

feedback

FROM THE FIELD

2022

Comments & Concerns

V C S C



Feedback from the Field



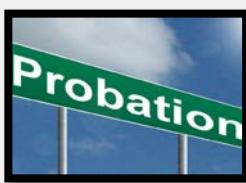
SGs & VCCs for Deferred Finding Cases

The number of deferred dispositions under **§§ 18.2-251, 18.2-258, 19.2-298.02 and 19.2-303.6** is on the rise.



Jury Cases: Judge vs. Jury Sentences

With the change in law, there currently is no systematic way to identify jury cases sentenced by a jury from cases sentenced by the judge.



Probation Violation Guidelines Procedures

Communication issues and changes at the hearing about the conditions violated delay case.

Feedback from the Field



SGs & VCCs for Deferred Finding Cases

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§ 19.2-298.02. Deferred disposition in a criminal case. —

DEFERRED DISPOSITION

A. A trial court presiding in a criminal case may, with the agreement of the defendant and the Commonwealth, after any plea or trial, with or without a determination, finding, or pronouncement of guilt, and notwithstanding the entry of a conviction order, upon consideration of the facts and circumstances of the case, including (i) mitigating factors relating to the defendant or the offense, (ii) the request of the victim, or (iii) any other appropriate factors, defer proceedings, defer entry of a conviction order, if none, or defer entry of a final order, and continue the case for final disposition, on such reasonable terms and conditions as may be agreed upon by the parties and placed on the record, or if there is no agreement, as may be imposed by the court. Final disposition may include (a) conviction of the original charge, (b) conviction of an alternative charge, or (c) dismissal of the proceedings.

B. Upon violation of a term or condition, the court may enter an adjudication of guilt, if not already entered, and make any final disposition of the case provided by subsection A. Upon fulfillment of the terms and conditions, the court shall adjudicate the matter consistent with the agreement of the parties or, if none, by conviction of an alternative charge or dismissal of the case.

C. By consenting to and receiving a deferral of proceedings or a deferral of entry of a final order of guilt and fulfilling the conditions as specified by the court as provided by subsection A, the defendant waives his right to appeal such entry of a final order of guilt.

Prior to granting a deferral of proceedings, a deferral of entry of a conviction order, if none, or a deferral of a final order, the court shall notify the defendant that he would be waiving his rights to appeal any final order of guilt if such deferral is granted.

D. Upon agreement of all parties, a charge that is dismissed pursuant to this section may be considered as otherwise dismissed for purposes of expungement of police and court records in accordance with § 19.2-392.2, and such agreement of all parties and expungement eligibility shall be indicated in the final disposition order. (2020, Sp. Sess. I, cc. 20, 21.)

§ 18.2-251. Persons charged with first offense may be placed on probation; conditions; substance abuse screening, assessment treatment and education programs or services; drug tests; costs and fees; violations; discharge. —

FIRST OFFENDER

Whenever any person who has not previously been convicted of any criminal offense under this article or under any statute of the United States or of any state relating to narcotic drugs, marijuana, or stimulant, depressant, or hallucinogenic drugs, or has not previously had a proceeding against him for violation of such an offense dismissed as provided in this section, or pleads guilty to or enters a plea of not guilty to possession of a controlled substance under § 18.2-250, the court, upon such plea if the facts found by the court would justify a finding of guilt, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him on probation upon terms and conditions. If the court defers further proceedings, at that time the court shall determine whether the clerk of court has been provided with the fingerprint identification information or fingerprints of the person, taken by a law-enforcement officer pursuant to § 19.2-390, and, if not, shall order that the fingerprints and photograph of the person be taken by a law-enforcement officer.

