



# Virginia Criminal Sentencing Commission

100 North Ninth Street • Richmond, Virginia 23219 • Tel.: 804.225.4398 • Fax: 804.786.3934

## Meeting of the Virginia Criminal Sentencing Commission

March 27, 2023

10:00 am – 12:15 pm

Meeting held at the Virginia Supreme Court Building and via WebEx

### Meeting Minutes

Members Attending In Person: **Judge Edward L. Hogshire** (Chairman), **Timothy S. Coyne**, **Marcus Elam**, **Judge Steven C. Frucci**, **Bethany Harrison**, **Judge Robert J. Humphreys**, **Judge Jack S. Hurley**, **Judge Patricia Kelly**, **Dr. Michon Moon**, **Judge Stacey Moreau** and **Judge Bryant L. Sugg**

Members Attending Virtually\*:

**Delegate Les R. Adams** – Reason cited: Principal residence is more than 60 miles from the meeting location / Participation location: Chatham, Va.

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

**Judge Victoria A.B. Willis** – Reason cited: Personal matter, specifically a schedule conflict with another judicial obligation / Participation location: Automobile traveling to Lynchburg, Va.

**Nicole Wittmann** (Attorney General Representative) – Reason cited: Principal residence is more than 60 miles from the meeting location / Participation location: Loudoun County, Va.

Members Absent: **Senator John Edwards** and **Judge Dennis Hupp**

### WELCOME

Before calling the meeting to order, Judge Hogshire, Commission Chairman, welcomed Commission members. Judge Hogshire introduced four new members. Chief Justice Goodwyn recently appointed Judge Bryant Sugg of the 7<sup>th</sup> Judicial Circuit and Judge Victoria Willis of the 15<sup>th</sup> Circuit to fill the vacancies left by the departures of Judge Sharp and Judge Lewis. Governor Youngkin recently appointed Judge Robert Humphreys of the Court of Appeals and Ms. Bethany Harrison, the elected Commonwealth's Attorney in Lynchburg, to fill the vacancies left by Shannon Taylor and Linda Brown. Judge Humphreys previously served on the Commission from 2002 to 2012.

### AGENDA

The meeting agenda is available at: <http://www.vcsc.virginia.gov/2023Meeting/AgendaMar2323.pdf>.

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\* 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.

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

Minutes from the meeting held on November 2, 2022, were approved as submitted. The meeting minutes are available at: <http://www.vcsc.virginia.gov/2023Meeting/MinutesNov22022.pdf>.

## **ISSUES FROM THE FIELD**

Presentation link: <http://www.vcsc.virginia.gov/2023Meeting/IssuesFieldMar2023.pdf>

Mr. Fridley, the Commission's Deputy Director, indicated that a variety of issues had arisen in the field recently. Mr. Fridley noted that staff would like guidance from members on certain matters.

The meeting was paused for approximately 20 minutes due to technical difficulties, as members of the Commission and the public participating remotely could no longer hear the audio of the meeting. Once audio was restored for virtual participants, the meeting continued.

## **Recent Court Decisions**

Mr. Fridley stated that, in 2016, the Commission approved a study that would provide the foundation needed to revise the Probation Violation Guidelines. Based on analysis of revocation data, the new Probation Violation Guidelines were designed to produce recommendations that provide judges with a more accurate benchmark of the typical, or average, case outcome given the nature of the violation(s), the original most serious offense, the probationer's prior revocations, and any new convictions. The 2021 General Assembly accepted the Commission's recommendations to revise the Probation Violation Guidelines. The new Probation Violation Guidelines took effect on July 1, 2021.

With the passage of [House Bill 2038](#) in 2021, the Commission adjusted the new Probation Violation Guidelines to ensure they are compatible with the requirements of the new law. The historically-based Guidelines were modified so that they would not recommend more incarceration time than that permitted under the provisions of § 19.2-306.1. The new § 19.2-306.1 defines technical violations based largely on the standard Conditions of Probation for adults supervised by the state Department of Corrections. The statute does not define special conditions. Mr. Fridley informed members that Commonwealth Attorneys had been trained that special conditions had to be cited in the court order to be scored on the Probation Violation Guidelines.

Mr. Fridley stated that, in the current environment, Probation Violation Guidelines often do not reflect historically accurate recommendations and may not systematically reflect statutory requirements. This is because Probation Violation Guidelines are being used in a manner that reflects individual interpretations of case law and statutes. As a result, the Guidelines recommendations often reflect the opinions of individuals and vary based on region, court, judge, prosecutor, defense attorney and probation officer. This has increased disparity in sentencing in revocation cases.

