



# ISSUES FROM THE FIELD



## DELAUNE V. COMMONWEALTH

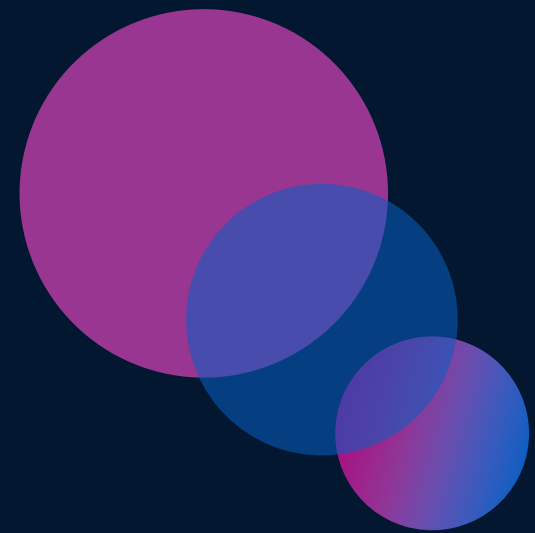
*Green v. Commonwealth, Smith v. Commonwealth, Heart v. Commonwealth, Henthorn v. Commonwealth*

## DISTRIBUTION OF GUIDELINES

## DOCKET NOTIFICATIONS

# Probation **Violations**

Development of the Sentencing Guidelines



**2020**

Results from PVG study (2016-2020) were released with recommendations to the General Assembly

2021 General Assembly accepts VCSC recommendations & defines technical violations and limits time to be imposed for violations

**2021**

**2022**

Green v. Commonwealth  
Smith V. Commonwealth  
Heart v. Commonwealth

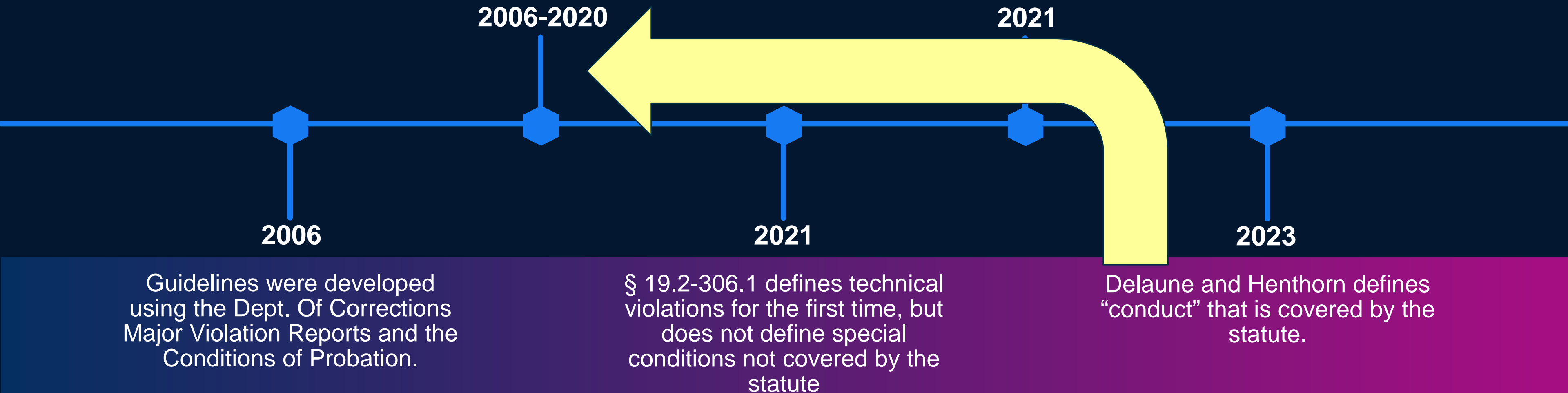
Delaune v. Commonwealth

Henthorn v. Commonwealth

**2023**

Anything other than Conditions 1-11 were considered and analyzed as special conditions