As a term or condition, the court shall require the accused to undergo a substance abuse assessment pursuant to § 18.2-251.01 or 19.2-299.2, as appropriate, and enter treatment and/or education program or services, if available, such as, in the opinion of the court, may be best suited to the needs of the accused based upon consideration of the substance abuse assessment. The program or services may be located in the judicial district in which the charge is brought or in any other judicial district as the court may provide. The services shall be provided by (i) a program licensed by the Department of Behavioral Health and Developmental Services, by a similar program which is made available through the Department of Corrections, (ii) a local community-based probation services agency established pursuant to § 9.1-174, or (iii) an ASAP program certified by the Commission on VASAP.

The court shall require the person entering such program under the provisions of this section to pay all or part of the costs of the program, including the costs of the screening, assessment, testing, and treatment, based upon the accused's ability to pay unless the person is determined by the court to be indigent.

As a condition of probation, the court shall require the accused (a) to successfully complete treatment or education program or services, (b) to remain drug and alcohol free during the period of probation and submit to such tests during that period as may be necessary and appropriate to determine if the accused is drug and alcohol free, (c) to make reasonable efforts to secure and maintain employment, and (d) to comply with a plan of at least 100 hours of community service for a felony and up to 24 hours of community service for a misdemeanor. Such testing shall be conducted by personnel of the supervising probation agency or personnel of any program or agency approved by the supervising probation agency.

Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, and upon determining that the clerk of court has been provided with the fingerprint identification information or fingerprints of such person, the court shall discharge the person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without adjudication of guilt and is a conviction only for the purposes of applying this section in subsequent proceedings.

Notwithstanding any other provision of this section, whenever a court places an individual on probation upon terms and conditions pursuant to this section, such action shall be treated as a conviction for purposes of § 22.1-315. The provisions of this paragraph shall not be applicable to any offense for which a juvenile has had his license suspended or denied pursuant to § 16.1-278.9 for the same offense.



Final Disposition • Fill In After Sentence Has Been Pronounced

Modification of Recommendation Based on Substantial Assistance, Acceptance of Responsibility or Expression of Remorse
The decision to modify the guidelines recommendation must be made by the judge. If the recommended low end is 3 years or less, the low end is adjusted to no incarceration. If recommended low end is more than 3 years, the low end is reduced by 50%.

Years Mos. Days Years Mos. Days

If accepted by the court the Adjusted Range is: _____ to _____ yyy/mm/ddd Life

SENTENCE

Total Time Imposed Before Suspension Life Sentence +

Years	Mos.	Days
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 yyy/mm/ddd

Total Effective Time To Serve Life Sentence +

Years	Mos.	Days
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 Sentenced to Time Served

Incarceration Sentence to Run Concurrently With Another Event

Restitution \$

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 Fine \$

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Post Release

Post Release Incarceration Term § 18.2-10 (Suspended).....

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(6 months to 3 years)

Post Release Supervision Period § 19.2-295.2(A)

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(6 months to 3 years)

Probation (Sentenced to no time, probation up to statutory maximum, Sentenced to incarceration, probation up to 5 years)

Probation Period (Supervised) §19.2-303 Indeterminate Not to Exceed §19.2-303

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Good Behavior

Good Behavior Period §19.2-306 Fixed at Statutory Maximum §19.2-303.1

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Agreements and Other Details (Check all that apply)

Written Plea Agreement Accepted (Rule 3A:8(c) (1) (A) or (C))

Plea and Recommendation Accepted (Rule 3A:8 (c) (1) (B))

Oral Sentence Recommendation Accepted

Other Sentencing Programs (Check all that apply)

Day Reporting

Electronic Monitoring

Intensive Probation

Substance Abuse Treatment

Drug Court

Youthful Offender

DJJ Commitment Indeterminate Determinate

CCAP Community Corrections Alternative Program

Other

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§ 18.2-251/§ 18.2-258.1

§ 19.2-298.02, § 19.2-303.6 (Deferred Disposition)

Community-Based Program

Reason For Departure • Must be completed pursuant to § 19.2-298.01(B)

Accepted NVRA recommendation, no departure reason needed.

