



# Virginia Criminal Sentencing Commission

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## Meeting of the Virginia Criminal Sentencing Commission

September 13, 2021

10:00 am – 12:05 pm

Meeting held via Zoom

### Meeting Minutes

Members Attending via Zoom: Judge Edward L. Hogshire (Chairman), Delegate Les R. Adams, Linda Brown, Timothy S. Coyne, Senator John Edwards, Marcus Elam, Judge Jack S. Hurley, Judge Patricia Kelly, Judge W. Revell Lewis, Judge Thomas Mann, K. Scott Miles, Judge Stacey Moreau, Kyanna Perkins, and Shannon Taylor

Members Absent: Judge James Fisher, Judge Steven C. Frucci and Judge Charles S. Sharp (Vice Chairman)

#### WELCOME

Before calling the meeting to order, Judge Hogshire, Commission Chairman, welcomed a new staff member. Philip Berry recently completed all coursework for his Ph.D. in Criminology and Criminal Justice at the University of South Carolina, and he plans on completing his dissertation by 2023.

#### AGENDA

The meeting agenda is available at: <http://www.vcsc.virginia.gov/2021Meeting/AgendaSep1321.pdf>

#### APPROVAL OF MINUTES FROM LAST COMMISSION MEETING

Minutes from the meeting held on June 7, 2021, were approved as submitted. The meeting minutes are available at: <http://www.vcsc.virginia.gov/2021Meeting/MinutesJun072021.pdf>

#### SENTENCING REVOCATION REPORTS AND PROBATION VIOLATION GUIDELINES – PRELIMINARY FY2021 REPORT

Presentation link: <http://www.vcsc.virginia.gov/2021Meeting/ConcurrencePVGfy2021Prelim.pdf>

Ms. Kim Thomas, Training Associate, gave a preliminary FY2021 report on Sentencing Revocation Reports (SRRs) and Probation Violation Guidelines (PVGs) submitted to the Commission and automated as of July 21, 2021. The SRRs provide information on revocation hearings conducted in Virginia's circuit court. Of the total 10,854 SRRs submitted, 54% were based on violations arising out of a new offense conviction, while 46% were related to technical violations of the conditions of probation.

The Probation Violation Guidelines provide judges with a recommended sentence range for violations committed by individuals under supervision for felony offenses. Prior to July 1, 2021, these guidelines applied only to technical violations. As reported by Ms. Thomas, for FY2021, overall concurrence with the Probation Violation Guidelines was approximately 50%. While lower than concurrence with the Sentencing Guidelines for felony offenses, concurrence with the Probation Violation Guidelines generally has been higher since modifications were implemented in FY2008 than in years prior to that. Ms. Thomas next presented concurrence rates across the 31 judicial circuits. For FY2021, the highest concurrence rate, 69.6%, was found in Circuit 10 (South Boston area). Circuit 8 (Hampton) had the lowest concurrence rate, at 29.0%.

Examining the technical violation cases revealed that 59.2% of the probationers were cited for violations related to drug use (Condition 8 of the Department of Corrections Conditions of Probation). The most common special condition violation was the probationer's failure to satisfy financial obligations set by the court. Among probation violations arising out of new convictions, nearly half (46.0%) involved a new felony and 37.3% were the result of a new misdemeanor.

Ms. Thomas displayed the new Probation Violation Guidelines, which became effective on July 1, 2021. The new guidelines were designed to better reflect judicial sentencing in revocation cases.

Senator Edwards inquired as to the types of violations covered by Condition 6 (fail to follow instructions). Judge Hurley commented that most probationers cited for a Condition 6 violation fail to show up for an appointment. Mr. Elam said a Condition 6 violation could be anything related to supervision, such as failure to seek employment or participate in a drug treatment program.

#### **FEEDBACK FROM THE FIELD AND IMPLEMENTATION ISSUES**

Presentation link: <http://www.vcsc.virginia.gov/2021Meeting/FeedbackfromtheField.pdf>

Mr. Jody Fridley, the Commission's Deputy Director, advised members that the staff had been traveling the state conducting seminars on the 2021 Guidelines changes. He stated that staff had received considerable feedback on the changes, as well as questions regarding the implementation of new statutory requirements. Mr. Fridley provided an overview of this information.