Attorneys for the Commonwealth were trained that special conditions had to be cited in the court order



## The Implementation of Probation Violation Guidelines & § 19.2-306.1

# Probation **Violations**

Use of the Sentencing Guidelines



## **Marginalized**

### **Guidelines are Marginalized**

Probation Violation Guidelines, as used now, often do not reflect historically accurate recommendations and may not systematically reflect statutory requirements



## **Interpretation**

### **Guidelines Mask Individual Interpretation of Statutes and Case Law**

Probation Violation Guidelines are used as a mechanism to reflect individual interpretations of case law and statutes. Errors on Guidelines are not appealable, but the application of law is

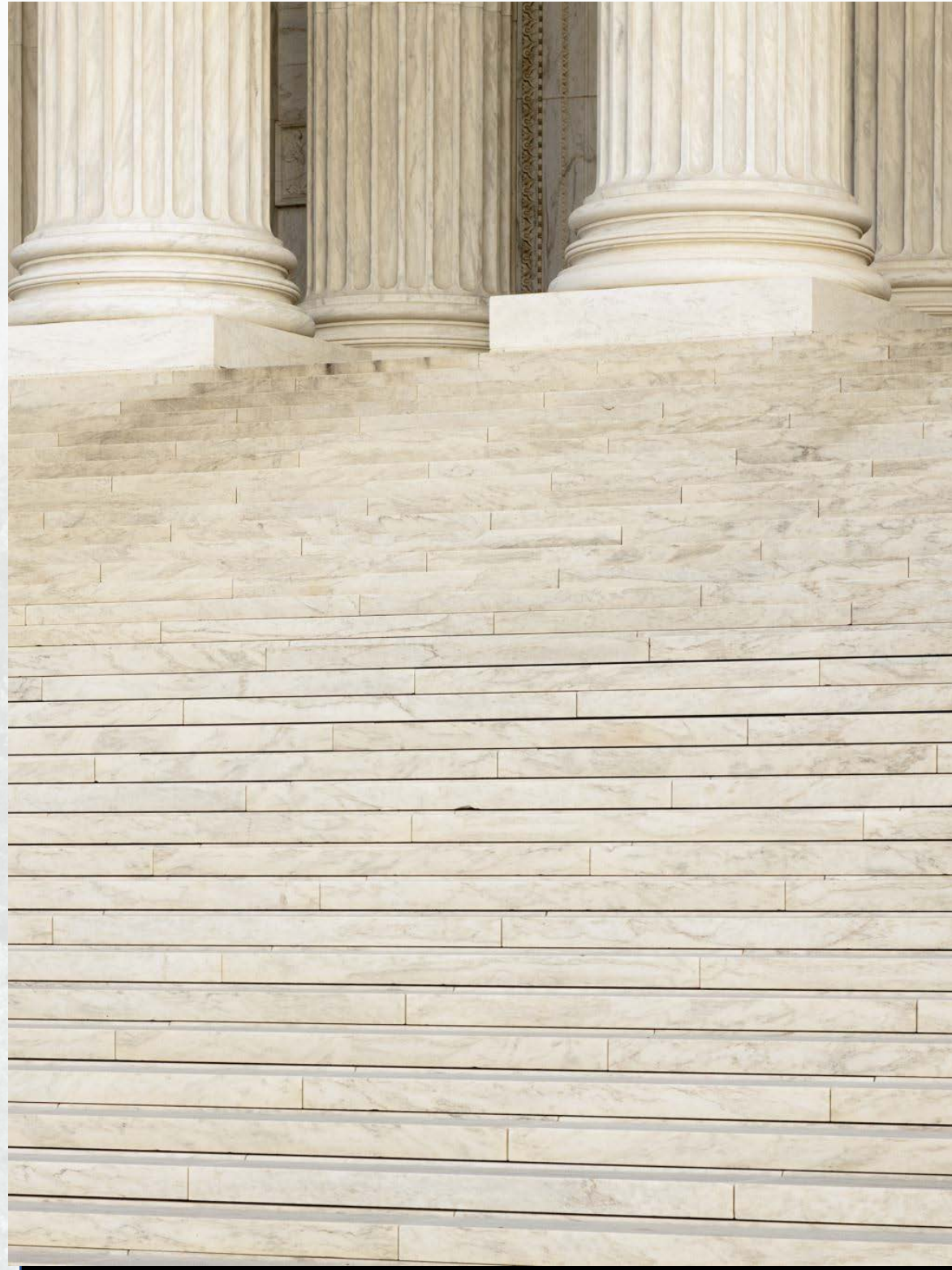


## **Disparity**

### **Guidelines used to increase Disparity**

As a result, often the Guidelines recommendations reflect the opinions of individuals and vary based on region, court, judge, prosecutor, defense attorney and probation officer

# Probation Violation Guidelines



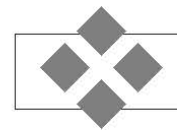
**In an environment when there is not universal agreement (or majority agreement) on the meaning of relevant statutes and case law, how can Probation Violation Guidelines be implemented so that the same recommendation is provided to judges for similarly situated individuals?**

# ACTION ITEMS

STATUTES - NOTES

PAGE 7 – **Delaune v. Commonwealth** ♦ PAGE 15 – **Henthorn v. Commonwealth** ♦ PAGE 23 – **Conditions v. Statute** ♦ PAGE 25 – **Conditions of Probation**  
PAGE 27 – **Sex Offender Conditions** ♦ PAGE 31 – **Gang Conditions** ♦ PAGE 33 – **Revised Cover Sheet** ♦ PAGE 35 – **§ 19.2-306.1** ♦ PAGE 39 – **§ 17.1-803** ♦  
PAGE 41 – **§ 19.2-298.01** ♦ PAGE 43 – **§ 19.2-299** ♦ PAGE 45 – **§ 19.2-306.2**

DOC	DOC Description	§ 19.2-306.1	Description in Statute	Question	Gang Cond	Sex Offender Cond
1	I will obey all Federal, State and local laws and ordinances.					
2	I will report any arrest, including traffic tickets, within 3 days to the Probation and Parole Officer.	i	Failure to report any arrest, including traffic tickets, within three days to the probation officer;			
3	I will maintain regular employment and I will notify the Probation and Parole Officer promptly of any changes in my employment.	ii	Failure to maintain regular employment or notify the probation officer of any changes in employment;			
