



Virginia Criminal Sentencing Commission

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Meeting of the Virginia Criminal Sentencing Commission

March 28, 2022

10:00 am – 12:35 pm

Meeting held at the Virginia Supreme Court and via Zoom

DRAFT

Meeting Minutes

Members Attending In Person: Judge Edward L. Hogshire (Chairman), Judge Charles S. Sharp (Vice Chairman), Timothy S. Coyne, Marcus Elam, Judge Jack S. Hurley, Judge Patricia Kelly, Judge Stacey Moreau, Shannon Taylor, and Nicole Wittmann (Attorney General Representative)

Members Attending Virtually: Delegate Les R. Adams, Linda Brown, Senator John Edwards, Judge Steven C. Frucci, Dr. Michon Moon, Judge W. Revell Lewis, Judge Thomas Mann, and K. Scott Miles

Members Absent: None

WELCOME

Before calling the meeting to order, Judge Hogshire, Commission Chairman, welcomed new Commission members. Since the last meeting, there have been three appointments to the Commission. Governor Northam appointed Dr. Michon Moon to serve as the Commission's victim representative. Dr. Moon is the Director of Grants and a Program Consultant for the JXN ("Jackson" Project), a neighborhood revitalization project in the Richmond area. In December 2021, then-House Speaker Filler-Corn appointed Mr. Scott Miles to fill the vacancy left by Judge Fisher, whose term expired. Mr. Miles is a Deputy Commonwealth's Attorney for the City of Norfolk. Attorney General Jason Miyares appointed Ms. Nicole Wittmann as his representative on the Commission.

Judge Hogshire also welcomed a new staff member. Dr. Catherine Chen has been hired as a Data Scientist to lead the Commission's Pre-Trial Data Project. Dr. Chen previously worked at East Tennessee State University. Her first day with the Commission was December 10.

AGENDA

The meeting agenda is available at: <http://www.vcsc.virginia.gov/2022Meeting/AgendaMar282022.pdf>

APPROVAL OF MINUTES FROM LAST COMMISSION MEETING

Minutes from the meeting held on November 3, 2021, were approved as submitted. The meeting minutes are available at: <http://www.vcsc.virginia.gov/2022Meeting/MinutesNov032021.pdf>

REPORT ON THE 2022 GENERAL ASSEMBLY AND LEGISLATIVE IMPACT ANALYSIS

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

Ms. Farrar-Owens, the Commission's Director, described the many activities of Commission staff during the 2022 Session of the General Assembly. These activities included the preparation of fiscal impact statements, as required by statute, responding to legislators' requests for supplemental information, monitoring legislation, observing the judicial interview process, and providing technical assistance to other agencies. She provided an overview of the requirements pertaining to fiscal impact statements that must be prepared by the Commission. She reviewed several pieces of legislation. Ms. Farrar-Owens noted that her presentation was not intended to be comprehensive but served to highlight bills related to the Commission, Sentencing Guidelines, criminal penalties, or time served by individuals convicted of felonies.

Ms. Farrar-Owens presented an overview of the number and kinds of impact statements prepared for the 2022 General Assembly. Staff produced 192 statements. Proposals requiring fiscal impact statements most frequently involved the expansion or clarification of an existing statute (92.7%) or the definition of a new crime (47.9%). Ms. Farrar-Owens displayed a slide to show the diversity of topic areas among fiscal impact statements prepared. For the 2022 Session, the most common topic area was drugs (Marijuana and Schedule I/II drugs). Commission staff also completed approximately 30 ad hoc analyses requested by legislators, the Department of Planning & Budget or other state agencies. As indicated by Ms. Farrar-Owens, legislators can ask the Joint Legislative Audit and Review Committee (JLARC) to conduct an independent review of any fiscal impact statement prepared by the Commission. The number of such requests has ranged from zero to two per year. During the 2022 Session, JLARC was not asked to review any of the Commission's fiscal impact statements.

Ms. Farrar-Owens informed members that no legislation had been introduced during the 2022 General Assembly session pertaining to the recommendations in the Commission's *2021 Annual Report*. Therefore, the Commission's recommendations for Guidelines revisions would become effective on July 1, 2022. The General Assembly did pass the 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 regards 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.