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Based on policy, the Commission has always received the Cover Sheet and Sentencing Guidelines for deferred cases. There are several reasons:

1. To satisfy the statutory requirements to monitor sentencing practices, monitor felony sentence lengths and study felony statutes in the context of judge-sentencing and jury-sentencing patterns (**§ 17.1-803**)
2. To provide the State Compensation Board a more precise number of “sentencing events” for calculation of case load levels for Commonwealth’s Attorneys.
3. To respond to policymakers about what types of offenses are deferred, who receives a deferred disposition, success and recidivism rates.



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Years	Mos.	Days
-------	------	------

 yyy/mm/ddd

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Electronic Monitoring

Intensive Probation

Substance Abuse Treatment

Drug Court

Youthful Offender

DJJ Commitment Indeterminate Determinate

CCAP Community Corrections Alternative Program

Other

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Reason For Departure • Must be completed pursuant to § 19.2-298.01(B)

Accepted NVRA recommendation, no departure reason needed.

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Deferred Dispositions Issues:

1. Policy has required that the Guidelines be submitted for first offender and deferred cases, but the *Code of Virginia* requires that Guidelines and court orders be submitted to the Commission after a final order of conviction. (§ 19.2-298.01(E))
2. With the expansion of deferred dispositions there is no good way to track defendants who fail to comply with the conditions of the deferral and monitor differences in sentencing patterns after a deferral failure.



Sentencing Guidelines • Burglary/Dwelling Cover Sheet

Complete this form ONLY for applicable felonies sentenced on or after July 1, 2021 and before July 1, 2022.

Sched. Sentencing: 07/11/22

Offender

Name First: <input type="text"/> Middle: <input type="text"/> Last: <input type="text"/> Suffix: <input type="text"/>	CCRE: <input type="text"/> CORIS Offender ID: <input type="text"/> PSI #: <input type="text"/> SSN: <input type="text"/> Date of Birth: <input type="text"/> mm/dd/yyyy	
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Court

Judicial Circuit: 25 FIPS Code: 005 City/County: <input type="text"/>	Sentencing Judge's Name: <input type="text"/>	
Prosecuting Commonwealth's Attorney: <input type="text"/>	Defense Attorney: <input type="text"/>	
Preparer Name: <input type="text"/>	<input type="radio"/> Commonwealth's Attorney <input type="radio"/> Probation Officer	

Convictions

Offense	Counts	VCC	Offense Date	Docket No.
Deferred Primary Offense Violation <input type="checkbox"/> STAT. BURGLARY OF DWELLING TO MURDER, E' 1 + <input type="checkbox"/> Additional Offense + <input type="radio"/> Text <input type="radio"/> Drop-Down - 1. <input type="checkbox"/> FIREARM USE IN COMMISSION OF FELONY-(FIR) 1 +		BUR 2212 D2 ASL 1319 D9	MM 01 DD 01 YY 22	CR2200027400 CR2200027401
Primary Offense Code Section §: 18.2-90				

METHOD OF ADJUDICATION

<input type="checkbox"/> Jury Trial Sentence Set by: <input type="radio"/> Judge <input type="radio"/> Jury <input type="text"/> yyy/mm/ddd <input type="radio"/> Life <input type="radio"/> Juvenile <input type="radio"/> Fine Only
<input type="checkbox"/> Bench Trial <input type="checkbox"/> Guilty Plea <input type="checkbox"/> Alford Plea/Nolo contendere

SENTENCING GUIDELINES RECOMMENDATION

<input type="radio"/> No Recommendation Offense (Primary offense does not yield a recommendation)	Section C
Section B	<input type="radio"/> Incarceration (Enter Midpoint and Range Below) Range Midpoint: <input type="text"/> 5 <input type="text"/> 10 <input type="text"/> 0 yyy/mm/ddd Sentence Range: <input type="text"/> 4 <input type="text"/> 10 <input type="text"/> 0 to <input type="text"/> 8 <input type="text"/> 6 <input type="text"/> 0
<input type="radio"/> Probation/No Incarceration <input type="radio"/> Incarceration 1 Day to 3 Months <input type="radio"/> Incarceration 3 to 6 Months	

