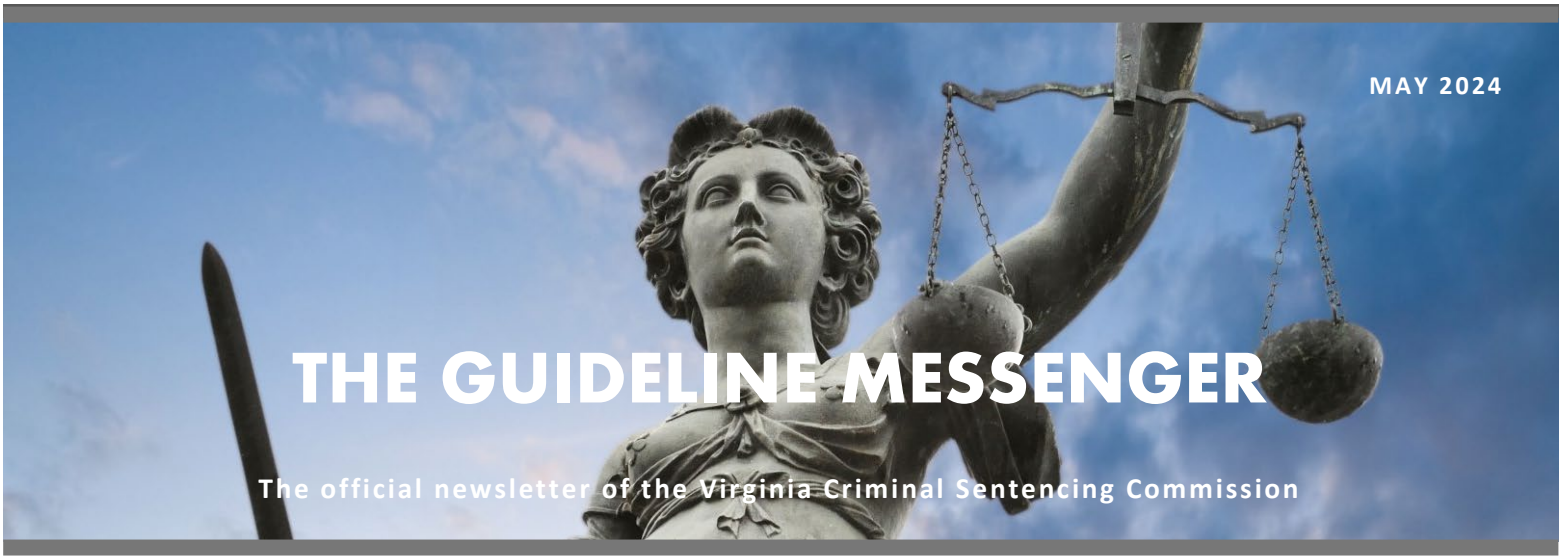


MAY 2024

THE GUIDELINE MESSENGER

The official newsletter of the Virginia Criminal Sentencing Commission

IN THIS EDITION

UPCOMING CHANGES TO VIRGINIA'S SENTENCING GUIDELINES EFFECTIVE JULY 1, 2024

Virginia's Sentencing Guidelines Are Historically Based. Unlike many other states, Virginia's Guidelines are based on analysis of actual sentencing practices and are designed to provide judges with a benchmark that represents the typical, or average, case. The Sentencing Commission closely monitors the Guidelines system and, each year, deliberates upon possible modifications to enhance the usefulness of the Guidelines as a tool for judges. Recommendations for revisions to the Guidelines are based on the best fit of the available data. Moreover, recommendations are designed to closely match historical prison and jail incarceration rates.

Process for Guidelines Revisions. Pursuant to § 17.1-806, any modifications adopted by the Commission must be presented in an annual report, due to the General Assembly each December 1. If the General Assembly takes no action, any recommendations for Guidelines revisions contained in the Commission's annual report automatically take effect the following July 1.

