

THE GUIDELINE MESSENGER

The official newsletter of the Virginia Criminal Sentencing Commission

IN THIS EDITION

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CHANGES TO PROBATION VIOLATION GUIDELINES - JUDGE MUST DETERMINE IF THE RESTRICTIONS OF § 19.2-306.1 APPLY

Legislation adopted by the General Assembly in 2021 specified limits for periods of probation and supervision terms, defined technical violations of supervision, and established caps on sentences for certain technical violations (see House Bill 2038, Special Session I). Following enactment of the legislation, the Commission adjusted the new Probation Violation Guidelines, which took effect on July 1, 2021, to ensure they were compatible with the requirements of the new law. Specifically, the Guidelines were adjusted to reflect the caps on sentences for technical violations specified in the new § 19.2-306.1.

Since passage of the 2021 legislation, the Sentencing Commission has received a number of questions related to the legislation and requests for guidance regarding interpretation of the new law. The Commission, however, cannot advise court stakeholders as to legal interpretation. Interpretation of the law lies with the purview of the courts and individual judges hearing such cases. Nonetheless, the Commission was in a unique position to document the questions raised by an array of court stakeholders and the potential unintended consequences of the legislation they described. The questions from stakeholders, and the unintended consequences they suggest, are discussed in the Commission's 2021 Annual Report.

Between June 2022 and May 2023, the Courts of Appeals of Virginia issued opinions in eight cases as to the interpretation and application of § 19.2-306.1. An overview of these cases can be found on the Commission's YouTube channel at <https://youtu.be/WCLqliMZRfg>.

Judges and other court stakeholders have advised the Commission that, as a result of determinations made by the court in individual violation cases as well as developing case law from the Court of Appeals, violation hearings are sometimes continued in order to allow for the preparation of new Guidelines. **To address the concerns raised, as of July 1, 2023, the Sentencing Revocation Report/Probation Violation Guidelines prepared for each hearing will provide 1) information needed for the judge to determine if the statutory limits of § 19.2-306.1 apply, and 2) the historically-based recommendation should the judge determine that the sentence for the violation is not restricted by statute.** Historically-based Guidelines were developed from an analysis of judicial sentencing in revocation cases and were approved by the General Assembly in 2021.

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CHANGES TO PROBATION VIOLATION GUIDELINES - JUDGE MUST DETERMINE IF THE RESTRICTION OF § 19.2-306.1 APPLY

(continued from page 1)

No Need to Delay Proceedings as the Historically-Based Guidelines Recommendation Will Always Be Available

The judge will determine, based on statute and case law, if the conduct alleged by the Probation Officer is defined by statute as a technical violation and if the limits of § 19.2-306.1 apply. There will be no need to delay proceedings if the court decides that § 19.2-306.1 is not applicable. The historical-based recommendation will be shown on the Sentencing Revocation Report (cover sheet), and the judge need only check the appropriate box based on his or her determination.

BEGINNING JULY 1, 2023:

The Sentencing Revocation Report/Probation Violation Guidelines will always provide the historically-based recommendation as well as information needed for the judge to determine if the statutory limits of § 19.2-306.1 apply.

◆ **RECOMMENDATION RANGE:** Time Served

Years	Months

 to

Years	Months	Days

 Statutory Requirement if Applicable No time 0 -14 days

Recommendation based on historical analysis of revocation sentences.

Statutory requirement if judge determines § 19.2-306.1 applies.

On the Disposition Page, the judge will record the determination made by the court



RULING ON APPLICATION OF § 19.2-306.1 _____
 Statutory Requirement (no time imposed or up to 14 days). Case is in compliance with statutory limits.
 Statutory Requirement Does Not Apply. Guidelines Recommended Range _____ to _____
DECISION OF THE COURT _____
 Found in Violation of Conditions as Cited
 Found in Violation of Conditions as Modified by the judge: Conditions Violated: _____
 Found in Violation of good behavior, suspended sentence, felony local probation or post release
 Taken Under Advisement/Continued
 Not in Violation

The Commission has also modified another policy based on stakeholder input. With the change, **draft paper copies of the Probation Violation Guidelines may be provided to the court, Commonwealth's attorney, and defense counsel (if known) at the time the Major Violation Report or capias request is submitted by the Probation Officer.** However, the Guidelines must be updated no more than 30 days prior to the hearing and finalized in SWIFT (the Commission's automated application) before the Guidelines will appear on the JIS docket.

Note Regarding Statutory Requirements

In any proceeding conducted pursuant to § 19.2-306 for a felony probation violation, § 19.2-306.2 requires that the circuit court be presented with the Sentencing Revocation Report and the Probation Violation Guidelines. Even if the attorneys and judge agree that the Guidelines are not relevant, Guidelines must be completed, reviewed by the court, and submitted to the Commission, pursuant to statute. Moreover, the public has come to expect the court's consideration of the Guidelines and availability of Guidelines worksheets in case files.