SUM OF ALL MANDATORY MINIMUMS

Deferred Dispositions Possible Solutions:

1. Propose modifying the *Code of Virginia* to include the requirement that the Cover Sheet, Guidelines and Case Details Worksheet be submitted in cases of a deferral. (**§ 19.2-298.01(E)**)
2. Add a check box to identify cases that are returned to court for violation of the conditions of the deferral and are being sentenced.
3. Add a modifier to the VCC to identify defendants sentenced for a felony offense after violating the conditions of the deferred dispositions.
Replace the “F” with a “D” for a violation of §§ 18.2-251, 18.2-258, 19.2-298.02 and 19.2-303.6.

The Seriousness Index

The first digit of the seriousness index (digit 8 of the VCC) is a letter which takes on the following meanings:

F = Felony Offense
M = Misdemeanor Offense
A = Attempt (<i>Felonies Only</i>)
C = Conspiracy (<i>Felonies Only</i>)
S = Special Penalty Structure
L = Life Without Parole (§ 19.2-297.1)
X = Subsequent Violent Sexual Assault (§ 18.2-67.5.3 and § 18.2-67.5.2)
O = Local Ordinance
J = Adult sentenced for Juvenile offense (§ 16.1-284)
Y = Commitment of serious juvenile offender (§ 16.1-285.1)
T = Solicitation to commit a felony (§ 18.2-29)
V = Solicitation to commit a felony-adult solicits juvenile (§ 18.2-29)

Note: Solicitation convictions under § 18.2-29 cannot be the primary offense on Sentencing Guidelines.

Feedback from the Field



Jury Cases: Judge vs. Jury Sentences

With the change in law, there currently is no systematic way to identify jury cases sentenced by a jury from cases sentenced by the judge.

§ 19.2-295. Ascertainment of punishment. —

SENTENCING IN JURY CASES

A. Within the limits prescribed by law, the court shall ascertain the term of confinement in the state correctional facility or in jail and the amount of fine, if any, when a person is convicted of a criminal offense, unless the accused is tried by a jury and has requested that the jury ascertain punishment. Such request for a jury to ascertain punishment shall be filed as a written pleading with the court at least 30 days prior to trial.

B. When the accused is tried by a jury, deliberations of the jury shall be confined to a determination of the guilt or innocence of the accused, except that when the ascertainment of punishment by the jury has been requested by the accused, a proceeding in accordance with § 19.2-295.1 shall apply.

C. In any case in which a jury has fixed a sentence as provided in this chapter and the sentence is modified by the court pursuant to the authority contained within this chapter, the court shall file with the record of the case a written explanation of such modification including the cause therefor. (Code 1950, §§ 19.1-291, 19.1-292; 1960, c. 366; 1975, c. 495; 2007, c. 259; 2020, Sp. Sess. I, c. 43.)

§ 19.2-295.1. Sentencing proceeding by the jury after conviction. — In cases of trial by jury, upon a finding that the defendant is guilty of a felony or a Class 1 misdemeanor, or upon a finding in the trial de novo of an appealed misdemeanor conviction that the defendant is guilty of a Class 1 misdemeanor, a separate proceeding limited to the ascertainment of punishment shall be held as soon as practicable before the same jury when ascertainment of punishment by jury has been requested by the accused as provided in subsection A of § 19.2-295. At such proceeding, the Commonwealth may present any victim impact testimony pursuant to § 19.2-295.3 and shall present the defendant's prior criminal history, including prior convictions and the punishments imposed, by certified, attested, or exemplified copies of the final order, including adult convictions and juvenile convictions and adjudications of delinquency. Prior convictions shall include convictions and adjudications of delinquency under the laws of any state, the District of Columbia, the United States or its territories. The Commonwealth shall provide to the defendant 14 days prior to trial notice of its intention to introduce copies of final orders evidencing the defendant's prior criminal history, including prior convictions and punishments imposed. Such notice shall include (i) the date of each prior conviction, (ii) the name and jurisdiction of the court where each prior conviction was had, (iii) each offense of which he was convicted, and (iv) the punishment imposed. Prior to commencement of the trial, the Commonwealth shall provide to the defendant photocopies of certified copies of the final orders that it intends to introduce at sentencing. After the Commonwealth has introduced in its case-in-chief of the sentencing phase such evidence of prior convictions or victim impact testimony, or both, or if no such evidence is introduced, the defendant may introduce relevant, admissible evidence related to punishment. Nothing in this section shall prevent the Commonwealth or the defendant from introducing relevant, admissible evidence in rebuttal.

