



Virginia Criminal Sentencing Commission

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Meeting of the Virginia Criminal Sentencing Commission

September 11, 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 Dennis Hupp (Vice Chairman), Timothy S. Coyne, Senator John Edwards, Marcus Elam, Judge Steven C. Frucci, Judge Robert J. Humphreys, Judge Patricia Kelly, Dr. Michon Moon, Judge Stacey Moreau, Judge Bryant L. Sugg, Robert Tracci (for Nicole Whittman) and Judge Victoria A.B. Willis

Members Attending Virtually*:

Judge Jack S. Hurley – Reason cited: Principal residence is more than 60 miles from the meeting location / Participation location: Tazewell, Va.

Bethany Harrison – Reason cited: Principal residence is more than 60 miles from the meeting location / Participation location: Lynchburg, Va.

Members Absent: Judge Edward L. Hogshire (Chairman), Delegate Les R. Adams and K. Scott Miles

WELCOME

Before calling the meeting to order, Judge Hupp, the Commission's Vice Chairman, welcomed Commission members. He informed members that Judge Hogshire was out of state and that he would be chairing the meeting in Judge Hogshire's absence.

PUBLIC COMMENT

Judge Hupp announced that the Commission would not be taking oral public comment at the end of the meeting but that, anyone who wished to provide comment, could do so in writing.

AGENDA

The meeting agenda is available at: <http://www.vcsc.virginia.gov/2023Meetings/AgendaSep1123.pdf>

APPROVAL OF MINUTES FROM LAST COMMISSION MEETING

Minutes from the meeting held on June 12, 2023, were approved as submitted. The meeting minutes are available at: <http://www.vcsc.virginia.gov/2023Meetings/MinutesJun1223.pdf>.

* 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.

CASELOAD TRENDS IN VIRGINIA'S COURTS

Presentation link: <http://www.vcsc.virginia.gov/2023Meetings/VACourtsSept23.pdf>

Mr. Christopher Wade, Senior Management Data Analyst with the Supreme Court, provided an overview of criminal filing trends in Virginia's courts. He informed Commission members that Alexandria and Fairfax filing numbers are not included in the report because they do not participate in the Supreme Court Circuit Caseload Management System (CCMS). Mr. Wade noted that Alexandria would be joining CCMS in January 2024.

Several charts were presented on the impact of the COVID-19 pandemic on the number of filings and dispositions in the Circuit, General District and Juvenile Courts. He displayed a series of charts showing recent trends in criminal filings, case processing, clearance rates, and the amount of time to disposition. Mr. Wade presented charts showing pending felonies in Virginia's courts and discussed trends in jury trials.

SENTENCING GUIDELINES CONCURRENCE-PRELIMINARY FY2023 REPORT

Presentation link: <http://www.vcsc.virginia.gov/2023Meetings/ConcSep2023.pdf>

Ms. Kimberly Thomas, Training Associate, informed members that data were insufficient as yet to fully analyze the impact of recent statutory changes on sentencing practices or to assess the implementation of recent Guidelines revisions. Preliminary Guidelines data for fiscal year (FY) FY2023 were available. Ms. Thomas stated that a total of 10,825 Guidelines worksheets had been submitted to the Commission and automated as of July 1, 2023.

Ms. Thomas 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. 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%. A judge need only check the appropriate box on the disposition page to indicate his or her determination as to the applicability of this factor. For preliminary FY2023 data, the Modification of Recommendation factor box was checked by the sentencing judge in 16% of all FY2023 cases. Of those cases, just over half were brought from mitigation into concurrence.

Based on available data, the overall concurrence rate in FY2023 increased to 83% (from 76%) when the judge's use of the new factor for substantial assistance, acceptance of responsibility or expression of remorse was taken into account. Ms. Thomas observed that Miscellaneous Other cases had the highest Guidelines concurrence rate of all offense groups (90.2%). In contrast, Weapon offenses, with a concurrence rate of 64%, yielded the lowest concurrence rate and the highest aggravation rate.

She gave a preliminary report on FY2023 Sentencing Revocation Reports (SRRs) and Probation Violation Guidelines (PVGs) submitted to the Commission and automated through July 1, 2023. Judge Moreau and Judge Willis were concerned about the low numbers of PVGs received from their jurisdictions. Ms. Thomas said the staff were continuing to receive and key cases and the numbers will increase. She then 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. With the implementation of the new Probation Violation Guidelines, including the new factor for rehabilitation potential, judicial concurrence had improved considerably, reaching 90% among the FY2023 cases analyzed. As expected,

concurrency rates for first and second technical violations are high (99%), due to statutory caps on sentences for such violations.