Mr. Fridley first discussed the new requirements specified in § 19.2-306 (revocation of suspension of sentence and probation) and § 19.2-306.1 (limitation on sentence upon revocation of suspension of sentence). He noted that the interpretation and implementation of the new provisions had varied across the Commonwealth. One circuit court judge had recently ruled that the new § 19.2-306.1 was unconstitutional. Also, questions had arisen regarding due process. For instance, could a probationer who represents a danger to himself or the community be arrested on a *capias* or PB-15 and held in jail to await his/her revocation hearing if the new statute requires that no active incarceration be given for the violation? Also, there were different opinions in the field about what constitutes a special condition of probation and how violations of special conditions should be handled. Confusion had developed as to whether the new provisions applied to violations of terms of good behavior or to offenders under the supervision of local community corrections programs. Further, the new provision was not clear if the 14-day maximum penalty for a violation applied to the whole revocation event or to each violation (i.e., can the sentences be stacked?). Users in the field had asked numerous questions as to which violations should be counted as prior technical violations (e.g., should violations sentenced prior to July 1, 2021, count? Should violations associated with prior terms of probation be counted? Should violations from other jurisdictions be counted?). Finally, Mr. Fridley described the practical challenges faced by users as they try to verify the number and nature of previous probation violations for the purposes of applying the new sentencing caps.

Mr. Fridley suggested that perhaps some unintended consequences were emerging. For example, the mandates may result in changes of behavior among judges, prosecutors, defense attorneys and probation officers. The new statute may encourage the return of probationers for the first and second technical violations sooner than they had been in the past. He noted that each revocation adds to an individual's criminal record. Mr. Fridley relayed concerns expressed to Commission staff about the increase in disparity given the different interpretations and application of the new statute.

Mr. Fridley stated that Commission staff provided guidance on the preparation of the new Probation Violation Guidelines based on the procedures and rules established by the Commission. However, Commission staff could not address the many questions and concerns that had been posed. He noted that the General Assembly could clarify the language and requirements in the new statute. He further noted the court's role in interpreting statutes.

Judge Mann asked if, following enactment of the new law, judges had increased their use of post-release terms/supervision periods. Mr. Fridley responded that staff could look into that.

Ms. Taylor expressed concern about the Commission offering no guidance to users in the field; she felt that the Commission had a duty to help resolve the issues, particularly regarding Condition 6 violations and special condition violations. Senator Edwards agreed with Ms. Taylor.

Senator Edwards made a motion to establish a subcommittee of the Commission to review concerns from users and report findings to the members at the next Commission meeting (November 3, 2021). Ms. Taylor seconded the motion. The Commission voted 14-0 in favor. Judge Hogshire asked members to volunteer for the subcommittee. Ms. Taylor, Senator Edwards, Mr. Elam, and Mr. Coyne agreed to serve on the subcommittee. Senator Edwards and Ms. Taylor will co-chair the newly established subcommittee.

Mr. Fridley continued his presentation by discussing the Commission's new Case Details Worksheet. To address the critical need for information, the Commission recently approved a Case Details Worksheet that was incorporated into the Sentencing Guidelines beginning July 1, 2021. This one-page worksheet is a vital tool for providing information to the court and to the Commission. Without reliable and consistent information, staff cannot complete analyses in a timely manner to respond to policy changes, criminal justice reforms and changes in sentencing patterns. According to Mr. Fridley, the reliability of this worksheet is being questioned by users in the field.

Mr. Fridley reported that users are not filling out the worksheet in every case and are often leaving Question #21 blank. As expressed to staff, defense counsel often believed that the information provided was not beneficial to the client or that it may be used against the client in a future case. According to Commonwealth's attorneys, prosecutors often do not have all the information needed to complete the worksheet. Guidelines users believed that Question #21 taints the validity of the entire worksheet and the information collected.