If the jury cannot agree on a punishment, the court shall fix punishment.

If the sentence imposed pursuant to this section is subsequently set aside or found invalid solely due to an error in the sentencing proceeding, the court shall impanel a different jury to ascertain punishment, unless the defendant, the attorney for the Commonwealth and the court agree, in the manner provided in § 19.2-257, that the court shall fix punishment.

NB	DATE	TIME	TYPE	DURATION	JUDG	CTRM	PLEA	J	RESULT
03	061421	0900AM	JURY	M 02H D	SWM			N	CD
04	061521	0900AM	JURY	M H D	SWM			N	CD
05	062021	0130PM	MOT	M H D	SWM			G	
06	071321	0900AM	JURY	M H D	SWM	NG	Y		TRYD
07	092721	0830AM	SENT	M 01H D	SWM				SENT

DISP: CD G DT 092721 CONC TJ

ACHRG:

J/P/T P SENT: 25Y00M000D SUSP 15Y00M000D C/S L/D
 FMS FINE CMS SUSP F/C PD M COS
 FMS COSTS PROG PROB: TYPE S TIME 05Y00M00D R/S R DIC
 OL: LOSS 00Y00M00D C/S SUR RES STRT END DMV
 CC1379 Y VASAP REST: PD AMT APPD 100721 ENDED #

N=NXT CSE H=H/D I/U F=FWD PGE
 X=NME IDX U=CSE I/U D=DSP PRV

L=PAST HEAR V=DMV BRW Y=SP
 S=HEAR SRCH W=STAT BRW F9=REMRKS

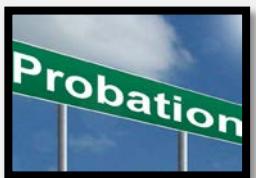
Issues with Monitoring Jury Sentences:

1. Defendants may request that the jury establish a sentence (§ 19.2-295). However, court orders and databases are not required to identify the method used for establishing a sentence (i.e., did the jury or the judge set the sentence).

Possible Solutions:

1. Add a code to the court's database base for the field result (JSEN) or the field concluded by (JS)
2. If needed, Judicial Services recommends that the *Code of Virginia* be modified to require the distinction in court orders and databases.

Feedback from the Field



Probation Violation Guidelines Procedures

Communication issues and changes at the hearing about the conditions violated delay case.

§ 19.2-306.2. Use of sentencing revocation report and discretionary sentencing guidelines in cases of revocation of suspension of sentence and probation. —