4	I will report in person or by telephone to the Probation and Parole office listed below within three working days of my release from incarceration, <b>and as otherwise instructed thereafter.</b>	iii	Failure to report within three days of release from incarceration;	Failure to report after court would be special? Never reporting would be special?		
5	I will permit the Probation and Parole Officer to visit my home and place of employment.	iv	Failure to permit the probation officer to visit his home and place of employment;		Condition 7	
6	I will follow the Probation and Parole Officer's instructions and will be truthful, cooperative, and report as instructed.	v	Failure to follow the instructions of the probation officer, be truthful and cooperative, and report as instructed;			
7	I will not use alcoholic beverages to the extent that it disrupts or interferes with my employment or orderly conduct.	vi	Failure to refrain from the use of alcoholic beverages to the extent that it disrupts or interferes with his employment or orderly conduct;			Condition 3
8	I will not unlawfully use, possess or distribute controlled substances or related paraphernalia.	vii	Failure to refrain from the use, possession, or distribution of controlled substances or related paraphernalia;			Condition 3
9	I will not use, own, possess, transport or <b>carry</b> a firearm.	viii	Failure to refrain from the use, ownership, possession, or transportation of a firearm;	No Issue	Condition 6	
10	I will not change my residence without the permission of the Probation and Parole Officer. <b>I will not leave the State of Virginia or travel outside of a designated area</b> without permission of the Probation and Parole Officer.	ix	Failure to gain permission to change his <u>residence</u> or <u>remain</u> in the Commonwealth or other designated area without permission of the probation officer;	Is the wording a problem?		Condition 1
11	I will not abscond from supervision. I understand I will be considered an absconder when my whereabouts are no longer known to my supervising officer. <b>I freely, voluntarily and intelligently waive any right I may have to extradition if arrested outside of Virginia.</b>	x	Failure to maintain contact with the probation officer whereby his whereabouts are no longer known to the probation officer.	What if location is unknown and the probationer maintains contact?		