New Guidelines Offenses. Beginning July 1, 2024, the following crimes will be covered by the Guidelines as the primary, or most serious, offense at sentencing:

- **Delivery of drugs to prisoner** (§ 18.2-474.1) - Miscellaneous/Other worksheets;
- **Distribution, etc., of 10 grams or more of methamphetamine** or 20 grams or more of a methamphetamine mixture (§ 18.2-248 (C,4)) - Drug Schedule I/II worksheets;
- **Violation of protective order, 3rd or subsequent offense, within 20 years** (§ 16.1-253.2(A)) - Miscellaneous/Person & Property worksheets; and
- **Conspire with another or assist in a larceny with an aggregate value of $1,000 or more** (§ 18.2-23(B)) – Larceny worksheets.

New Ineligibility Condition for Risk Assessment. The Nonviolent Offender Risk Assessment is incorporated into the Guidelines for felony drug, fraud and larceny offenses. Beginning July 1, 2024, the Risk Assessment instrument will be amended to exclude from risk evaluation any defendants who commit one of these felonies while serving a state-responsible (prison) sentence. This change addresses a face validity issue in that defendants convicted of offenses committed while serving a state-prison term are not eligible for an alternative (community-based) sanction even if one is recommended via Risk Assessment, as they must still serve the remaining portion of their incarceration term.

NEW REVIEW OF SENTENCING GUIDELINES SUBMISSIONS

Commission Is Assisting Localities in Identification of Unsubmitted Guidelines

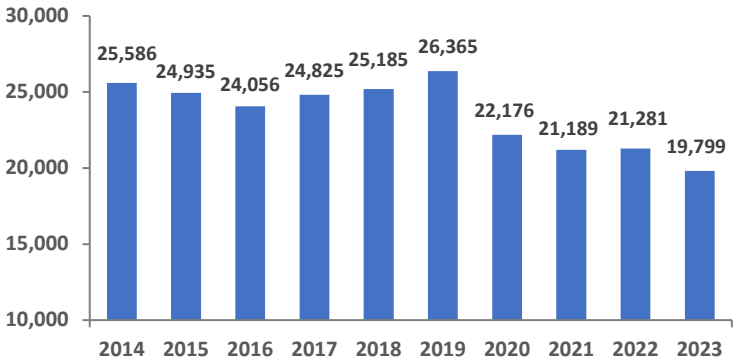
Recent Requests from Clerks

At the request of two circuit court clerk's offices, the Sentencing Commission recently assisted in a review of FY2022 and FY2023 Sentencing Guidelines worksheets received by the Commission. The objective was to assist the localities in identifying Guidelines worksheets that 1) had not been prepared for the sentencing event, or 2) had not yet been submitted to the Commission. Staff worked with the clerks in those jurisdictions to support their efforts to identify and submit all Guidelines worksheets.

Decline in Guidelines Worksheets Received

Analysis of available data has revealed a substantial drop in the number of Guidelines worksheets received in recent years. Commission data indicate a marked decline in the number of Guidelines worksheets received during FY2020 through FY2022, which is consistent with trends in other areas of the criminal justice system during the height of the COVID-19 pandemic. Data also indicate a significant decline in FY2023 cases received compared to the previous fiscal year (see figure below). This is not consistent with many criminal system indicators, which began to increase post-COVID. Thus, the Commission explored the possible reasons for the decline in Guidelines worksheets in FY2023.

Number of Guidelines Worksheets Received by the Sentencing Commission, FY2014-FY2023



Judges Use of Automated or Paper Guidelines

When judges use the Commission's automated Guidelines system, known as SWIFT, to complete the disposition page and sign the Guidelines, the worksheets are sent automatically to the Commission. SWIFT is now fully integrated in the Judicial Information System (JIS).

If a judge uses paper Guidelines, the clerk's office must scan the Guidelines into the Clerks Information System (CIS), assign the scanned image to the correct file, and click the SEND TO VCSC button in CIS to submit the Guidelines worksheet to the Commission.[1] This option first became available to all Circuit Court Clerks in 2020 and more Clerks' offices have joined over time. One possible explanation for the drop in Guidelines worksheets may be that clerks in some cases inadvertently skipped the step of clicking the SEND TO VCSC button to submit the Guidelines. The Commission emphasized the importance of this step during the new Circuit Court Clerks orientation in February 2024. Recent training, however, does not address worksheets that may be missing from the historical data.