Mr. Fridley discussed the potential impact of the recent Court of Appeals decisions on the Probation Violation Guidelines, particularly *Delaune v. Commonwealth* and *Henthorn v. Commonwealth*. The Court of Appeals opinions were included in the members materials. Mr. Fridley also displayed questions asked by users in the field.

Judge Humphreys informed members that several more cases related to § 19.2-306.1 are currently within the Court of Appeals and the opinions have not yet been published. He noted that the upcoming opinions could provide clarification on what constitutes good behavior, good conduct, and special condition violations.

Mr. Fridley indicated that staff would like to give standard instructions to Probation Officers as to the scoring of the Probation Violation Guidelines. Currently, staff instruct Probation Officers to score only the violations of conditions cited in the Probation Officer's Major Violation Report (MVR). If the violation behavior is not included in the MVR, the Probation Officers are instructed that they cannot score it on the Probation Violation Guidelines, and it would be up to the judge to determine if the conduct was a violation of § 19.2-306.1.

Ms. Farrar-Owens said that the General Assembly have made attempts to clarify the language in § 19.2-306.1, but the bills have not passed. Delegate Adams shared with members that he patroned the [House Bill 2013](#), which would have made changes to the definition of technical violation as it pertains to the revocation of suspension of sentence and probation, but it failed to pass the Senate.

After discussing the issue, the Commission decided not to change the Conditions of State Probation on the Sentencing Revocation Report to the descriptions of technical violations used in § 19.2-306.1.

Judge Kelly made a motion that Commission staff continue to study the issue and report back to the Commission at a future meeting; furthermore, the staff should continue to advise users to score only violations of conditions cited in the Major Violation Report. Probation Officers should not attempt to decide whether the limits of § 19.2-306.1 apply or interpret the impact of recent Court of Appeals Decisions on Guidelines. The motion was seconded. With no further discussion, the Commission voted 14-0 in favor.

### **Distribution of Guidelines**

Mr. Fridley reminded members that legislation adopted in 2022 modified § 17.1-803 and added § 19.2-306.2 to establish statutory requirements for Probation Violation Guidelines. Mr. Fridley noted that § 19.2-306.2 references § 17.1-803. Given this statutory reference, Mr. Fridley asked members if the provisions of § 19.2-298.01 (use of discretionary Sentencing Guidelines) apply to Probation Violation Guidelines. If so, Mr. Fridley asked members to approve the following statement for inclusion in Guidelines manuals and communications: *According to § 19.2-298.01 of the Code of Virginia, all discretionary Sentencing Guidelines shall be subject to the same distribution as presentence investigation reports (subsection A of § 19.2-299).* This language would encourage preparers to distribute Guidelines to all parties five days prior to the court hearing. He remarked that, currently, local procedures determine when defense counsel receives copies of the Probation Violation Guidelines.

The staff could:

- E-mail the requirement to all Probation Officers and attorneys for the Commonwealth;
- Send a text reminder;
- Include it in a newsletter; and
- In the near future, SWIFT could be modified to allow users to send Guidelines worksheets to other attorneys and probation officers.

Members discussed the feasibility of that type of distribution. Mr. Fridley asked, if the members felt that the provisions of § 19.2-298.01 did not apply to Probation Violation Guidelines, should the Commission request that the statute be modified?

After discussion by members, Judge Moreau made a motion for the Commission to establish a policy that, when an MVR is sent to the court and copied to Commonwealth attorney and defense counsel, a draft of the Probation Violation Guidelines should be attached to the MVR; furthermore, the final Guidelines should be submitted to all parties prior to the revocation hearing. The motion was seconded. With no further discussion, the Commission voted 14-0 in favor.

## **Docket Notifications**

Mr. Fridley informed members that, in several jurisdictions, violation hearings are added to the docket the evening before the hearing is to take place and the probation officer often does not receive notice. According to Mr. Fridley, probation officers cannot always have Guidelines available for the court on such short notice. Probation officers have asked if the Clerk could notify the Probation Office at the same time defense counsel is notified.

Mr. Fridley described the current Court Alert Subscription Service (CASS), which is a service that defendants, attorneys, witnesses, victims, media, etc., can subscribe to in order to receive a notification/reminder that a hearing for a particular case has been scheduled. There are limitations to CASS, such as the fact that a request for notification must be submitted for each case number of interest. This would create additional work for probation officers, as they would have to enter in all case numbers associated with their clients.