# Sentencing Revocation Report (SRR) - Felony Supervision/Good Behavior/Suspended Sentence Violations

◆ **OFFENDER** \_\_\_\_\_

First: \_\_\_\_\_ Middle: \_\_\_\_\_ Last: \_\_\_\_\_ Suffix: \_\_\_\_\_

Date of Birth: \_\_\_\_\_ SSN: \_\_\_\_\_ SID/CCRE: \_\_\_\_\_ CORIS Offender ID: \_\_\_\_\_

◆ **COURT** \_\_\_\_\_

Judicial Circuit: \_\_\_\_\_ City/County: \_\_\_\_\_ Docket Number: \_\_\_\_\_ FIPS Code: \_\_\_\_\_

Sentencing Judge's Name \_\_\_\_\_

Preparer Name \_\_\_\_\_  Commonwealth's Attorney  Probation Officer

Most Serious Original Primary Offense: \_\_\_\_\_ Sentencing Date (Original): \_\_\_\_\_

◆ **TYPE OF REVOCATION** \_\_\_\_\_

- (Complete SRR and Guidelines):  State Supervised Probation for Felony  
 (Complete SRR only, guidelines do not apply):  Local Probation  Good Behavior /Suspend Sentence  
 CCAP  Procedural  Post Release

Technical Violation i-x (2-11):  1st  2nd  3rd+ or TV\* Special Conditions:  Yes  
 Technical Violation vii or x (9 or 11):  1st  2nd  3rd+ or TV\* New Law Violation:  Felony  Misdemeanor

(NOTE: Guidelines are not completed for First Offender, Deferred Finding, Post Release or Parole Violations)

◆ **§ 19.2-306.1 CONDUCT CITED IN VIOLATION BY PROBATION/PAROLE OFFICER** *(check all that apply)*

- |   |   |
|---|---|
| <input type="checkbox"/> Fail to obey all Federal, State, and local laws. (Cond 1)  | <input type="checkbox"/> vii. Failure to refrain from the use, possession, or distribution of controlled substances or related paraphernalia. (Cond 8)  |
| <input type="checkbox"/> i. Failure to report any arrest, including traffic tickets, within three days to the probation officer. (Cond 2)   | <input type="checkbox"/> viii. Failure to refrain from the use, ownership, possession, or transportation of a firearm. (Cond 9)   |
| <input type="checkbox"/> ii. Failure to maintain regular employment or notify the probation officer of any changes in employment. (Cond 3)  | <input type="checkbox"/> ix. Failure to gain permission to change his residence or remain in the Commonwealth or other designated area without permission of the probation officer. (Cond 10) |
| <input type="checkbox"/> iii. Failure to report within three days of release from incarceration. (Cond 4)   | <input type="checkbox"/> x. Failure to maintain contact with the probation officer whereby his whereabouts are no longer known to the probation officer. (Cond 11)                            |
| <input type="checkbox"/> iv. Failure to permit the probation officer to visit home and place of employment. (Cond 5)  | <input type="checkbox"/> Sex Offender Conditions (Enter DOC Condition(s) Violated): <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>                                |
| <input type="checkbox"/> v. Failure to follow the instructions of the probation officer, be truthful and cooperative, and report as instructed. (Cond 6)                          | <input type="checkbox"/> Gang Member Conditions (Enter DOC Condition(s) Violated): <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>                                 |
| <input type="checkbox"/> vi. Failure to refrain from the use of alcoholic beverages to the extent that it disrupts or interferes with his employment or orderly conduct. (Cond 7) |   |