Process to Identify Unsubmitted Guidelines

In March 2024, the Commission approved a review of Guidelines worksheets received from circuit courts throughout the Commonwealth. Data from the Circuit Court Case Management System (CMS), provided by the Office of the Executive Secretary, was used to identify the total number of felony sentencing events in each circuit court. Commission staff compared these data to the Guidelines worksheets received from each court and identified the sentencing events for which no corresponding Guidelines worksheet was found in the Commission's data system. This process revealed that Guidelines worksheets had not been received for up to 17% of the felony sentencing events in FY2022-FY2023.

The Commission directed staff to provide a list of cases that could not be identified in the Commission's system to each circuit court clerk and Commonwealth's Attorney. Judges will also receive a copy of the list for their jurisdiction. Staff will send the lists, based on the most recent data available, in May 2024.

[1] The other option, which most courts have moved away from, is submitting paper forms by mail.

PROBATION VIOLATIONS: CASE LAW CONTINUES TO EVOLVE

Probation Violation Guidelines Provide Historically Based Recommendation

Case Law and § 19.2-306.1. 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).

Between June 2022 and April 2024, the Court of Appeals and Supreme Court of Virginia have issued opinions in 12 cases regarding the interpretation and application of § 19.2-306.1. Overviews of many of these cases can be found on the Sentencing Commission's YouTube channel, located at https://youtu.be/WCLqliMZRfg. Case law continues to evolve.

VIRGINIA SUPREME COURT (SCV) AND COURT OF APPEALS (CAV) OPINIONS RELATED TO VIOLATIONS & § 19.2-306.1

SCV

Hannah v. Commonwealth (4/18/2024)
Delaune v. Commonwealth (12/14/2023)

CAV

* Hamilton v. Commonwealth (2/6/2024)
* Nalls v. Commonwealth (2/6/2024)
* Canales v. Commonwealth (9/5/2023)
Burford v. Commonwealth (8/8/2023)
Thomas v. Commonwealth (5/9/2023)
Diaz-Urrutia v. Commonwealth (4/4/2023)
Nottingham v. Commonwealth (3/21/2023)
Henthorne v. Commonwealth (11/22/2022)
* Heart v. Commonwealth (9/13/2022)
Green v. Commonwealth (6/14/2022)

* Appealed to Supreme Court of Virginia

Impact on Probation Violation Guidelines. As of July 1, 2023, the Sentencing Revocation Report/Probation Violation Guidelines prepared for each hearing provide 1) information needed for the judge to determine if the statutory limits of § 19.2-306.1 apply, and 2) the historically-based sentence recommendation should the judge determine that the sentence for the violation is not restricted by statute. Historically-based Probation Violation Guidelines were developed from an analysis of judicial sentencing in revocation cases and were approved by the General Assembly in 2021.

The judge must determine, based on statute and current 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. The probation officer is not required to interpret the statute or apply the most recent Court of Appeals or Supreme Court opinions. There is no need to delay the proceedings if the court decides that § 19.2-306.1 is not applicable. The historically-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.

Severing Violations into Separate Hearings. The Court of Appeals in *Canales* held that "the trial court did not exceed its statutory authority by conducting separate revocation hearings" for violations alleged in the Major Violation Report. The issue is now before the Virginia Supreme Court. The Sentencing Commission takes no position on this matter. If the court decides to sever the conditions violated into separate hearings, the Probation Violation Guidelines will reflect the same recommendation for each hearing and the court must decide if the § 19.2-306.1 restrictions apply or if the historically-based Guidelines are considered.

Recording Good Behavior and Probation Supervision on the Disposition Page. After the *Hamilton* decision, judges have asked how to record multiple periods of probation and good behavior on the Sentencing Revocation Report's Disposition Page. The Guidelines were designed to collect summary information on the sentencing event and not the sentence details for each offense conviction or count violated. The length of supervised probation and the period of good behavior entered on the Disposition Page are to reflect the sum of all or, if concurrent, the longest period ordered. There are boxes to check if the court imposes the statutory maximum allowed. The court order should contain the specifics related to each offense/count.

