



Virginia Criminal Sentencing Commission

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Meeting of the Virginia Criminal Sentencing Commission

June 12, 2023

10:00 am – 12:40 pm

Meeting held at the Virginia Supreme Court Building and via WebEx

Meeting Minutes

Members Attending In Person: Judge Edward L. Hogshire (Chairman), Delegate Les R. Adams, Timothy S. Coyne, Senator John Edwards, Marcus Elam, Bethany Harrison, Judge Robert J. Humphreys, Judge Jack S. Hurley, Dr. Michon Moon, Judge Stacey Moreau, Judge Bryant L. Sugg and Robert Tracci (for Nicole Wittmann)

Members Attending Virtually*:

K. Scott Miles – Reason cited: Principal residence is more than 60 miles from the meeting location / Participation location: Norfolk, Va.

Members Absent: Judge Steven C. Frucci, Judge Dennis Hupp, Judge Patricia Kelly, and Judge Victoria A.B. Willis

WELCOME

Before calling the meeting to order, Judge Hogshire, Commission Chairman, welcomed a new staff member. Cassandra Wright recently joined the staff as a Training Associate.

AGENDA

The meeting agenda is available at: <http://www.vcsc.virginia.gov/2023Meetings/AgendaJun1223.pdf>

APPROVAL OF MINUTES FROM LAST COMMISSION MEETING

Minutes from the meeting held on March 27, 2023, were approved as submitted. The meeting minutes are available at: <http://www.vcsc.virginia.gov/2023Meeting/MinutesMar2723.pdf>.

OVERVIEW OF INTERSTATE COMPACT FOR ADULT OFFENDER SUPERVISION

Presentation link: <http://www.vcsc.virginia.gov/2023Meetings/ICAOSJun2023.pdf>

Virginia participates in a multistate agreement known as the Interstate Compact for Adult Offender Supervision (ICAOS). Ms. Julie Lohman, Deputy Compact Administrator with the Virginia Department of Corrections, provided an overview of the program. Ms. Lohman was accompanied by Jim Parks, the Interstate Compact Commissioner, and Zugeilie Diaz, Compact Supervisor.

* Virginia Code § 2.2-3708 specifies that, if remote participation by a member is approved, the minutes of the meeting must specify that the member participated remotely, the general location from which the member participated, and the specific condition cited by the member when notifying the Chair of his or her need for remote participation.

The ICAOS is a nationwide agreement that permits the transfer of supervision obligations from one state to another after an individual is released from court, jail, or prison. According to Ms. Lohman, the agreement helps certain supervisees achieve successful re-entry into the community by providing a new start to experience improved residential, employment, or social conditions. Receiving states must treat compact supervisees as they would their own. Supervisees are returned to the sending state when a probationer violates the conditions of community supervision.

Ms. Lohman stated that the purpose of ICAOS is to promote public safety, ensure effective supervision and rehabilitation, protect the rights of victims, and control and track movement of offenders. The Virginia Interstate Compact Unit at the Virginia Department of Corrections acts as the central authority in monitoring and regulating interstate transfers into and out of the Commonwealth. Ms. Lohman highlighted some regulatory details and described the advantages and disadvantages of the Compact agreement.

Ms. Lohman continued by saying that all fifty states plus the District of Columbia, US Virgin Islands, and Puerto Rico are members of the ICAOS agreement. The Commonwealth of Virginia has the fourth largest volume of interstate cases among the 50 states.

- 7,766 total Interstate cases into & out of Virginia (as of 5/26/2023)
 - 5,320 out of Virginia
 - 2,446 into Virginia

Ms. Lohman explained the criteria that make an offender eligible for transfer and the different types of transfers. She then discussed important elements of Compact supervision for both the sending and receiving state. In order to participate, the probationer must waive extradition back to the sending state should he violate conditions of supervision. Ms. Lohman shared some of the challenges associated with the Compact. She reviewed the implications should a state not comply with Compact rules. Failure to comply with Compact rules could lead the Interstate Commission to take corrective or punitive action, including suit in federal court for injunctive relief. Ms. Lohman concluded by providing a list of resources for additional information on the ICAOS, rules and procedures.

