



# Virginia Criminal Sentencing Commission

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**Meeting of the Virginia Criminal Sentencing Commission  
September 13, 2022  
10:00 am – 12:40 pm**

**Meeting held at the Virginia Supreme Court and via WebEx**

## **Meeting Minutes**

**Members Attending In Person:** Judge Charles S. Sharp (Vice Chairman), Delegate Les R. Adams, Marcus Elam, Judge Dennis Hupp, Judge Patricia Kelly, and Shannon Taylor

**Members Attending Virtually:** Linda Brown, Timothy S. Coyne, Patrick Giallorenzo for Senator John Edwards, Judge Steven C. Frucci, Dr. Michon Moon, Judge Stacey Moreau, Judge W. Revell Lewis, and Nicole Wittmann (Attorney General Representative)

**Members Absent:** Judge Edward L. Hogshire (Chairman), Judge Jack S. Hurley, and K. Scott Miles

### **WELCOME**

Before calling the meeting to order, Judge Sharp, Commission Vice Chairman, welcomed Commission members. He informed members that Judge Hogshire was away on vacation and that he would be chairing the meeting in Judge Hogshire's absence.

Judge Sharp introduced a recently-appointed Commission member. The Speaker of the House of Delegates appointed Judge Dennis Hupp, retired circuit judge from Shenandoah County, to fill the vacancy created by the recent elevation of Judge Mann to the Virginia Supreme Court. Judge Hupp previously served on the Commission from 2003 to 2010 and then again from 2016 to 2018.

### **AGENDA**

The meeting agenda is available at: <http://www.vcsc.virginia.gov/2022Meeting/AgendaSep1322.pdf>

### **APPROVAL OF MINUTES FROM LAST COMMISSION MEETING**

Minutes from the meeting held on June 13, 2022, were approved as submitted. The meeting minutes are available at: <http://www.vcsc.virginia.gov/2022Meeting/MinutesJun132022.pdf>

### **FEEDBACK FROM THE FIELD**

Presentation link: <http://www.vcsc.virginia.gov/2022Meeting/FeedbackFieldSept2022.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 certain Commission policies/procedures. He provided an overview of the feedback and the solutions proposed by staff.

### **Sentencing Guidelines and Deferred Dispositions**

According to Mr. Fridley, for a number of years, it has been the Sentencing Commission's policy that Guidelines for defendants placed under First Offender status (§ 18.2-251) and other deferred dispositions be submitted to the Commission. The rationale is three-fold: 1) the Commission is statutorily mandated to study felony sentencing patterns (§ 17.1-803); 2) currently, annual Sentencing Guidelines counts are used in the workload formula for Commonwealth's Attorneys, and 3) information is needed to respond to policymakers about what types of offenses are deferred, who receives a deferred disposition, and success and violation rates. He noted that the General Assembly has recently expanded judicial options for deferred dispositions (§§ 19.2-303.6 and 19.2-298.02). While Commission policy has established that the Guidelines be submitted for First Offender and deferred cases, the *Code of Virginia* specifies that Guidelines and court orders be submitted to the Commission "following the entry of a final order of conviction and sentence" (§ 19.2-298.01(E)). Thus, with the expansion of deferred dispositions, there is no good way to track all defendants who fail to comply with the conditions of the deferral and monitor differences in sentencing patterns after a deferral failure.

Mr. Fridley presented options for the Commission's consideration: 1) a legislative proposal to modify the *Code of Virginia* to require submission of the completed Cover Sheet, Guidelines and Case Details Worksheet in cases resulting in deferred dispositions; 2) the addition of a check box on the Sentencing Guidelines Cover Sheet to identify individuals returned to court for violation of the conditions of a deferral; and/or 3) the addition of a modifier to the Virginia Crime Codes to identify cases in which defendants are sentenced for a felony offense after violating the conditions of the deferred dispositions.

Judge Hupp recommended that the Commission pursue a statutory change and add the check box to the Guidelines forms to identify these cases. Judge Kelly agreed. Judge Hupp made a motion to recommend a statutory change and add a check box to the Guidelines form. Ms. Taylor seconded the motion. With no further discussion, the Commission voted 14-0 in favor.