Appointment of Counsel. Since the enactment of § 19.2-306.1 in 2021, the Virginia Court of Appeals has not decided a case in which the failure to appoint counsel for a previous probation violation was raised as an issue during a subsequent technical violation proceeding. Such a case may arise in the future. Failure to appoint counsel for a prior misdemeanor conviction that was later used as the basis to enhance the penalty for a subsequent offense was an issue argued in Sawyer v. Commonwealth, 43 Va. App. 42 (2004) and Webb v. Commonwealth, 17 Va. App. 188 (1993).

GENERAL ASSEMBLY CHANGES NAME AND ELIGIBLITY CRITERIA FOR DRUG TREATMENT COURT

Changes Become Effective on July 1, 2024

The 2024 General Assembly passed legislation to change the name and eligibility criteria for Virginia's Drug Treatment Courts. House Bill 292 and Senate Bill 725 rename the Drug Treatment Court Act as the Recovery Court Act and Drug Treatment Courts as Recovery Courts. Senate Bill 706 modified the eligibility criteria for program participants. These changes will take effect on July 1, 2024

Currently, a person is ineligible for participation in a Drug Treatment Court program if he has been convicted of a violent criminal offense, as defined in § 17.1-805 or 19.2-297.1, within the preceding 10 years, or juvenile offenders who previously have been adjudicated not innocent of any such offense within the preceding 10 years. Senate Bill 706 amends § 18.2-254.1 and replaces the current restriction with a restriction on participation if any of the following conditions apply:

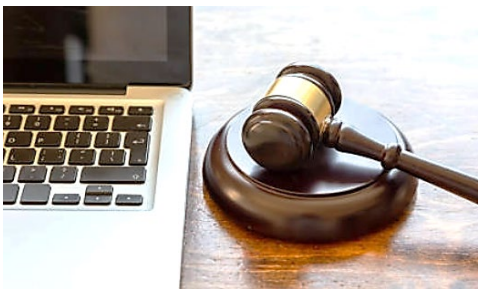
1. The offender is presently charged with a felony offense or is convicted of a felony offense while participating in any drug treatment court where:
   (a) the offender carried, possessed, or used a firearm or any dangerous weapon during such offense; or
   (b) the death or serious bodily injury of any person occurred during such offense; or
   (c) the use of force against any other person besides the offender occurred during such offense; or
2. The offender was previously convicted as an adult of any felony offense that involved the use of force or attempted use of force against any person with the intent to cause death or serious bodily injury.

FEEDBACK FROM THE JAILS: SENTENCES TO TIME SERVED

Defendants are often incarcerated for multiple offenses or probation violations in cases handled in different jurisdictions. In some cases, the court may be unaware of the amount of time the defendant was incarcerated for offenses or probation violations across jurisdictions or when the individual was released from confinement. Often, the court is unaware of the manner in which jails are applying credits for time served and to which offenses/violations the credits for time served are applied.

Based on feedback from jail staff at a recent Local Inmate Data Systems (LIDS) Advisory Committee meeting, if a judge sentences a defendant or a probation violator to time served, but the judge does not specify the amount of time served or the underlying offenses (or counts) to which the time served should be applied, jail staff must make such determinations. This may affect the total amount of time an offender serves in that locality or others. Lack of specification in the court order requiring determinations be made by jail staff, who may not have detailed knowledge of the specific case, may impact the liberty of an individual and/or the safety of the community.

At the LIDS Advisory Committee meeting, jail staff recommended that courts determine with specificity the amount of time served before (or at) sentencing and document that time in the court order. Alternatively, courts may order a sentence without reference to the time already served and jail staff will calculate the amount of time served to apply. Jail staff stressed the importance of specifying in the order the underlying offenses (or counts) to which the time served should be applied. This will ensure that jails are applying the credits as envisioned by the court and allow for easier application of time served credits in the future should the offender return to court for additional violations.