RECENT CASES FROM THE COURT OF APPEALS OF VIRGINIA RELATED TO PROBATION VIOLATIONS

Presentation link: <http://www.vcsc.virginia.gov/2023Meetings/ProbationViolationsJun2023.pdf>

The Virginia Court of Appeals has issued a number of opinions regarding the applicability of § 19.2-306.1, which became effective on July 1, 2021 (see House Bill 2038, 2021 General Assembly, Special Session I). Judge Robert J. Humphreys, judge on the Court of Appeals and a Sentencing Commission member, reviewed the statutory authority for probation in Virginia and the recent Court of Appeals opinions. The opinions were included in the members' materials. Link to presentation video: <https://www.youtube.com/watch?v=WCLqliMZRfg>

Judge Humphreys discussed relevant sections of the *Code of Virginia* (§§ 19.2-303, 19.2-306 and 19.2-306.1). He listed the violations that are defined as "technical" violations in § 19.2-306.1 and the penalties prescribed. Judge Humphreys explained the way the statute refers to other types of violations and a potential issue associated with the statute's use of the term "good conduct violation." He then discussed certain statutory construction considerations, noting that courts have the inherent power to enforce their own orders.

Judge Humphreys proceeded to discuss recent Court of Appeals opinions related to § 19.2-306.1 and the relevance of each.

Delaune v. Commonwealth, 76 Va. App. 372 (2023). The Court concluded that the limitation on confinement for conduct defined as a technical violation applies irrespective of whether it is made a “special condition” of probation in the original sentencing order.

Heart v. Commonwealth, 75 Va. App. 453 (2022). The statutory language “third or subsequent technical violation” means a “technical violation” of probation preceded by two prior “technical violations” of probation. The two prior revocations must be known to be technical for the provision related to the “third or subsequent technical violation” to apply.

Diaz-Urrutia v. Commonwealth, 76 Va. App. ___ 0502224 (April 4, 2023). [I]f the defendant has been convicted of a new criminal offense, then the court may revoke the suspension and impose or resuspend any or all of that period previously suspended. Additionally, the court may revoke the suspension and impose any or all of the previously suspended sentence if the basis of the violation is “another condition,” i.e., a special condition, that is not an enumerated technical violation or a good conduct violation that does not result in a new criminal conviction.

Diaz-Urrutia specifies that “a sentencing court must engage in a four-step process to classify the basis of the revocation proceeding before determining what sentence it may impose.” These steps are as follows:

1. The “court must determine whether the violation conduct matches the conduct [specifically] listed in § 19.2-306.1(A). If so, then the defendant has committed a technical violation and the sentencing limitations found in § 19.2-306.1(A) apply, regardless of whether the sentencing court included that conduct as “another condition” of the defendant’s suspended sentence.” The statutory requirement will be zero time for the first violation and no more than 14 days for a second or subsequent violation.

If the defendant is found in violation of § 19.2-306.1. (viii) failure to refrain from the use, ownership, possession, or transportation of a firearm; or (x) failure to maintain contact with the probation officer whereby the defendant’s whereabouts are no longer known to the probation officer (similar to State Conditions of Probation #9, related to firearms, and #11, related to absconding), the statutory requirement will be no more than 14 days for the first violation. For a second violation related to conduct defined by § 19.2-306.1 (viii) or (x), there are no statutory caps specified.

2. If the violation conduct does not match the conduct listed in § 19.2-306.1(A), the court must then determine whether another condition, other than the generic good behavior condition of the defendant’s suspended sentence, covers the conduct. If so, then the court’s sentencing authority is not restricted by § 19.2-306.1.
3. If the defendant’s sentencing order contained no other condition matching the violation conduct, then the court must determine whether the conduct resulted in a new criminal conviction. If so, then the court’s sentencing authority is not restricted by § 19.2-306.1.
4. If none of the above apply, then the court must determine whether the defendant engaged in substantial misconduct amounting to a good conduct violation.” (In *Diaz-Urrutia v. Commonwealth* the Court of Appeals did not decide what sanction is required, if any, for a good conduct violation.)

***Thomas v. Commonwealth*, ___ Va. App. ___ 047722 (May 9, 2023).** “Special conditions” of probation may be fashioned by either the court or the PO and are separate from the general conditions imposed on all probationers. If the underlying conduct falls within a technical violation and a special condition, the technical violation limitations apply; otherwise, not.

Judge Hurley asked if there were any recent court decisions on the five-year limitation for supervised probation. Judge Humphreys stated there had been no cases deciding that issue. He noted that some unpublished opinions affirm situations where the court imposed more than five years of probation, but the violations occurred prior to the effective date of § 19.2-306.1 and the statute was not retroactive.