Ms. Taylor expressed her disappointment that the Case Details Worksheet had caused some problems between the parties. Judge Hurley stated that he is receiving some pushback from attorneys in his court. He suggested revising Question #21 (a) so that only convictions would be considered in answering the questions related to drug abuse; this would remove subjectivity in responses to that question. Judge Moreau commented that her jurisdiction likes the Case Details Worksheet. Mr. Coyne reminded members that the Case Details Worksheet collects much of the same information as a Pre-Sentence Investigation (PSI) report and it is important because PSIs are not ordered in every case. Judge Hogshire asked members if they wished to take any action now or wait until the November meeting. Senator Edwards suggested that the Commission should wait and

ask the subcommittee to look at this issue as well. The Commission's Director, Meredith Farrar-Owens, said staff could present available FY2022 data at the November meeting. Mr. Coyne remarked that the Commission should continue to collect this information; he felt more time was needed for users to get accustomed to filling out the information.

Judge Hogshire asked for a motion. No motion was made. The members decided to take no action at this time.

Mr. Fridley then addressed issues related to the recently-adopted guidelines modification for substantial assistance, acceptance of responsibility or expression of remorse. Questions from the field primarily focused on the implementation of this factor. Mr. Fridley reminded members that this modification was not based on the federal guidelines system but rather on analysis of judicial departure reasons in Virginia. The modification was not intended to apply to most cases, as it does in the federal system. Virginia judges cited one of these three reasons in approximately 1% of guidelines cases overall (10% of all mitigation cases).

Mr. Fridley briefly reviewed the original analysis that was presented to the Commission in September 2020. Analysis identified 1,428 sentencing events (out of 122,627 during FY2016-FY2020) in which the judge cited substantial assistance, acceptance of responsibility or expression of remorse as the reason for departing from the sentencing guidelines recommendation. Effective July 1, 2021, if a judge determines that the defendant provided substantial assistance, accepted responsibility or expressed remorse, the low end of the guidelines recommended range is reduced (if the calculated low end of the guidelines is three years or less, the low end is reduced to zero; if the calculated low end is more than three years, the low end is reduced by 50%). Mr. Fridley emphasized that the analysis was not based on whether the defendant pled guilty but, rather, what the judge cited when departing below the guidelines range. Further analysis revealed that 32.3% of assistance cases and 62.4% of responsibility cases did not involve a plea agreement. To reflect the analysis of the historical data, the decision to utilize the adjusted guidelines range for one of these reasons must be made by the judge at the time of sentencing.

Mr. Fridley stated that some users in the field suggested that Virginia replicate the federal guidelines in terms of acceptance of responsibility. In the federal court system, nearly all defendants (96.3%) receive a guidelines reduction for acceptance of responsibility. Because nearly all defendants receive the reduction, it does not differentiate between defendants. Furthermore, that is not the way Commission staff conducted the analysis of Virginia guidelines data. He displayed some of the reasons for departure cited by Virginia judges in these types of cases.

Mr. Fridley displayed a few e-mails from prosecutors describing the various ways the guidelines modification is being implemented in the Commonwealth. To encourage greater consistency in the application of the new guidelines modification, Mr. Fridley proposed moving the factor from the top of the disposition page to the Reason for Departure section. If the judge checks the box for Modification of Recommendation due to substantial assistance, acceptance of responsibility or expression of remorse, and the effective sentence is within the new modified range, the case will be classified as in general concurrence with the guidelines for reporting purposes.

Mr. Coyne asked if it would be treated as a departure modification or not. Mr. Fridley responded that, if the judge recognized acceptance of responsibility, etc., then the recommendation would be lowered, and the sentence would be in concurrence. Mr. Coyne believed that this proposed solution would cause more confusion. Judge Moreau was concerned about moving the Modification of Recommendation factor because it may lead to uncertainty about the factor (users may think it is a departure). Judge Hogshire asked Mr. Fridley if he would like to wait for approval of the change until

the November meeting. If so, he would ask the subcommittee to take up this topic as well and report back in November. Ms. Taylor indicated that she would like to see any available FY2022 data related to the guidelines modification factor at the Commission's next meeting.

