



# Virginia Criminal Sentencing Commission

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## Meeting of the Virginia Criminal Sentencing Commission

June 13, 2022

10:00 am – 11:43 am

Held at the Virginia Supreme Court

### Meeting Minutes

**Members Attending (In Person):** Judge Edward L. Hogshire (Chairman), Judge Charles S. Sharp (Vice-Chairman), Diane Abato (for Nicole Wittmann), Delegate Les R. Adams, Linda Brown, Timothy S. Coyne, Marcus Elam, Judge Jack S. Hurley, Judge Patricia Kelly, Judge W. Revell Lewis, Dr. Michon Moon, Judge Stacey Moreau, K. Scott Miles, and Shannon Taylor

**Members Absent:** Senator John Edwards, Judge Steven C. Frucci and Judge Thomas Mann

#### WELCOME

Before calling the meeting to order, Judge Hogshire, Commission Chairman, welcomed Commission members.

#### AGENDA

The meeting agenda is available at: <http://www.vcsc.virginia.gov/2022Meeting/AgendaJun622.pdf>

#### APPROVAL OF MINUTES FROM LAST COMMISSION MEETING

Minutes from the meeting held on March 28, 2022, were approved as submitted. The meeting minutes are available at: <http://www.vcsc.virginia.gov/2022Meeting/MinutesMar282022.pdf>

#### SENTENCING GUIDELINES CONCURRENCE (FY2022 to DATE) AND CASE DETAILS WORKSHEET

Presentation link: <http://www.vcsc.virginia.gov/2022Meeting/ConcurrenceJun2022.pdf>

Mr. Barnes, Research Associate, informed members that it was too early to fully analyze the impact of recent statutory changes and Guidelines revisions on sentencing practices, but early FY2022 data was available. Mr. Barnes stated that a total of 9,003 Guidelines worksheets had been submitted to the Commission and automated as of May 5, 2022. He reminded members of the new Guidelines factor related to the defendant's substantial assistance, acceptance of responsibility or expression of remorse and how additional instructions to score this factor would be added to the Guidelines manual in July 2022.<sup>1</sup> Judges had checked the box (to indicate the defendant's substantial assistance, acceptance of responsibility or expression of remorse) on 991 (11%) of the 9003 worksheets received and automated

<sup>1</sup> Effective July 1, 2021, if a judge determines at sentencing that the defendant provided substantial assistance, accepted responsibility or expressed remorse, the low end of the guidelines recommended range is adjusted. If the calculated low end of guidelines range is three years or less, the low end of the guidelines range is reduced to zero. If the calculated low end of the guidelines range is more than three years, the low end of the guidelines range is reduced by 50%.

to date. Nearly half of the cases were already in concurrence with the Guidelines recommendation; therefore, checking the box did not result in bringing those cases into concurrence.

Mr. Barnes reported that the overall concurrence rate with the Guidelines among the FY2022 cases thus far was nearly 77%. Judges imposed sentences higher than the Guidelines in 7% of the cases and lower than the Guidelines in 16% of the cases. The overall concurrence rate increased to 82% when judge's use of the new factor for substantial assistance, acceptance of responsibility or expression of remorse was taken into account. Mr. Barnes observed that Schedule I/II drug cases had the highest Guidelines concurrence rate of all offense groups (85.8%). In contrast, rape offenses, with a rate of 67%, yielded the lowest concurrence rate.

Mr. Barnes reported that the new Case Details Worksheet, in many cases, was either missing or incomplete. For example, the defendant's race was missing in 35% of the FY2022 cases received to date and the type of drug was missing in 49% of Schedule I/II drug cases. Mr. Barnes noted that responses to Question #21 were completely missing in 58% of the cases.

Mr. Barnes gave a preliminary report on FY2022 Sentencing Revocation Reports (SRRs) and Probation Violation Guidelines (PVGs) submitted to the Commission and automated through May 5, 2022. He displayed the new factor added to the PVGs (effective July 1, 2021) that judges can utilize if they find an offender in a revocation case to be a good candidate for rehabilitation.<sup>2</sup> With the implementation of the new Probation Violation Guidelines, including the new factor for rehabilitation potential, judicial concurrence had improved considerably, reaching 85% among the FY2022 cases analyzed.