POSSIBLE RECOMMENDATIONS FOR GUIDELINES REVISIONS

Presentation link: <http://www.vcsc.virginia.gov/2023Meetings/RecommGuideSep23.pdf>

Ms. Cassandra Wright, Training Associate, stated that the Commission closely monitors the Sentencing Guidelines system and, each year, members deliberate upon possible modifications to enhance the usefulness of the Guidelines as a tool for judges. Topics for possible Guidelines revisions are suggested by Commission members, prosecutors, defense attorneys, and other Guidelines users. In addition, staff closely examine compliance with the Guidelines and departure patterns in order to pinpoint specific areas where the Guidelines may need adjustment to better reflect current judicial thinking. The reasons judges write for departing from the Guidelines are very important in guiding the analysis. The staff's proposals represent the best fit for the available sentencing data. Any modifications to the Guidelines adopted by the Commission must be presented in its *Annual Report*, submitted to the General Assembly each December 1.

She presented nine offenses that could be analyzed for possible addition as new Guidelines offenses and discussed overall disposition and median sentences for each. Research of these offenses would proceed, if approved by members, and results of the analysis would be presented at the next meeting.

- Delivery of Drugs, Firearms, Explosives, etc. to Prisoner § 18.2-474.1;
- Prisoner Possess, Sell, Secrete, etc. Unlawful Chemical § 53.1-203(5);
- Prisoner Possess Weapon; Prisoner Tamper/Damage Fire System § 53.1-203(4); § 53.1-203(9);
- Selling/Possessing Drugs While Possessing Firearm § 18.2-308.4(A-C);
- Distribution of Methamphetamine – 10g or Greater § 18.2-248(C,4);
- Violation of Protective Order – 3rd Within 20 Years § 16.1-253.2(A);
- Resisting Arrest with Threats, Bodily Harm, or Force § 18.2-460(C);
- Torture/Mutilate Dog or Cat Resulting in Serious Injury/Death § 3.2-6570(F); and
- Conspire to Commit or Assist in Grand Larceny § 18.2-23(B)

Ms. Wright also gave an update on robbery penalty structure changes.

Mr. Coyne asked if there was a threshold for the number of cases for the Commission to proceed with Guidelines analysis. Ms. Farrar-Owens responded that the minimum number of cases is typically 50.

Judge Kelly made a motion to proceed with the analysis of the listed offenses (including robbery) and have the results presented at the next Commission meeting. Judge Sugg seconded the motion. The Commission voted 14-0 in favor.

ISSUES FROM THE FIELD

Presentation link: <http://www.vcsc.virginia.gov/2023Meetings/IssuesFieldSep23.pdf>

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

The first issue relates to missing information. Guidelines received by the Commission reveal that the Case Details Worksheet, in many cases, is either missing or incomplete. For non-Guidelines felonies,

the staff 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. The staff may be unable to move forward with the Robbery Guidelines analysis due to missing information. Guidelines cannot be modified to reflect current historical ranges. The lack of information increases the need for Pre or Post Sentence Investigation (PSI) reports.

Judge Frucci commented that Guidelines preparers were using Question #21 as a reason not to complete the Case Details Worksheet. He was disappointed that most of the information was still missing after the elimination of Question #21 in July 2023. Mr. Fridley said it is still too early to tell if the change made a difference. Dr. Moon suggested a pop-up note in the SWIFT automated system to tell users that mandatory fields should be completed before the preparer can finalize the Guidelines. Mr. Fridley said he could reach out to the Ethics group at the Virginia State Bar to see if it is an ethical issue. Ms. Harrison commented that she will make the Commonwealth Attorneys aware of the Commission's concerns at the next Commonwealth Attorneys Council meeting. Ms. Harrison said that, currently, prosecutors are not required to fill out the Case Details Worksheet. Mr. Fridley stated that all Guidelines worksheets are to be completed by preparers. Judge Kelly asked if the staff could prepare a report that details the number of missing Case Details Worksheet by preparer. The members decided not to take any further action at this time.