◆ **FOR JUDICIAL REVIEW** \_\_\_\_\_

◆ **TREATMENT, SANCTIONS, EDUCATIONAL PROGRAMS & ALTERNATIVES AVAILABLE**

◆ **DATE ARRESTED FOR THIS VIOLATION OR SHOW CAUSE ISSUED/SERVED:** \_\_\_\_/\_\_\_\_/\_\_\_\_

◆ **PRETRIAL CONFINEMENT FOR THIS VIOLATION**  
 (There is no indication that the time served will be applied to this case)

No  Confined Since Arrest for Violation Dates Confined \_\_\_\_/\_\_\_\_/\_\_\_\_ to \_\_\_\_/\_\_\_\_/\_\_\_\_ and \_\_\_\_/\_\_\_\_/\_\_\_\_ to \_\_\_\_/\_\_\_\_/\_\_\_\_

◆ **PRETRIAL STATUS RELEASE :**

Bond: \_\_\_Secured \_\_\_Unsecured  Own Recognizance  Third Party Release  N/A

◆ **RECOMMENDATION RANGE:**  No Time  Time Served

\_\_\_\_\_ to \_\_\_\_\_

Years Months Days to Years Months Days



# QUESTIONS ON THE IMPACT OF DELAUNE v. COMMONWEALTH

1. Should Guidelines reflect the conduct defined by § 19.2-306.1 and not the DOC Conditions of Probation? (The Conditions of Probation and the statute are not perfectly aligned. Please see attached comparison and revised Guidelines.)
2. Are special conditions of Probation anything other than the conduct specified in § 19.2-306.1? (Unique conditions that limit the conduct of defendants convicted of sex offenses and gang offenses are not specified in § 19.2-306.1. Please see the attached Sex Offender and Gang Conditions of Probation.)
3. Does the Delaune decision classify all drug related conduct as a violation of technical and not special conditions? (Staff have been asked about defendants removed from substance abuse treatment because of a positive drug test. Is this technical or is it a violation of a special condition to complete substance abuse treatment?)
4. Is the Henthorn decision specific to reporting after incarceration as defined by statute? (The statute removed from Condition 4, “and as otherwise instructed thereafter.”)
5. Can special conditions be imposed by the Probation Officer if authorized by a judge? (In the past, the research definition of special conditions was any condition other than 1-11 that was imposed or authorized by the court. In some cases, it was a blanket statement in the court order.)