JUDGES MUST REVIEW GUIDELINES BEFORE A DEFERRED DISPOSITION



Statutory Changes Made by the 2023 General Assembly

The 2023 General Assembly passed House Bill 2019, which clarifies that Guidelines must be reviewed in cases in which the court plans to defer disposition (as authorized by § 18.2-251, 18.2-258.1, 19.2-298.02, or 19.2-303.6.). The Commonwealth’s attorney or Probation Officer must prepare the Guidelines for the court’s review. House Bill 2019 also specifies that Circuit Court clerks must submit Guidelines to the Commission in cases resulting in a deferred disposition. The statutory change takes effect on July 1, 2023.

For a number of years, it has been the Commission’s policy that Sentencing Guidelines worksheets for defendants placed under First Offender (§ 18.2-251) and other deferred dispositions should be submitted to the Commission. The rationale is three-fold:

- The Commission is charged with studying felony sentencing patterns (§ 17.1-803);
- Currently, annual Sentencing Guidelines worksheet counts are used in the workload formula for Commonwealth’s Attorneys (which affects the distribution of resources to these offices); and
- To respond to policymakers about what types of offenses are deferred and success rates.

The General Assembly recently expanded judicial options for deferred dispositions. There are now four *Code* sections that explicitly provide for deferred dispositions. These are:

- § 18.2-251 – First offender for drug possession;
- § 18.2-258.1 – Obtain controlled substance by fraud/deceit;
- § 19.2-303.6 – Deferred dispositions in certain cases for defendants diagnosed with autism or intellectual disabilities (2020 General Assembly); and
- § 19.2-298.02 – Deferred disposition with agreement of defendant and Commonwealth (2020 General Assembly, Special Session I).

With the 2023 statutory change, the Commission will improve its ability to identify defendants who receive a deferred disposition, monitor outcomes of such cases, including sentencing patterns following a deferral failure, and determine which factors are associated with successful completion of deferral conditions and continued success in the community.

Also, beginning July 1, 2023, Guidelines preparers must identify convictions on the Guidelines Coversheet that are the result of the defendant’s failure to satisfy the conditions of a deferred disposition. Finally, the Virginia Crime Codes (VCCs) used by criminal justice agencies will be modified in order to identify convictions resulting from the failure of a defendant to satisfy conditions of a deferred disposition.

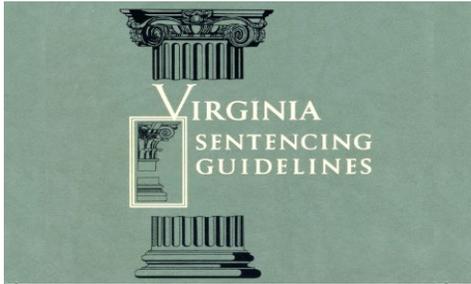
Example:

LAR-2359-F9	VCC for grand larceny conviction
LAR-2359-D9	VCC for grand larceny conviction following failure on deferred disposition

CALCULATING GUIDELINES CONCURRENCE

Beginning July 1, 2023, cases in which a judge defers disposition will be excluded from calculations of judicial concurrence with the Guidelines. Use of a deferred disposition will not affect judicial concurrence rates.

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.



RE-BENCHMARKING VIRGINIA'S SENTENCING GUIDELINES

New Study Will Update Virginia's Sentencing Guidelines

The Sentencing Commission has approved a comprehensive study to re-examine the state's Sentencing Guidelines system. The purpose of the study is to re-benchmark the Guidelines so that they reflect current sentencing practices as accurately as possible. Unlike most states, Virginia's Guidelines are based on analysis of historical sentencing data. Among its statutory mandates, the Commission is required by § 17.1-803 to develop Guidelines that take into account historical sentencing practices. Reanalysis of all Guidelines offense groups is a large-scale, multi-year project and work is expected to continue until late 2025 or early 2026.

The Commission's decision to move forward with a new comprehensive analysis of the Guidelines was based on several factors. These include recent statutory changes by the General Assembly related to larceny, robbery, jury trials, and sentence credits that may be earned by some individuals serving time for felony offenses. The changes to § 53.1-202.3, effective on July 1, 2022, increased sentence credits considerably for most nonviolent felons. For eligible offenders, the changes result in a minimum of 67% time served. It is unclear what impact recent statutory changes may have on judicial sentencing practices (or charging practices of prosecutors). It is possible that sentencing patterns may shift over time and any such changes should be examined, thus supporting the need for the new Guidelines study. Because Virginia's Guidelines are based on analysis of actual sentencing practices, the Commission going forward will revise the Guidelines, if supported by the data, to better reflect judges' current practices.