Mr. Fridley next discussed the recent modification to the Virginia Crime Codes (VCC) system to identify convictions resulting from the failure of a defendant to satisfy conditions of a deferred disposition. The SWIFT system was modified to allow judges to remove deferred disposition cases from the docket while the defendant is in deferred status. The Guidelines preparer must present updated Guidelines to the judge if the defendant violates conditions set by the court for the deferred disposition. New Guidelines are not required for successful deferral cases.

Mr. Fridley discussed an evolving trend in probation violation cases whereby a number of probation violations, one or more violations from the current probation period and one or more violations arising out of convictions for offenses committed during the previous probation period, are handled together in the same sentencing event. Mr. Fridley stated that staff had not analyzed this particular scenario as it was not common during the time period staff examined. For this reason, Mr. Fridley recommended that, in this scenario, preparers should check the "Procedural" box, meaning that no Guidelines recommendation would be presented to the judge. Members concurred.

The members were also provided a report of Guidelines received by the court for FY2022 and FY2023.

VIRGINIA'S PRETRIAL DATA PROJECT – PRELIMINARY RESULTS FOR CY2019 AND FY2020 COHORTS

Presentation link: <http://www.vcsc.virginia.gov/2023Meetings/PretrialSept23.pdf>

Ms. 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. Data for the Project was obtained from multiple agencies and the Sentencing Commission was the central repository for the data. 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) 2019 and CY2020. 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. For individuals with more than one contact event in a calendar year, only the first event occurring within the calendar year was selected. Individuals were tracked for a minimum of 15 months. Ms. Farrar-Owens then asked Dr. Chang Kwon, the Commission's Chief Methodologist, to present key findings from recent research conducted by staff.

Dr. Kwon provided an overview of the number of cases analyzed and the demographics and indigency status of defendants in the CY2019 and CY2020 cohorts. The most common felony charge continued to be a drug offense. In CY2020, assault became the most common misdemeanor offense. Dr. Kwon reported that, when examining data from CY2018 through CY2020, the percentage of defendants detained throughout the pretrial period declined slightly. The percentage of defendants released on secured bond also decreased slightly during this period, while the percentage of defendants released on personal recognizance or unsecured bond increased. Regarding outcomes measures, the percentage of defendants who failed to appear for court increased from 12.4% in CY2018 to 16.6% in FY2020; the percentage of defendants with a new in-state arrest for an offense punishable by incarceration increased marginally from 22.4% in CY2018 to 24.0% in CY2020. The COVID-19 pandemic may have played a role in the changes observed during this period.

The Commission's next Pretrial Data Project report is due to the General Assembly on December 1, 2023. Dr. Kwon concluded by saying that a data dashboard tool and the final data set will be available on the Commission's website on December 1, as required by statute.

MISCELLANEOUS ITEMS

Before turning to the Miscellaneous items on the agenda, Judge Hupp asked for a moment of silence in honor of the victims of the September 11 attacks.

Ms. Farrar-Owens thanked Judge Hupp, Judge Kelly, Senator Edwards, and Mr. Elam for attending the 2023 conference of the National Association of Sentencing Commissions (NASC). The conference was held on August 7-9, 2023, in Lake Tahoe, Nevada. The attendees shared favorable comments about the conference and the agenda.

Ms. Farrar-Owens informed members that, in response to a request received from the Senate, staff must submit a written report on the issues raised by Senate Bill 1335, which was introduced but not passed during the 2023 General Assembly. She noted that members would receive a draft of the report before its submission to the General Assembly.

Ms. Farrar-Owens reminded members of the remaining 2023 meeting date: November 1.

ADJOURNMENT

With no comments and there being no further business, the Commission adjourned at 12:20 p.m.

LINK TO MEETING RECORDING

[www.vcsc.virginia.gov/2023Meetings/Virginia Criminal Sentencing Commission Meeting-202309111337-1 Trimed.mp4](http://www.vcsc.virginia.gov/2023Meetings/Virginia%20Criminal%20Sentencing%20Commission%20Meeting-202309111337-1%20Trimed.mp4)

NEXT VCSC MEETING:

Date: Wednesday, November 1, 2023

Time: 10:00 a.m.

Members of the public may request participation by sending email to: cwilliamson@vacourts.gov.

Respectfully submitted by:

Carolyn Williamson, Research Associate

Minutes Reviewed by:

Meredith Farrar-Owens, Director