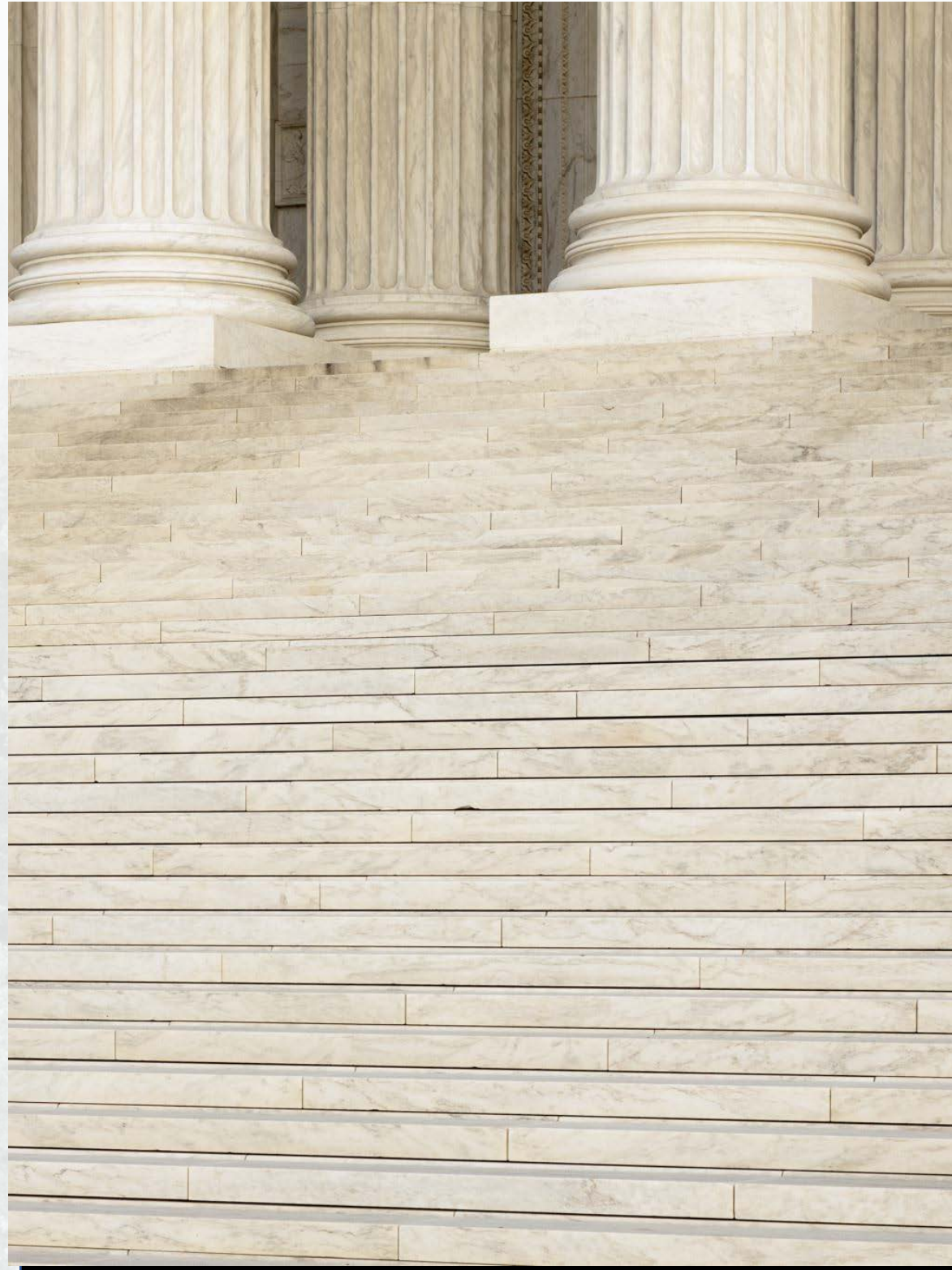


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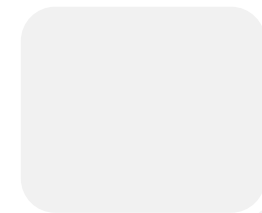
# Probation Violation Guidelines



**What is the will of the Commission:**

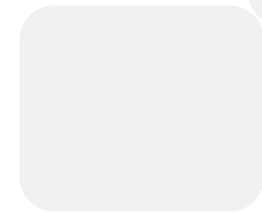
- 1. Modify the Sentencing Revocation Report to reflect § 19.2-306.1?**
- 2. Policies to resolve inconsistencies in scoring Guidelines?**

# ISSUES FROM THE FIELD



DELAUNE V. COMMONWEALTH

DISTRIBUTION OF GUIDELINES



DOCKET NOTIFICATIONS

# Distribution of Guidelines

MARCH 27, 2023 - COMMISSION MEETING

- **§ 17.1-803(8)** was modified to include Probation Violation Guidelines. “Develop, maintain, and modify as may be deemed necessary”
- As of July 1, 2022, **§ 19.2-306.2** “Use of sentencing revocation report and discretionary sentencing guidelines in cases of revocation of suspension of sentence and probation” was added to the *Code of Virginia*. § 19.2-306.2 of the *Code* references § 17.1-803.
- As a result, do the provisions of **§ 19.2-298.01** (use of discretionary sentencing guidelines) apply to Probation Violation Guidelines?