## **FEEDBACK FROM THE FIELD**

Presentation link: <http://www.vcsc.virginia.gov/2022Meeting/FeedbackField2022.pdf>

Mr. Fridley, the Commission's Deputy Director, indicated that the staff had received a variety of feedback on the Sentencing Guidelines, Probation Violation Guidelines, and SWIFT (the automated Guidelines application). He provided an overview of the feedback and the solutions implemented by staff. For example, users wanted SWIFT to identify and calculate the mandatory minimums in a sentencing event. Specifically, attorneys requested that the Guidelines recommendation itself not be modified but, rather, that a field be added to calculate the sum of all mandatory minimum sentences required for the sentencing event. The SWIFT system was modified as requested and allows for a manual override when the judge determines that the mandatory sentence is not applicable to the defendant. The factor for substantial assistance, acceptance of responsibility and expression of remorse was also modified to take into account any mandatory minimum sentences required. Users also wanted the new factor to reflect the adjusted high end of the Guidelines recommendation based on the sex offender risk assessment instrument. This change was made in SWIFT and the range is adjusted automatically for the user.

Mr. Fridley next discussed user feedback related to the higher rates of earned sentence credits for nonviolent offenders pursuant to § 53.1-202.2 (effective July 1, 2022).<sup>3</sup> Users wanted a way to distinguish the offenses eligible for the new higher rates of sentence credits from offenses that are not eligible for the higher rates. The Virginia Crime Code book and SWIFT were modified to identify offenses in such a manner.

Finally, per user request, a new feature was added to SWIFT to allow users to share Guidelines worksheets with other attorneys involved in the case.

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<sup>2</sup> When the judge determines a probationer has good rehabilitation potential, despite the current violation, analysis the Probation Violation Guidelines are adjusted and the low end of the range is reduced to zero or "time served."

<sup>3</sup> See House Bill 5148, 2020 Special Session I (effective July 1, 2022).

## PRETRIAL DATA PROJECT – STATUS REPORT

Presentation link: <http://www.vcsc.virginia.gov/2022Meeting/pretrialDataJun132022.pdf>

Ms. Farrar-Owens, the Commission’s Director, provided a brief overview of the Pretrial Data Project. She reminded members that, between 2016 and 2020, the Virginia State Crime Commission had studied various aspects of the pretrial system in the Commonwealth. However, there was a significant lack of data readily available to answer many important questions related to the pretrial process. As a result, the Virginia Pretrial Data Project was established. This was an unprecedented, collaborative effort between numerous state and local agencies representing all three branches of government. The goal was to compile data sufficient to answer many questions, such as: what percentage of defendants are released to the community while awaiting trial? The Project consisted of two phases: (i) developing a cohort of adult defendants charged with a criminal offense in Virginia during October 2017 (referred to as the “contact event”) and (ii) tracking various outcomes within that cohort. Data for the Project was obtained from multiple agencies and the Sentencing Commission was the central repository for the data. Sentencing Commission staff spent a tremendous amount of time compiling the dataset. This process was manually intensive and required meticulous attention to detail, as Virginia does not have a uniform, statewide data system to conduct an automated merging of such information. Ms. Farrar-Owens stated that over 800 variables were collected and computed for each defendant.

The information provided by the Pretrial Data Project was well-received by the General Assembly and there was considerable interest in having the project continue. The 2021 General Assembly passed legislation directing the Sentencing Commission to continue this work.<sup>4</sup> Per the legislation, 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 on the website.

Dr. Kwon, the Commission’s Chief Methodologist, described some of the findings from the previous study. He noted that nearly 23,000 adult defendants charged during October 2017 were tracked through final case disposition or until December 31, 2018, whichever came first. The analysis focused on 11,487 defendants who were arrested for an offense that could result in a term of incarceration (excluding individuals released on summons, those whose contact event related to a pre-existing court obligation, such as a probation violation, and individuals for whom sufficient information could not be found). Of the 11,487 defendants, 9,503 defendants were released pretrial. Of those released, 56% of defendants were released on a personal recognizance (PR) or unsecured bond and 44% were released on a secured bond. The study revealed that a large majority of released defendants were not charged with failure to appear and were not arrested for a new in-state offense punishable by incarceration during the pretrial period.