Ms. Farrar-Owens reviewed Senate Bill 137, which specified that the written explanation filed by the court when departing from the Guidelines must adequately explain the sentence imposed to promote fair sentencing. Furthermore, under this proposal, failure to follow any provisions, including the failure to provide an explanation that adequately explains the sentence imposed, would be reviewable on appeal or may be the basis of other post-conviction relief, including resentencing by the trial judge. The bill failed to pass both houses of the General Assembly.

Ms. Taylor noted that judges were recently sent a reminder from the Chairman encouraging them to provide detailed departure explanations. Judge Moreau added that Commission staff notify sentencing judges about missing departure reasons. Per Ms. Farrar-Owens, staff also provide judges up for reappointment a list of their cases with missing departure reasons; the judge has the opportunity to provide the Commission with a departure reason and the system is updated accordingly. Judge Hurley questioned if there was a discussion in the General Assembly as to how the term "adequately" would be defined. Ms. Farrar-Owens responded that the question was asked during the Committee hearing on the bill. Senator Edwards said that the concept of "adequately" would be subject to litigation. He felt that judges should give an adequate departure reason and, if not, the defendant should have the right to appeal. Ms. Taylor hoped that all of the staff's efforts would remedy the issue of missing departure reasons.

PLANNING FOR FULL REANALYSIS OF ALL GUIDELINES OFFENSE GROUPS

Presentation link: <http://www.vcsc.virginia.gov/2022Meeting/Reanalysis2022.pdf>

Ms. Farrar-Owens described the history and structure of Virginia's Sentencing Guidelines. The Guidelines were introduced with the goal of reducing unwarranted sentencing disparity and promoting greater consistency and predictability in sentencing outcomes. In essence, the Guidelines are designed to provide judges with a benchmark of the typical (or average) case outcome given the defendant's current offenses and prior record. There is one exception to the historical basis of Virginia's Guidelines. Per § 17.1-805, the Guidelines must include enhancements to increase sentence recommendations for defendants who have been convicted of violent felony offenses (as defined in that section).

In 2021, the Commission approved a full reanalysis of all felony offense guidelines. The objective is to re-benchmark the Guidelines so that they reflect current sentencing practices as accurately as possible. The approach will be holistic and comprehensive. Ms. Farrar-Owens noted that, while Virginia's judges concur with Guidelines at a high rate overall, they depart more often in certain types of cases (e.g., midpoint enhancement cases). Such cases would be examined in detail in the upcoming study. She also cited recent changes in felony larceny threshold (2018, 2020) and recent legislation to create classes of robbery (2021) as necessitating reanalysis. On July 1, 2021, the Commission implemented the Case Details Worksheet (CDW) as part of the Guidelines, which will provide critical details for each sentencing event. That data will be invaluable as the staff proceeds with reanalysis of the Guidelines.

In its *2021 Annual Report*, the Commission informed the General Assembly that it would seek legislation to clarify the Commission's authority to recommend revisions to the Guidelines based on historical sentencing data, specifically in regards to the size of midpoint enhancements. Both House Bill 1320 and Senate Bill 423 passed out of their respective houses unanimously without amendment.

Ms. Farrar-Owens informed the Commission that staff had begun planning for the full reanalysis of all Guidelines. The planning takes into account a number of challenges, including recent statutory changes. Staff proposed to begin the reanalysis with offense groups that are unaffected by recent statutory changes. Ms. Farrar-Owens provided an overview of the methodology used to develop the Guidelines.

She concluded by saying that if the study proceeds according to plan, staff may present preliminary models at the September 2022 meeting and final models with proposed recommendations at the November 2022 meeting.

IMPLEMENTATION OF STATUTORY CHANGES & GUIDELINES REVISIONS – FELONY SENTENCING GUIDELINES AND PROBATION VIOLATION GUIDELINES (FY2022 TO DATE)

Presentation link: <http://www.vcsc.virginia.gov/2022Meeting/Implementation2022.pdf>

Mr. Jody Fridley, the Commission's Deputy Director, reminded members that the Commission had implemented several modifications to the Guidelines, effective July 1, 2021. He presented a preliminary report on implementation and concurrence with the revised Guidelines for FY2022 to date.