VIRGINIA’S PRETRIAL DATA PROJECT – FINDINGS FROM RECENT RESEARCH

Presentation link: <http://www.vcsc.virginia.gov/2023Meetings/PretrialJun2023.pdf>

Meredith 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 regarding various pretrial release mechanisms, conditions of pretrial release, appearance at court proceedings, and public safety. As a result, the Virginia Pretrial Data Project was established. The goal of the Project was to compile data sufficient to answer many questions, such as: what percentage of defendants are released to the community while awaiting trial? 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. The 2021 General Assembly passed legislation directing the Sentencing Commission to continue this work on an annual basis.

Ms. Farrar-Owens stated that, for the most recent study, staff selected individuals with pretrial contact events during Calendar Year (CY) 2018. A contact event is the point at which an individual comes into contact with the criminal justice system and he or she is charged with a criminal offense, thus beginning the pretrial process. CY2018 was selected for the study in order to establish a pre-COVID baseline of pretrial data. For individuals with more than one contact event during CY2018, only the first event was selected. Individuals were tracked for a minimum of 15 months. The study focused on the 96,135 adult defendants whose CY2018 contact event included a criminal offense punishable by incarceration where bail determination was made by a judicial officer. The [Commissions’ December 2022 report](#) provides a snapshot of defendants at key points in the pretrial process. She noted that additional research is necessary in order to better understand the relationships among factors and the impact each factor may have on pretrial decision making and outcomes.

She then asked Dr. Chang Kwon, the Commission’s Chief Methodologist, to present key findings from recent research conducted by staff. Dr. Kwon stated that staff had recently conducted research to ascertain the effect of attorney type (public defender, court-appointed, or private) on pretrial release and sentence outcome. He indicated that 59% of the defendants in the CY2018 cohort had been assigned a court-appointed attorney or public defender (as captured at case closure). Dr. Kwon displayed a list of the factors included in the analysis, described the methodology, and noted certain limitations of the study. He explained that staff conducted analyses to examine the effect of attorney at various points: whether or not the defendant was detained pretrial, days in jail until pretrial release, whether the defendant was convicted, whether the defendant was convicted of the original or reduced charge, whether an incarceration sentence was ordered, and effective sentence length. Dr. Kwon presented a series of slides displaying the results of the analyses. For example, the results suggested

that, given the factors in the statistical models, public defenders achieved better outcomes for their clients (compared to court-appointed attorneys) in regards to pretrial release and effective sentence length.

Dr. Kwon then discussed a research project related to the Public Safety Assessment (PSA). The PSA is a pretrial risk assessment tool developed by Arnold Ventures that has been validated in a number of states/localities outside of Virginia. Risk assessment tools are commonly used at various stages within the criminal justice system to assist with decision making. The Virginia Department of Criminal Justice Services (DCJS), which oversees Pretrial Services Agencies, is planning to pilot test the PSA risk assessment instrument in select sites around the Commonwealth. Ms. Farrar-Owens serves on two of the committees providing input to DCJS regarding implementation. The Commission's research provides additional information for DCJS as it considers switching from the current pretrial risk assessment instrument to the PSA across the Commonwealth. According to Dr. Kwon, the findings from several statistical analyses suggest that the PSA risk assessment score is a valid predictor of the defendant's failure to appear in court. It is also a valid predictor as to whether or not the defendant had a new criminal arrest for an offense alleged to have been committed during the pretrial period. PSA scores, however, do not account for all of the factors that have important effects on pretrial outcomes.

FEE WAIVERS FOR TRAINING AND MANUALS

Presentation link: <http://www.vcsc.virginia.gov/2023Meetings/FeeWaiversJun2023.pdf>

Mr. Jody Fridley, the Commission's Deputy Director, 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 for 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 were previously approved by the Commission. He presented the FY2023 program report, describing the characteristics of the applicants and approvals for fee waivers. Mr. Fridley asked if the Commission wished to approve funds for waivers for FY2024. 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 of \$3,000 for waivers (the same amount as FY2023), 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 informed members that, as part of the Pretrial Data Project, staff submitted a request to the Federal Bureau of Investigation for access to out-of-state criminal records for defendants included in the study. She reported that the Commission's request had been approved at the first stage and the application was currently in the second-stage review.

Ms. Farrar-Owens reminded members of the remaining 2023 meeting dates: September 11 and November 1.

PUBLIC COMMENT

No member of the public wished to provide comment.

ADJOURNMENT

With no comments and there being no further business, the Commission adjourned at 12:40 p.m.

LINK TO MEETING RECORDING

<http://www.vcsc.virginia.gov/2023Meetings/Virginia%20Criminal%20Sentencing%20Commission%20Meeting-20230612%20Final.mp4>

NEXT VCSC MEETING:

Date: Monday, September 11, 2023

Time: 10:00 a.m.

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