commission voted 14-1 in favor.

Judge Willis felt that the Commission should look for guidance from the General Assembly. Ms. Farrar-Owens, the Commission's Director, stated that the Commission could include prior record scoring in the Recommendations section of the Commission's Annual Report. This would provide the General Assembly an opportunity to review the current approach for scoring prior convictions on the Guidelines. She noted that recommendations adopted by the Commission and presented in the Annual Report, unless otherwise acted upon by the General Assembly, automatically take effect on July 1 of the following year.

Judge Moreau made an amendment to her previous motion. Under the revised motion, staff would be directed to draft a recommendation as described by Ms. Farrar-Owens for inclusion in the 2024 Annual Report. Judge Willis seconded the motion. With no further discussion, the Commission voted 15-0 in favor.

## **VIRGINIA'S PRETRIAL DATA PROJECT – 2021 and 2022 COHORT ANALYSIS**

Presentation link: <http://www.vcsc.virginia.gov/2024Meetings/PretrialDataProjectNov072024.pdf>

Dr. Chang Kwon, Chief Methodologist, provided a brief overview of the Pretrial Data Project. 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 that person 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 15 months or until disposition of the case, whichever occurred first.

Dr. Kwon reviewed the number of defendants in the CY2020, CY2021 and CY2022 cohorts. He displayed the overall pretrial release rate by year. The overall pretrial release rate gradually decreased between 2020 and 2022 but remained higher than pre-pandemic levels. Between 2020 and 2022, release on secured bond decreased slightly, while release on recognizance or unsecured bond increased. Dr. Kwon presented information relating to defendant demographics and the most common offenses charged.

Dr. Kwon next discussed the Public Safety Assessment (PSA), a pretrial risk assessment instrument, that can be computed for each defendant based on information collected in the Pretrial Data Project. Analysis revealed that, as PSA Scores increase, the percentage of defendants released pretrial decreases. Since CY2020 (during COVID), proportionally fewer defendants with higher PSA Scores (5 or 6) have been released.

Dr. Kwon described two outcome measures used in the Pretrial Data Project: the failure-to-appear rate and the rate of new in-state arrests for an offense punishable by incarceration. Data indicate that both the failure-to-appear rate and the new-arrest rate decreased overall between 2020 and 2022.

According to Dr. Kwon, the Commission's next Pretrial Data Project report was due to the General Assembly on December 1, 2024. The data dashboard tool will be updated, and the final data set will be available on the Commission's website on December 1, as required by statute. Ms. Farrar-Owens added that Dr. Kwon and Dr. Chen have been asked to present their work at the next conference of the American Society of Criminology (ASC) in San Francisco.

Mr. Tracci suggested adding additional clarification that the data pertains to all offenses. Ms. Farrar-Owens said that more information would be included in the full report.

Dr. Kwon then discussed a special study conducted by staff to examine the effects of eliminating the presumptive denial of bail in Virginia. Results of the study indicate that eliminating the presumption against bail in 2021 increased pretrial release among defendants who would have been subject to the provision (had it still been in effect). This finding is highly statistically significant. Data also suggest that the likelihood of failure-to-appear and new-criminal arrest may have increased among affected defendants after the policy change; however, the estimations are only marginally significant, and the magnitude of the estimated effects is small. Dr. Kwon noted potential shortcomings of the study. Certain aspects of the presumptive denial of bail provision made it very difficult to determine whether a defendant was subject to the presumptive denial of bail or not. Defendants for whom it could not be determined with certainty whether the presumption applied or not were excluded, resulting in the removal of 26% of cases from the analysis. In order to address the possible impact related to missing data, Dr. Kwon indicated that more work was needed to achieve greater confidence in the findings.

Mr. Tracci recommended that this potential shortcoming of the study be fully documented in the upcoming report. Dr. Kwon indicated that such detail will be included in the report.

## **2024 ANNUAL REPORT**

Presentation link: <http://www.vcsc.virginia.gov/2024Meetings/AnnualReportNov072024.pdf>

Mr. Fridley began by saying that a draft of the 2024 Annual Report was included in the meeting materials, and he requested that members review the draft and provide any comments by November 22.

Concurrence with the Guidelines in fiscal year 2024 was similar to past years. Mr. Fridley noted that the proposed Robbery Guidelines were approved during the September 2024 meeting. However, staff now suggested an adjustment to the Robbery Section C Recommendation Table that required approval by members before it could be included in the Annual Report. Mr. Fridley presented the proposed table. The Robbery Section C Recommendation Table was modified to remove the distinction between jail and prison recommendations, consistent with the structure of the proposed new Robbery Guidelines. Thus, the Table now included recommendations for individuals who score between 1 and 6 points on the Section C worksheet. For scores 7 through 32, recommended ranges were adjusted to reflect the new sentencing patterns for robbery. For these scores, the recommended ranges are wider than the Section C Recommendation Table previously used for robbery offenses (which is currently used only for carjacking offenses). For scores above 32, no changes to the Table are recommended.

Ms. Harrison made a motion to include this recommendation in the Annual Report. The motion was seconded by Judge Hupp. With no further discussion, the Commission voted 13-1 in favor.

### **MISCELLANEOUS ITEMS**

Ms. Farrar-Owens then gave a brief update on SWIFT (the automated Sentencing Guidelines application). A significant amount of time was spent developing the judicial component of SWIFT and establishing an automated process to distribute Guidelines to judges, clerks and the Commission. As part of this process, and at the request of judges, SWIFT was modified to allow judges to designate staff to complete the disposition page of the Guidelines. Judge Willis stated that this component of SWIFT has been extremely beneficial for Stafford's substitute judges.

Ms. Farrar-Owens informed members that, as part of the Pretrial Data Project, staff requested out-of-state criminal history records from the Federal Bureau of Investigation. She was pleased to report that the Commission had been granted access to the records for the Project.

Ms. Farrar-Owens recognized Judge Hogshire and Timothy Coyne and noted that this meeting would be their last with the Commission. She thanked them for their commitment and service to the Commission.

Ms. Farrar-Owens asked members to select tentative dates for the Commission's 2025 meetings. After some discussion, meetings were tentatively set for March 24, June 9, September 3, and November 6.

### **PUBLIC COMMENT**

No member of the public wished to provide comment.

With no comments and there being no further business, the Commission adjourned at 12:15p.m.

### **Sentencing Commission Meeting Recording**

#### **NEXT VCSC MEETING:**

Tentative Date: Monday, March 24, 2025

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](mailto:Cwilliamson@vacourts.gov).

Respectfully submitted by:

Carolyn Williamson, Research Associate

Minutes Reviewed by:

Meredith Farrar-Owens, Director