Mr. Coyne made a motion to have the subcommittee review concerns from users regarding the guidelines modification and report back to the full Commission at the meeting on November 3, 2021. Ms. Taylor seconded the motion. The Commission voted 14-0 in favor.

### **STATUTORY REQUIREMENT FOR SEALING OF CRIMINAL HISTORY RECORDS**

Presentation link: <http://www.vcsc.virginia.gov/2021Meeting/SealingRecords.pdf>

The General Assembly recently passed legislation to broaden provisions for the sealing of criminal history records in the Commonwealth. Colin Drabert, Deputy Director of the Virginia State Crime Commission, reviewed the legislation and the new requirements for handling criminal history records.

Mr. Drabert began by saying that the automatic and petition-based sealing processes were created during the 2021 General Assembly, Special Session I (House Bill 2113/Senate Bill 1339). The new sealing processes will take effect on July 1, 2025, or earlier if agencies are capable of doing so. Sealing means restricting dissemination of criminal history record information contained in the Central Criminal Records Exchange (CCRE) maintained by the Virginia State Police and prohibiting dissemination of court records. He noted that court records are retained and destroyed in accordance with current record retention laws and schedules.

Mr. Drabert described the criteria and the procedures for the automatic sealing of convictions prescribed in the new legislation. He then discussed the offenses eligible for petition-based sealing of convictions, the criteria for an individual to file a petition with the court, and the process for the court to grant the petition.

Mr. Drabert then spoke about the expungement of marijuana convictions as provided in House Bill 2312/Senate Bill 1406. These provisions will also take effect on July 1, 2025, or earlier if agencies are capable of doing so. Expungement is to remove, in accordance with a court order, a criminal history record or a portion of a record from public inspection or normal access. Misdemeanor possession of marijuana and misdemeanor distribution of marijuana will be eligible for automatic expungement under these provisions, while felony marijuana distribution will require the filing of a petition and court approval for expungement.

According to Mr. Drabert, sealed and expunged criminal history record information can be disseminated and used for certain specific purposes. He noted that such records can be disseminated to and used by the Virginia Criminal Sentencing Commission for its research purposes.

Ms. Farrar-Owens thanked Mr. Drabert for his presentation. She emphasized that the Sentencing Commission has twenty-five years of data on felony sentencing events that could be considered criminal history records. Per § 19.2-298.01, the sentencing guidelines worksheets are public record. A number of years prior, the Attorney General's Office had advised the Commission that any information on the guidelines worksheets that is entered into an automated system would also be considered public record. Thus, the Commission releases Sentencing Guidelines data when a Virginia Freedom of Information Act (FOIA) request is received.

Ms. Farrar-Owens believed the Commission should be mindful of this legislation moving forward. She offered to seek formal advice from the Attorney General's Office, if desired by the members. She also offered to reach out to Virginia's FOIA Council to see if the Commission could release de-identified data and still be compliance with FOIA requirements.

Judge Moreau made a motion for the Director to request a formal response from the Attorney General and guidance from the FOIA Council regarding the new statutory requirements. Judge Mann seconded the motion. The Commission voted 13-0 in favor.

**TRENDS IN LARCENY AND OTHER OFFENSES AFFECTED BY THE FELONY LARCENY THRESHOLD**

Presentation link: <http://www.vcsc.virginia.gov/2021Meeting/LarcenyTrends.pdf>

Ms. Farrar-Owens decided to move this presentation to a later date. She said that the information was included in members' packets for their review.

**MISCELLANEOUS ITEMS**

Ms. Farrar-Owens provided members with a brief update on recruiting and hiring of Commission staff. She then asked members to submit topic suggestions for the Commission's Fall 2021 newsletter.

Ms. Farrar-Owens reminded members of the remaining 2021 meeting date: Wednesday, November 3.

With no comments and there being no further business, the Commission adjourned at 12:05pm.

**NEXT VCSC MEETING:**

Date: Wednesday, November 3, 2021

Time : 10:00 am

Host Site: In-person or virtual meeting options to be determined

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

Judge Edward Hogshire (Ret.), Chairman