Mr. Fridley asked members if the Commission should adopt a policy to require that the Probation Violation Guidelines be prepared within a certain number of days after the defendant is arrested on the *capias*/warrant or he is served with the show cause. If so, a process to notify the Probation Office must be developed. Judge Moreau felt that would be different from court to court. Judge Kelly agreed that it would be difficult to issue a statewide policy on this issue. Judge Hogshire said that this topic could be discussed at the Judicial Conference in May when the Chief Justice meets with the Chief Judge in each circuit court. Judge Moreau suggested that the Chief Probation officer could also reach out to the Chief Judge about this issue.

## **PROPOSED CHANGE TO CALCULATING GUIDELINES CONCURRENCE**

Presentation link: <http://www.vcsc.virginia.gov/2023Meeting/PropChangeMar2023.pdf>

Mr. Jody Fridley reviewed the four sections of the *Code of Virginia* that explicitly provide for deferred dispositions (§§ 18.2-251, 18.2-258.1, 19.2-303.6 and 19.2-298.02). He noted that two of the sections were added in 2020.

Mr. Fridley reminded members that the Commission had requested legislation to clarify that judges must review Guidelines in cases in which they plan to defer disposition and to require court clerks to submit Guidelines from deferred disposition cases to the Commission. Delegate Adams carried the legislation (House Bill 2019), which was passed by the 2023 General Assembly.

Mr. Fridley explained the rationale for receiving Guidelines worksheets for deferred dispositions: 1) the Commission is charged in statute with studying felony sentencing patterns, 2) Sentencing Guidelines counts are used in the workload formula for Commonwealth's attorneys, 3) to enable the Commission to respond to policymakers about what type of offenses are deferred, who receives a deferred disposition, and success and violation rates.

Mr. Fridley presented an overview of how judicial concurrence with the felony Sentencing Guidelines is calculated. Concurrence with the Guidelines is measured by two distinct classes of concurrence: strict and general concurrence. Together, they comprise the overall concurrence rate. Strict concurrence by far makes up the largest share of the overall concurrence rate. For the case to be in strict concurrence, the offender must be sentenced to the same type of sanction as the Guidelines recommend and to a term which falls within the sentence range recommended by the Guidelines. General concurrence is composed of concurrence by rounding, sentences to time served, and concurrence through the nonviolent offender or sex offender risk assessment instruments.

Mr. Fridley reported that in FY2014-FY2018, most (93%) of the First Offender deferred disposition cases (§ 18.2-251) were in concurrence with the Guidelines recommendation. Under current Commission policy, however, all cases involving deferred disposition under § 18.2-251 are considered in concurrence. In contrast, during FY2021 - FY2022, the type of cases that were deferred under §§ 19.2- 298.02 or 19.2-303.6 included many cases for which the Guidelines recommended an active term of incarceration, and these are not currently considered to be in concurrence with the Guidelines (rather these would be mitigation sentences). If all deferred disposition cases were treated the same as First Offender (§ 18.2-251) dispositions under Commission policy, concurrence would artificially be set to 100% in such cases. This would skew concurrence figures and not reflect the actual dynamics of sentencing in that case.

The staff's proposal is to exclude all cases resulting in a deferred disposition from concurrence calculations. If a defendant later violates the conditions of a deferred disposition and is convicted of a felony, the Guidelines will be updated and the case will be included in judicial concurrence calculations at that time.

Judge Humphreys asked if, once a violation of a deferred disposition occurs and the defendant is sentenced, the staff would review the data to see if the deferred disposition failure was cited by the judge as a reason for departing above the Guidelines. Mr. Fridley indicated that staff would do so. Mr. Coyne asked if the cases would continue to be tracked by the staff if they were no longer included in concurrence calculations. Mr. Fridley responded by saying that such cases would be tracked.

Judge Moreau made a motion to accept the staff proposal to exclude all cases resulting in a deferred disposition from concurrence calculations until such time as the defendant is convicted of the offense. Judge Humphreys seconded the motion. With no further discussion, the Commission voted 14-0 in favor.