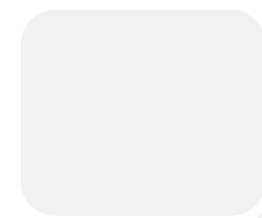
# Distribution of Guidelines

- If YES, can staff add the following to the manuals and to all 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).

- ✓ Email the requirement to all Probation Officers and attorneys for the Commonwealth
  - ✓ Send a text reminder
  - ✓ Include in Newsletter
  - ✓ In the near future, SWIFT will be modified to allow users to send guidelines to other attorneys and probation officers
- If NO, should the Commission recommend that the statute be modified? Currently, local procedures determine when defense counsel receives the Guidelines.

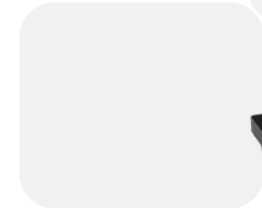
# ISSUES FROM THE FIELD



DELAUNE V. COMMONWEALTH



DISTRIBUTION OF GUIDELINES



DOCKET NOTIFICATIONS

# Docket Notifications

- Probation Officers advised that in some jurisdictions Probation Violations are added to the docket the evening before the hearing -- and the Officers do not receive notice.
- Without notice, the Officers cannot always have Guidelines available for the court.
- Is there a solution to improve communication?
- Can the Clerk notify a Probation Office at the same time defense counsel is notified?
- Does the Commission need to adopt a policy to require Guidelines be prepared within a certain number of days after the defendant is arrested on the probation violation (capias) or after the show cause is served? How would the Probation Officer be notified? (Guidelines must be updated if hearing is delayed 30 days or more)







Supreme Court of Virginia  
Office of the Executive Secretary  
Department of Judicial Services

# Court Alert Subscription Service (CASS)

# CASS

- PUBLIC COURT CASE SUBSCRIPTION SERVICE THROUGH OCIS 2.0 ON [WWW.VACOURTS.GOV](http://WWW.VACOURTS.GOV)
- ANY PERSON WITH INTERNET ACCESS CAN SUBSCRIBE TO ANY PUBLIC ADULT CRIMINAL OR TRAFFIC CASE
- SUBSCRIPTION ALERTS WILL BE BY EMAIL, TEXT OR BOTH



#### 4. Case Alert Subscription System

The Case Alert Subscription System (CASS) is a court case event update service that enables users to receive e-mail alerts when a case event is scheduled. Case information is available through OCIS 2.0. There are no fees charged to use CASS. All Terms for OCIS 2.0 within this EULA shall also apply to CASS.

A SUBPOENA OR A NOTICE OF HEARING  
THAT HAD BEEN SERVED ON THE PARTY  
(IS PROBATION & PAROLE NOTIFIED?)

**Updates received through CASS are not intended to be, and are not a substitute for, the official record or legal notice of a court event. CASS is a courtesy reminder service.** Users should independently verify court event dates, times, and locations. The data used by CASS may not include recent case updates. OES disclaims any responsibility or liability for any errors, omissions, or inaccurate information.



# SUGGESTED SUBSCRIBERS

- DEFENDANTS
- COURT COUNSEL
- VICTIM WITNESS
  - WITNESS
  - LEO
- NEWS MEDIA

Probation  
& Parole






# Docket Notifications

- CASS is not immediate, requires extra work and is not automatic.
- VCSC staff can facilitate a conversation between the DOC and SCV in ways to notify a central email or cell phone for each Probation District. Until then individual officers could use CASS.
- Any suggestions on increasing communication between the courts, probation districts and attorneys for the Commonwealth?
- Any new policies needed?





# ISSUES FROM THE FIELD

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-  DISTRIBUTION OF GUIDELINES
-  DOCKET NOTIFICATIONS