A new factor on the Guidelines in FY2022 allows the judge the option to consider the defendant's substantial assistance, acceptance of responsibility or expression of remorse. If the judge determines at sentencing that the defendant provided substantial assistance, accepted responsibility or expressed remorse, the low end of the Guidelines recommended range is reduced. Mr. Fridley reported that judges had checked the box for this new factor in 11% of the FY2022 Guidelines worksheets received. For approximately half of these cases, utilization of this factor by the judge brought the sentence into concurrence with the Guidelines recommendation.

The Sentencing Commission implemented the new Case Details Worksheet and incorporated it into the Guidelines for FY2022. The majority of the Case Details Worksheet captures details that must be known to accurately score the Guidelines. 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, which the judge may wish to consider in the sentencing decision. This one-page worksheet is designed to provide vital and essential information for the court, the Commission, and state policy makers. Mr. Fridley reported that the Case Details Worksheet, in many cases, was either missing or incomplete. For example, the defendant's race was missing in 50% of the FY2022 cases received to date and the type of drug was missing in 49% of Schedule I or II drug cases. Mr. Fridley noted that responses to Question #21 were missing in nearly two-thirds of the cases. Mr. Fridley stated that, based on feedback from the field, Guidelines preparers were using Question #21 as a reason not to complete the Case Details Worksheet or to have defense counsel complete the worksheet. Staff proposed that the Commission label Question #21 as optional.

Mr. Fridley then gave a preliminary FY2022 report on Sentencing Revocation Reports (SRRs) and Probation Violation Guidelines (PVGs) submitted to the Commission and automated from July to December 2021. Based on preliminary analysis, courts were not holding separate violation hearings for individual probation violations (in lieu of one hearing covering multiple violations), as some users had feared. On the Final Disposition section of the Sentencing Revocation Report (SRR), staff proposed changing the reference to "indefinite" probation to "indeterminate" probation, as the latter term better reflected the nature of what was being ordered by the court.

Judge Moreau made a motion to adopt this recommendation to change the wording, which was seconded by Judge Kelly. With no further discussion, the Commission voted 17-0 in favor.

According to Mr. Fridley, analysis of early FY2022 data suggested that sentences for technical violations have been lower under the new Probation Violation Guidelines and new statutory provisions compared to sentences handed down in the years past (prior to the onset of the COVID-19 pandemic, release of the new Guidelines, and enactment of the new statutory caps). Given the limited data available, no conclusions can yet be drawn about potential impacts of these changes.

Mr. Fridley reviewed the new factor on the Sentencing Revocation Report for FY2022 related to rehabilitation potential. If the judge determines that the probationer is a good candidate for rehabilitation, he/she can check the box and the low end of the Probation Violation Guidelines recommendation is reduced to zero. Judges have used this new factor in 4% of the Probation Violation Guidelines cases, which is about the level anticipated based on previous analysis.

Mr. Fridley provided a preliminary report on concurrence with the new Probation Violation Guidelines in effect for FY2022. With the implementation of the new Probation Violation Guidelines, judicial concurrence had improved considerably. Some of the increase in concurrence was due to the Commission's adjustment of the new Probation Violation Guidelines to integrate the new statutory sentencing caps for certain technical violations. Mr. Fridley noted that staff would continue to analyze violation data as it became available.

Members suggested that Ms. Farrar-Owens and Mr. Fridley promote the completion of the Case Details Worksheet at the upcoming Judicial Conference in May. Several members indicated they would like to be presented with additional information regarding completion of the Case Details Worksheet at the next Commission meeting (June 13, 2022).

MISCELLANEOUS ITEMS

Ms. Farrar-Owens indicated that the Commission's next newsletter would be sent out to members in May or June. She asked members to submit topic suggestions for the newsletter.

Ms. Farrar-Owens reminded members of the remaining 2022 meeting dates: June 13, September 7, and November 2.

With no comments and there being no further business, the Commission adjourned at 12:35pm.

[Meeting Video Link](#)

NEXT VCSC MEETING:

Date: Monday, June 13, 2022

Time : 10:00 am

Members of the public may request participation by sending email to:

Carolyn.williamson@vacourts.gov.

Respectfully submitted by:

Carolyn Williamson, Research Associate

Minutes Reviewed by:

Meredith Farrar-Owens, Director