#### **REPORT ON THE 2023 GENERAL ASSEMBLY AND LEGISLATIVE IMPACT ANALYSIS**

Presentation link: <http://www.vcsc.virginia.gov/2023Meeting/GAReportMar2023.pdf>

Ms. Farrar-Owens, the Commission's Director, described the many activities of Commission staff during the 2023 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. 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 2023 General Assembly. Staff produced 285 statements. Proposals requiring fiscal impact statements most frequently involved the expansion or clarification of an existing statute (91%) or the definition of a new crime (54%). Ms. Farrar-Owens displayed a slide to show the diversity of topic areas among fiscal impact statements prepared. For the 2023 Session, the most common topic area was firearms/weapons. Commission staff also completed 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 2023 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 2023 General Assembly session pertaining to the recommendations in the Commission's *2022 Annual Report*. Therefore, the Commission's recommendations for Guidelines revisions would become effective on July 1, 2023. The General Assembly did pass the one piece of legislation requested by the Commission (House Bill 2019). House Bill 2019 clarifies that Guidelines must be reviewed even in cases in which the court plans to defer disposition and it specifies that the circuit court clerks must submit Guidelines forms to the Commission in cases resulting in a deferred disposition. The bill was patroned by Delegate Adams.

Ms. Farrar-Owens reviewed Senate Bill 939, 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 passed the Senate but was left in House Courts of Justice. Ms. Farrar-Owens concluded by quickly reviewing Senate Bill 1335, related to the Commission's fiscal impact statements for proposed legislation, and several other bills pertaining to sentencing, time served, and new/expanded felony offenses.

#### **DEVELOPMENT OF NEW ROBBERY GUIDELINES**

Presentation link: <http://www.vcsc.virginia.gov/2023Meeting/RobSGMar2023.pdf>

Mr. Barnes, Research Associate, presented a report on the development of new Sentencing Guidelines for robbery offenses. Mr. Barnes reminded members that the General Assembly made changes to § 18.2-58, effective July 1, 2021, that created different degrees of punishment for robbery based on the elements of the offense, with penalties ranging from a Class 2 felony down to a Class 6 felony.

As a result of the changes to the penalty structure for Robbery, the Commission had determined that robbery would not be covered as a Guidelines offense until a full analysis of sentencing under the new penalty structure can be completed. For non-Guidelines felonies, the Commission instructs users to prepare the Guidelines Coversheet and Case Details Worksheet and asks judges to enter sentence information on the back of the Coversheet. This information is critically important for the development of new Guidelines.

Mr. Barnes reported that staff analyzed FY2021 and FY2022 data from the Supreme Court of Virginia's Court Case Management System (CMS) to identify cases involving robbery and Sentencing Guidelines data from the same period. There were fewer robbery cases in Guidelines data than in CMS data. This suggests that users were not preparing and/or clerks were not submitting the Coversheet and Case Details Worksheet in a number of robbery cases. Also, there were relatively few robbery cases sentenced under the new penalty structure during that time period.

The staff proposed an audit to determine if and why Sentencing Guidelines Coversheets and Case Details Worksheets were missing. The audit would capture missing information from the Case Details Worksheets and move the development of Robbery Guidelines forward. The audit would be completed through access to court records in the clerks' Officer of the Court Record Access (OCRA) system. If OCRA is not available, then field visits would be needed. Staff asked the Commission for approval to conduct a continuous audit.

Judge Frucci commented that some attorneys will state in court that robbery is not a Guidelines offense, so no Guidelines are provided. Ms. Farrar-Owens agreed that is probably the issue. Judge Kelly suggested that this topic should be mentioned at the Judicial Conference. Ms. Farrar-Owens said that she would prepare a handout about the Case Details Worksheet and offenses not covered by the Guidelines for distribution at the conference.

Judge Moreau made a motion to move forward with the audit as proposed. Judge Humphreys seconded the motion. With no further discussion, the Commission voted 14-0 in favor.

#### **MISCELLANEOUS ITEMS**

Ms. Farrar-Owens informed members that, as part of the Pretrial Data Project, staff were preparing a request to the Federal Bureau of Investigation for special access to out-of-state criminal records for defendants included in the study. She hoped that she would have news about the access at the June meeting.

Ms. Farrar-Owens reported that staff would have a presence at the upcoming Judicial Conference and would have a table where judges could ask any Guidelines questions they may have.

Ms. Farrar-Owens reminded members of the remaining 2023 meeting dates: June 12, September 11, and November 1.

#### **PUBLIC COMMENT**

No member of the public wished to provide comment.

With no comments and there being no further business, the Commission adjourned at 12:13 p.m.

#### **Sentencing Commission Meeting Recording**

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

Date: Monday, June 12, 2023

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