VIRGINIA'S PRETRIAL DATA PROJECT

Information on Pretrial System Outcomes Now Available

Background

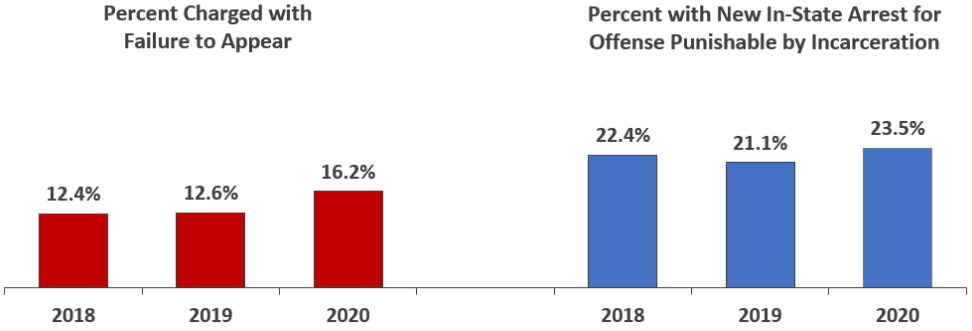
Virginia's Pretrial Data Project was established in 2018 under the direction of the Virginia State Crime Commission as part of the Crime Commission's broader study of the pretrial system in the Commonwealth. The purpose of the Project was to address the significant lack of data available to answer key questions regarding the pretrial process in Virginia. The Project was an unprecedented, collaborative effort between numerous state and local agencies representing all three branches of government. The Sentencing Commission was called upon to provide technical assistance for the Project. The work was well-received by lawmakers and the 2021 General Assembly passed legislation, now codified in § 19.2-134.1, directing the Sentencing Commission to continue this work on an annual basis. Virginia's Pretrial Data Project serves as a valuable resource for policy makers, practitioners, and researchers.

For the newest pretrial study, the Commission selected individuals with pretrial contact events during CY2019 and CY2020. For individuals with more than one contact event during the period, only the first event was selected. Individuals are tracked for a minimum of 15 months. Data for the Project was obtained from multiple agencies. Compiling the data requires numerous iterations of data cleaning, merging, and matching to ensure accuracy when linking information from each data system to each defendant in the cohort. This study focused on the 89,433 adult defendants in CY2019 and 73,537 adult defendants in CY2020 whose contact event included a criminal offense punishable by incarceration where a bail determination was made by a judicial officer.

Selected Findings.

- Throughout CY2018-CY2020, the vast majority of defendants were ultimately released from custody during the pretrial period. During the three-year period, pretrial release rates increased slightly, from 86.8% in CY2018 to 87.7% in CY2019 and 89.5% in CY2020.
- Over half of the defendants each year were released on a personal recognizance or unsecured bond. The percentage released on personal or unsecured bond increased from 51.5% in CY2018 to 57.5% in CY2020.
- Controlling for offense seriousness (felony or misdemeanor) and nature of the offense (violent or nonviolent), females were more likely to be released pretrial than males and Whites were more likely to be released than Blacks. Non-indigent defendants were more likely to be released pretrial than defendants categorized as indigent.
- Secured bond amounts at the time of release generally did not vary widely across sex, race, age, indigency status, or year of release.
- The majority of released defendants were not charged with failure to appear at court proceedings for the offense(s) in the contact event. Similarly, the majority of released defendants were not arrested during the pretrial period for an in-state offense punishable by incarceration. However, the failure-to-appear rate increased from 12.4% in CY2018 to 16.2% in CY2020, while the new-arrest rate increased from 22.4% in CY2018 to 23.5% in CY2020 (see figure below).

COURT APPEARANCE Outcomes for Released Defendants



PUBLIC SAFETY Outcomes for Released Defendants

The full report, entitled Virginia Pretrial Data Project: Findings from the 2019 and 2020 Cohorts, can be found on the Commission's website at http://www.vcsc.virginia.gov/pretrialdataproject.html

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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