### **Jury Sentencing**

Mr. Fridley described recent legislation adopted by the General Assembly that substantially changed the jury trial process in Virginia, effective July 1, 2021. Virginia was one of five states in the nation that provided for jury sentencing in non-capital cases. Beginning July 1, 2021, the new law provides that, in a criminal case tried by a jury, the defendant will be sentenced by the judge unless he or she requests that the jury recommend punishment. Mr. Fridley stated that court orders and databases are not required to identify whether the jury recommended the sentence or the judge sentenced without a jury recommendation; therefore, there currently is no systematic way to know the extent to which defendants are choosing a jury sentence. Moreover, the Sentencing Guidelines Cover Sheet is often completed incorrectly in such cases.

Mr. Fridley presented options for the Commission's consideration: 1) request that the Office of the Secretary of the Supreme Court of Virginia add a code or codes to the Court Case Management System (CMS) to identify the sentencing mechanism, and/or 2) per Judicial Services recommendation, request a legislation change to require the distinction in court orders and databases.

Judge Sharp and Judge Moreau believed this information could be found in court orders already. Judge Sharp also noted that the judge has the final sentencing authority either way. Delegate Adams was uncertain of the best approach for a statutory change. Ms. Farrar-Owens said she would contact the Judicial Council about a possible solution. Judge Kelly suggested that the next Newsletter could be used

to educate Guidelines users on the correct way to complete the jury boxes on the Guidelines Cover Sheet. Judge Hupp agreed. Judge Kelly made a motion to add the topic of jury sentencing to the next Commission newsletter. Judge Hupp seconded the motion. With no further discussion, the Commission voted 14-0 in favor.

### **Probation Violation Guidelines**

Mr. Fridley informed members that, in a number of jurisdictions, communication issues between the clerk, Commonwealth's attorney and probation officer regarding the scheduling of revocation hearings and changes on the day of the hearing as to the probation conditions violated were causing delays in the courts. According to Mr. Fridley, probation officers are concerned that probation violations are placed on the courts' docket without notice or without sufficient notice for them to accurately prepare the Probation Violation Guidelines. Attorneys are concerned about delays in sentencing because of the statutory requirement that probation officers must complete the Probation Violation Guidelines. The Commission allows the attorney for the Commonwealth to prepare the Guidelines when the attorney has the Major Violation Report and the statutory requirements limit the sentence to no time or 0-14 days. This is not defined by statute, but the recommendation generated in such instances is based on the statutory requirement and not a Guidelines recommendation.

Mr. Fridley noted that solutions must place the need for accurate Guidelines over simply satisfying the requirement that a form be submitted to the court. Solutions must adhere to statutory requirements. SWIFT, the Commission's automated Guidelines application, allows for the modification of Guidelines from the bench, but it requires the judge to make the change. Delegate Adams believed legislation would be introduced during the upcoming session to clarify aspects of the recent legislation (see § 19.2-306.1). As a possible solution, Mr. Fridley inquired if better communication and completion of multiple Guidelines scenarios before the revocation hearing might limit delays (i.e., having multiple Guidelines available for the court's review).

Ms. Taylor commented that attorneys have been struggling with issues of special conditions versus technical violations and the interpretation of absconding and failing to report. Ms. Taylor made a motion to postpone any action on this issue since there are legislative efforts underway for the next General Assembly Session. Judge Kelly seconded. With no further discussion, the Commission voted 14-0 in favor.

### **FELONY SENTENCING GUIDELINES JUDICIAL SURVEY**

Presentation link: <http://www.vcsc.virginia.gov/2022Meeting/JudicialSurveySep2022.pdf>

Ms. Farrar-Owens, the Commission's Director, briefly 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. Staff recommended conducting a survey of circuit court judges to obtain input and guidance for the re-analysis project. The Commission's previous survey, related to Probation Violation Guidelines, had a high response rate and was very informative (2018). 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.

Members had been sent a draft of the survey ahead of the meeting for their review and a copy also was provided in the members' materials. Before discussing the survey questions, Ms. Farrar-Owens noted that judges will have the option to take the survey online through Survey Monkey or on paper. Results of the survey will be presented at the November meeting. Ms. Farrar-Owens emphasized that judges' responses to the survey would be anonymous, as no identifying information would be captured.

Ms. Farrar-Owens presented each of the survey's 16 questions. The survey included questions about the way the judge approaches sentencing in felony cases and factors important to the judge when sentencing felony defendants. Regarding such factors, the survey asked the responding judge to indicate the importance of each factor in the sentencing decision from "not at all important" to "extremely important. The survey included specific questions to the responding judge's opinion on the scoring of prior record on the Guidelines. The survey concluded with an open-ended question asking if the judge had anything else he/she would like to communicate to the Commission regarding the Sentencing Guidelines.