Dr. Kwon then discussed the Commission’s new study. Staff selected individuals with pretrial contact events during calendar year 2018, in order to obtain pre-COVID baseline data. As with the previous study, if an individual had more than one contact event during the year, only the first event was selected. The same 15-month follow-up period will be used for the new study. Dr. Kwon summarized the data collection process to date. He noted that the work would still face multiple challenges, such as data quality, inconsistent offense tracking numbers, and missing information. Dr. Kwon concluded by saying that, if the study proceeds according to plan, staff may be able to present preliminary results at the September 2022 meeting.

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<sup>4</sup> See House Bill 2110 and Senate Bill 1391, 2021 General Assembly (effective July 1, 2021).

Ms. Taylor asked if the analysis of detained individuals could be broken down by most serious offense and indigency status. Ms. Taylor was also interested in seeing the court appearance outcomes for released defendants broken down by most serious offense and indigency status. Dr. Kwon said the staff would include those items in the analysis.

Ms. Farrar-Owens recognized Dr. Catherine Chen, the Data Scientist hired for the Project, for her excellent work.

### **FEE WAIVERS FOR TRAINING AND MANUALS**

Presentation link: <http://www.vcsc.virginia.gov/2022Meeting/FeeWaiversJun22.pdf>

Mr. Fridley provided a brief overview of the Commission's fee waiver program. While the Commission provides free guidelines manuals and training to government employees, such as Commonwealth's attorneys, probation officers and public defenders, the Commission charges private defense attorneys, including court-appointed attorneys, for manuals and training seminars. Applications for fee waivers are evaluated based on the percentage of the applicant's practice focusing on indigent defense cases and the financial need of an applicant (especially new or solo practitioners). Mr. Fridley displayed the fee waiver application and the scoring sheet used by staff to objectively evaluate fee waiver applications, both of which had been approved by the Commission.

He presented a status report on this program. He displayed information describing the characteristics of the applicants approved for fee waivers.

Mr. Fridley asked if the Commission wished to approve funds for waivers for FY2023. If so, Mr. Fridley asked members if the Commission desired to modify the application, scoring sheet, or procedures.

A Commission member made a motion to approve funds for waivers in the same amount as FY2022, which was seconded. With no further discussion, the Commission voted 14-0 in favor. Judge Hogshire asked that the training seminars be advertised in the Commission's Newsletter.

### **MISCELLANEOUS ITEMS**

Ms. Farrar-Owens provided an update about two pieces of legislation requested by the Commission: House Bill 1320/Senate Bill 423 (clarifying the Commission's authority to recommend revisions to the Guidelines based on historical sentencing data, specifically in regard to the size of midpoint enhancements) and House Bill 1318/Senate Bill 424 (codifying requirements for the Probation Violation Guidelines). These bills were patroned by Delegate Adams and Senator Edwards. House Bill 1318 and Senate Bill 424 were signed by the Governor and would be effective July 1, 2022. Regarding House Bill 1320 and Senate Bill 423, the Governor returned the bills with suggested amendments. The amendments were accepted by the General Assembly and the bills were passed. The Governor's amendments added two enactment clauses to the bills. The first requires the Commission to submit a report by October 1, 2022, documenting the impact on Sentencing Guideline midpoints for each offense if the Commission were to recommend changes to the midpoints based on analysis of historical sentencing data. The second enactment clause specifies that the provisions of the bill will take effect on July 1, 2023. Ms. Farrar-Owens stated that members would receive a draft of the report for their review before its submission to the General Assembly.

Ms. Farrar-Owens reminded members of the remaining 2022 meeting dates: September 7,

and November 2. The Chairman asked that the September meeting be moved to the following Tuesday, September 13. Members concurred with the date change.

With no comments and there being no further business, the Commission adjourned at 11:45 a.m.

### **[Sentencing Commission Meeting Recording](#)**

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

Date: Tuesday, September 13, 2022

Time: 10:00 a.m.

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