In addition to the recent array of legislative changes, the Commission has identified areas of the Guidelines that appear to be out of sync with current sentencing practices. For example, while Virginia's Circuit Court judges concur with the Guidelines at a high rate overall, data show that judges often depart from the Guidelines in certain types of cases, such as cases involving midpoint enhancements required by § 17.1-805. The Commission's new study will include a detailed examination of these cases and other areas of the Guidelines in which judges, overall, depart at a higher-than-average rate. The departure explanations provided by judges will be key in directing the Commission to areas of greatest concern to judges.

As an important first step, the Commission approved a survey to seek input and guidance from circuit court judges. The survey, which was conducted in October 2022, was sent to all active circuit court judges and all retired circuit judges who continue to sit. Overall, 148 judges responded to the survey. Judges provided valuable input as to the ways in which they structure felony sentences and what factors that, on average, are weighed most heavily in felony sentencing decisions. For example, more than half of responding judges felt that juvenile record should be scored on the Guidelines but weighed less than adult convictions.

The purpose of the Sentencing Commission's new study is to re-benchmark the Guidelines so that they reflect current sentencing practices as accurately as possible.

Virginia's Guidelines Provide Recommendations with Broad Ranges

Unlike many states, Virginia's Sentencing Guidelines ranges are relatively broad, allowing judges to exercise discretion in sentencing offenders and to individualize incarceration terms while remaining in concurrence with the Guidelines. Analysis of FY2022 cases with a recommended sentence of more than six months reveals that, when sentencing *within* the Guidelines range, judges sentence at or below the recommended midpoint in 86% of the cases. Only 14% of the offenders sentenced within the Guidelines range were given a sentence that exceeded the recommended midpoint (i.e., judges were unlikely to sentence toward the upper end of the recommended range). Nonetheless, the relatively wide ranges provided by the Guidelines give judges an opportunity to consider many factors when determining the sentence and, in many cases, will be sufficiently wide enough to allow judges to consider recent statutory changes in their sentencing decisions. As part of the study to re-benchmark the Guidelines, the Commission will analyze any shifts in sentencing patterns, including the extent to which judges may make greater use of the upper end of the Guidelines range. The Commission will recommend revisions to the Guidelines, if supported by the data, to better reflect judges' new practices.

OTHER NEWS FROM THE COMMISSION



Case Details Worksheet Must Be Completed by the Probation Officer or Commonwealth's Attorney

The Case Details are for the Judge's Review

The Case Details Worksheet captures offense details that must be known to accurately score the Guidelines. With information from the Case Details Worksheet, the Commission can develop Guidelines that best reflect judicial sentencing. Lack of essential data may hamper or delay the Guidelines re-analysis project and the development of new Guidelines for robbery and updated Guidelines for other offenses.

The Case Details Worksheet should be completed by an authorized Guidelines preparer (Probation Officer or Commonwealth's attorney). Rules of Professional Conduct 1.3(c) may conflict with the court requiring defense counsel to prepare the Case Details Worksheet.

Question 21 ("Other factors known at the time of sentencing") will be removed as of July 1, 2023.

Questions about SWIFT

The Commission's automated Guidelines application, known as SWIFT, is now integrated in the Judicial Information System (JIS).

The Commission encourages judges with questions about SWIFT to call the Commission's hotline at (804) 225-4398 or send an e-mail to SWIFT@vcsc.virginia.gov.

Commission staff will be more than happy to assist you. Individualized one-on-one training sessions can also be scheduled.

Questions about JIS should be directed to the OES Circuit Team at circuitteam@vacourts.gov or (804) 371-2424.

Guidelines Cover Sheet and Case Details Required in All Felony Cases

For Non-Guidelines Felonies, There Will Be No Recommendation

For non-Guidelines felonies, judges must review the Guidelines Coversheet and Case Details Worksheet and enter sentence information. These are official Guidelines worksheets.

In such cases, clerks are required to submit the Guidelines Coversheet and Case Details Worksheet to the Commission.

This information is critically important for the development of new Guidelines (for robbery, as an example). In addition, Guidelines worksheets currently are counted in the Commonwealth's Attorneys workload statistics, which affect the distribution of state resources to those offices.



Esther J. Windmueller Fee Waiver Program

On a limited basis and subject to the availability of funds, the Sentencing Commission offers fee waivers for private attorneys. Applications for fee waivers are evaluated based on the percentage of the attorney's practice focusing on indigent defense cases and financial need (especially for new or solo practitioners). To submit an application, go to <http://www.vcsc.virginia.gov/training.html>.

Fees are always waived for Commonwealth's Attorneys, Public Defenders, and Probation and Parole Staff

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Data Scientist

Catherine Chen, Ph.D.

Research Associate

Carolyn A. Williamson

Quality Control Specialist

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Training Associate

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Training Associate

Cassandra E. Wright

Research Associate

Thomas Y. Barnes

Research Associate

Marc E. Leslie

Contacts and Resources



VIRGINIA CRIMINAL SENTENCING COMMISSION



Hotline (804) 225-4398



Text (804) 393-9588



E-mail SWIFT@vcsc.virginia.gov



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