Judge Kelly asked for more clarification on a question related to time served in jail prior to sentencing and recommended revision in wording. Judge Moreau recommended changes to a question related to scoring the defendant's prior record and how the "look back period" should be applied. Ms. Farrar-Owens responded that staff would make the changes recommended by members. Judge Kelly asked if the Commission should ask Chief Justice Goodwyn to send an e-mail encouraging judges to participate.

Judge Frucci made a motion to revise the judicial survey as discussed by members and administer it prior to the November meeting. The motion was seconded by Judge Hupp. Members voted unanimously to approve the motion.

#### **PRETRIAL DATA PROJECT – PRELIMINARY FINDINGS**

Presentation link: <http://www.vcsc.virginia.gov/2022Meeting/PretrialDataProjectSep2022.pdf>

Dr. Chen, the Commission's Data Scientist, gave a brief overview of the Pretrial Data Project. A significant lack of data on Virginia's pretrial system led to the creation of the Pretrial Data Project. The General Assembly passed legislation, effective July 1, 2021, requiring the Commission to continue the project.<sup>1</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 from the website.

Dr. Chen described the Commission's approach for the newest phase of the project. 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. Chen listed the data sources used for the project.

Dr. Chen then presented preliminary findings. The analysis was based on the 97,265 contact events that included a new criminal offense punishable by incarceration where the bail determination was made by a judicial officer. Of those contact events, 84,064 defendants (86.4%) were released during the pretrial period. Of those released, 59.3% were released on a personal recognizance (PR) or unsecured bond, while 40.7% were released on a secured bond. She noted that defendants categorized as indigent were more likely to be charged with a felony offense than non-indigent defendants and they were more likely to be detained throughout the pretrial period. Staff scored all of the individuals in the cohort on a pretrial risk assessment tool called the Public Safety Assessment (PSA). Staff then tracked defendants through the disposition of the case or March 31, 2020, whichever came first. The study revealed that the lowest risk pretrial defendants were the least likely to be charged with failure to appear for court and were the least likely to be arrested for a new offense during the pretrial period.

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

Judge Kelly asked if the staff would address the members at the November meeting about the final report that is due on December 1. Ms. Farrar-Owens said that more information will be discussed at the next meeting and that members would receive a draft of the report for their review before its submission.

### **SENTENCING GUIDELINES CONCURRENCE – PRELIMINARY FY2022 REPORT**

Presentation link: <http://www.vcsc.virginia.gov/2022Meeting/ConcurrenceSept2022.pdf>

Mr. Barnes, Research Associate, presented a preliminary compliance report for fiscal year (FY) 2022. Mr. Barnes stated that a total of 16,436 Guidelines worksheets had been submitted to the Commission and automated as of August 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 were added to the Guidelines manual in July 2022.<sup>2</sup> Judges had checked the box (to indicate the defendant's substantial assistance, acceptance of responsibility or expression of remorse) on 1,808 (11.7%) of the 15,511 worksheets used in the analysis. Nearly half of the cases were already in concurrence with the Guidelines recommendation; therefore, checking the box did not bring 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 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%).

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 36% 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 also provided a preliminary report on FY2022 Sentencing Revocation Reports (SRRs) and Probation Violation Guidelines (PVGs) submitted to the Commission and automated through August 15, 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 despite the current violation(s).<sup>3</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.

Judge Frucci asked if a box could be added to the Probation Violation Guidelines for modification of the recommendation based on a probationer's substantial assistance, acceptance of responsibility or expression of remorse for the violation. Ms. Farrar-Owens said that the staff could examine the data and report back to the Commission. Judge Sharp asked the staff to examine the data to see if the data supported such a change.

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<sup>2</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%.

<sup>3</sup> When the judge determines a probationer has good rehabilitation potential, despite the current violation, the Probation Violation Guidelines are adjusted, and the low end of the range is reduced to zero or "time served."

## **MISCELLANEOUS ITEMS**

Ms. Farrar-Owens provided an update on 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). The legislation as passed 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 date: Wednesday, November 2.

## **PUBLIC COMMENT**

During the public comment, a concerned citizen wondered why juries are not provided the Sentencing Guidelines. She felt that the Guidelines would be an important resource for juries to have. Judge Sharp noted that legislation would be required to change the law and allow juries to receive the Guidelines. He recommended that she contact her legislators. Judge Sharp thanked her for her interest in the Commission.

With no comments and there being no further business, the Commission adjourned at 12:45 p.m.

## **Sentencing Commission Meeting Recording**

### **NEXT VCSC MEETING:**

Date: Wednesday, November 2, 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