PROBATION VIOLATIONS

- A. In any proceeding conducted pursuant to § 19.2-306 for revocation of suspension of sentence or probation imposed as a result of a felony conviction, the circuit court shall have presented to it a sentencing revocation report prepared on a form designated by the Virginia Criminal Sentencing Commission. Such form shall indicate the nature of the alleged violation or violations and, if the defendant is subject to supervised probation, the condition or conditions of probation that the defendant has allegedly violated. The sentencing revocation report shall be prepared by the supervising probation agency that initiated the request for the revocation hearing. If the defendant is not under active probation supervision or the supervising probation agency did not initiate the request for the revocation hearing, the sentencing revocation report shall be completed by an attorney for the Commonwealth.
- B. For every proceeding conducted pursuant to § 19.2-306 in which the defendant is cited for violating a condition or conditions of supervised probation imposed as a result of a felony conviction and such person is under the supervision of a state probation and parole officer, the court shall have presented to it the applicable discretionary probation violation guidelines pursuant to § 17.1-803.
1. The applicable discretionary probation violation guidelines shall be prepared by a state probation and parole officer on a form designated by the Virginia Criminal Sentencing Commission. If a party other than a probation and parole officer initiated the request for the revocation hearing, no probation violation guidelines are prepared and only the sentencing revocation report required by subsection A shall be submitted to the court.
 2. The court shall review and consider the suitability of the applicable discretionary probation violation guidelines. Before imposing sentence, the court shall state for the record that such review and consideration have been accomplished and shall make the completed worksheets a part of the record of the case.
 3. In any proceeding in which the court imposes a sentence that is either greater than or less than that indicated by the discretionary probation violation guidelines, the court shall provide a written explanation of such departure to be filed with the record of the case.
- C. Within 30 days following the entry of a final order in a revocation proceeding, the clerk of the circuit court shall prepare and send to the Virginia Criminal Sentencing Commission a copy or copies of (i) the final order, (ii) the original sentencing revocation report, (iii) any applicable probation violation guideline worksheets prepared for such proceeding, and (iv) any written explanation regarding a departure from the probation violation guidelines pursuant to subsection B.
- D. Failure to follow the provisions of this section or failure to follow these provisions in the prescribed manner shall not be reviewable on appeal and shall not be used for the basis of any other post-proceeding relief. (2022, cc. 569, 570.)



Issues with Probation Violation Guidelines:

1. Probation Officers are concerned that probation violations are placed on the courts' dockets without notice or without enough notice to accurately prepare the Guidelines.
2. Attorneys for the Commonwealth and defense attorneys are concerned about delays in sentencing because of the statutory requirement that Probation Violation Guidelines be completed by the probation officer.
3. 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 is the statutory requirement and not a Guidelines recommendation.

Good afternoon! Are there any conversations to allow for Commonwealth's Attorneys to be authorized preparers for SRRs when the action is begun by a Major Violation Report filed by Probation and Parole? This is becoming a larger and larger problem as (a) our probation officers are overworked and running out of time to do their jobs and (b) defense attorneys are pushing for cases to be resolved in the absence of probation officers and without guidelines. Specifically in cases with violations of special conditions.

On a somewhat related note, there are also problems when the probation officer determines that a violation is a technical violation, but the Commonwealth successfully argues that it is a violation of a special condition.

I'm not sure that asking defendants to wait for sentencing so that guidelines can be prepared is in the interests of justice and fairness.

Here is the scenario we deal with most often:

- PO prepares MVR.
- I review and note any questions: clarifications on special condition requirements, new charges/convictions, etc., which I share with defense counsel and PO.
- Sometimes all of that makes it into an addendum; sometimes it doesn't—this seems to be based on DOC policy more than an individual PO's discretion.
- PO prepares SSR based on the addendums.
- Testimony at court develops a violation of special conditions not alleged exactly in the "Violation Data" section of the MVR.
- The guidelines prepared aren't valid for the violations the Court finds.



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Are There Any Possible Solutions Related to the Probation Violation Guidelines?

1. Solutions must balance the need for accurate Guidelines over the need that “a form” be submitted to the court and reviewed by the judge.
2. Solutions must adhere to statutory requirements. Resolving a probation violation in the absence of probation officers and without Sentencing Guidelines is not an option.
3. SWIFT allows for the modification of Guidelines from the bench but would require the judge to make the change.
4. Would better communication about possible outcomes and completion of scenarios before the hearing limit delays (i.e., having multiple Guidelines available for the court's review)?

questions

FROM THE VCSC

2022

Comments & Concerns

VCSC

