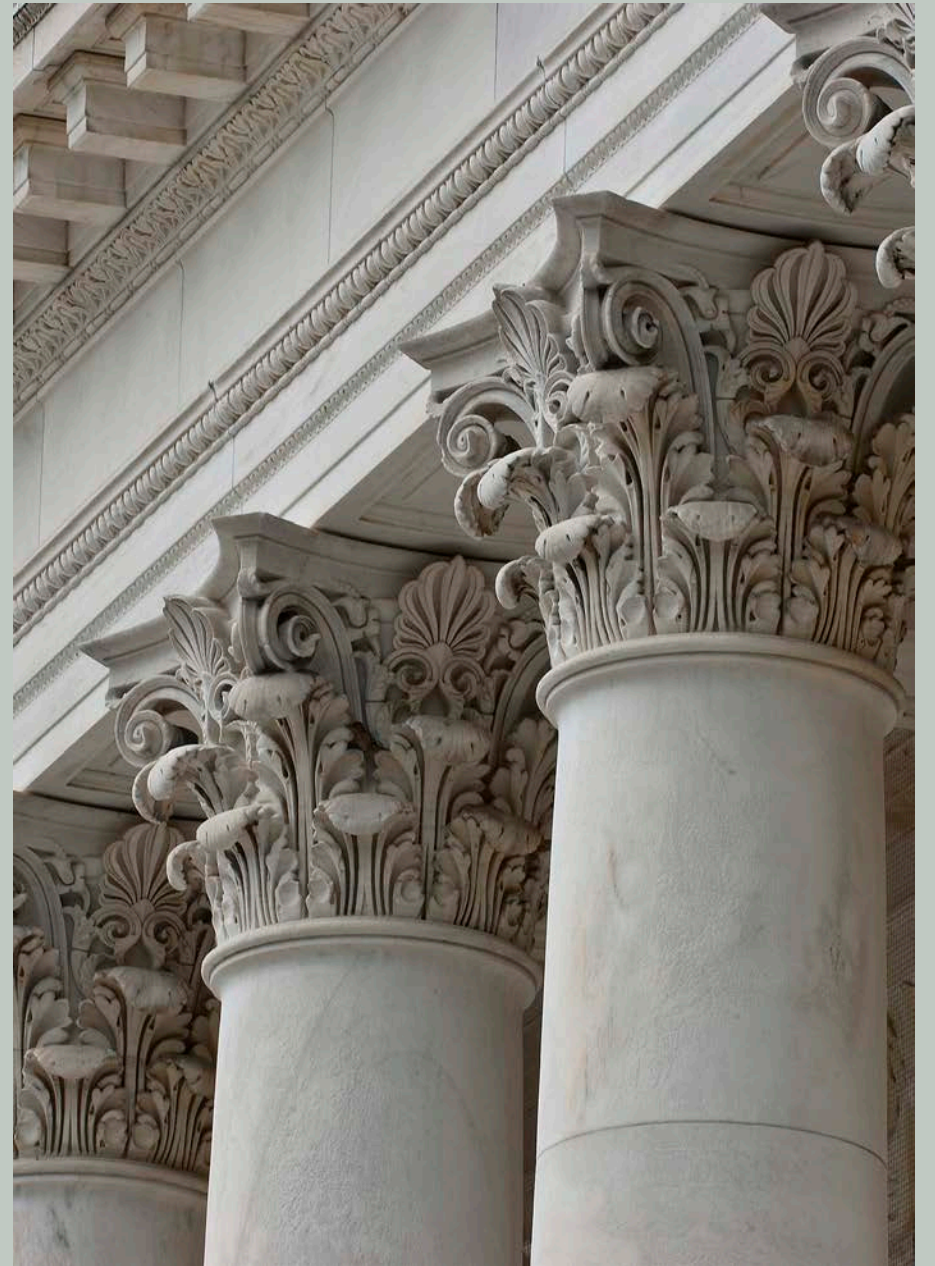

Concurrency calculations

Virginia Criminal Sentencing Commission

March 27, 2023

Issue: Impact of deferred dispositions on the calculation of
concurrency to the Guidelines recommendations



01 Revisions to § 19.2-298.01

There are four Code sections that provide for deferred dispositions.

“ 18.2-251

First offender for drug possession

“ 18.2-258.1

Obtain controlled substance by fraud or deceit

“ 19.2-303.6

Deferred dispositions in certain cases for defendants diagnosed with autism (2020 General Assembly)

“ 19.2-298.02

Deferred disposition for any offense with agreement of defendant and Commonwealth (2020 General Assembly, Special Session I)

The rationale for receiving Guidelines for deferred dispositions is three-fold:

1. Statutory Requirement

The Commission is charged with studying felony sentencing patterns (“ 17.1-803).

2. Workload Calculations

Currently, annual Sentencing Guidelines counts are used in the workload formula for Commonwealth’s Attorneys.

3. Information for Policymakers

To respond to policymakers about what types of offenses are deferred, who receives a deferred disposition, success and violation rates.

With the revisions to § 19.2-298.01, adopted by the 2023 General Assembly, the VCSC will be able to:

- Track

Track defendants who fail to comply with the conditions of the deferral. Provide policy makers with success and failure rates

- Monitor

Monitor differences in sentencing patterns after a deferral failure. If needed, modify the Guidelines to reflect judicial sentencing practices.

- Receive Guidelines in all cases

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 *An Act to amend and reenact § 19.2-298.01 of the Code of Virginia, relating to review of discretionary*
 3 *sentencing guidelines; deferred disposition.*

[H 2019]

4 Approved

6 **Be it enacted by the General Assembly of Virginia:**7 **1. That § 19.2-298.01 of the Code of Virginia is amended and reenacted as follows:**8 **§ 19.2-298.01. Use of discretionary sentencing guidelines.**

9 A. In all felony cases, other than Class 1 felonies, the court shall (i) have presented to it the
 10 appropriate discretionary sentencing guidelines worksheets and (ii) review and consider the suitability of
 11 the applicable discretionary sentencing guidelines established pursuant to Chapter 8 (§ 17.1-800 et seq.)
 12 of Title 17.1. Before imposing sentence *or deferring disposition as authorized by § 18.2-251, 18.2-258.1,*
 13 *19.2-298.02, or 19.2-303.6,* the court shall state for the record that such review and consideration have
 14 been accomplished and shall make the completed worksheets a part of the record of the case and open
 15 for inspection. In cases tried by a jury, the jury shall not be presented any information regarding
 16 sentencing guidelines.

17 B. In any felony case, other than Class 1 felonies, in which the court imposes a sentence which is
 18 either greater or less than that indicated by the discretionary sentencing guidelines, the court shall file
 19 with the record of the case a written explanation of such departure.

20 C. In felony cases, other than Class 1 felonies, tried by a jury and in felony cases tried by the court
 21 without a jury upon a plea of not guilty, the court shall direct a probation officer of such court to
 22 prepare the discretionary sentencing guidelines worksheets. In felony cases tried upon a plea of guilty,
 23 including cases which are the subject of a plea agreement, the court shall direct a probation officer of
 24 such court to prepare the discretionary sentencing guidelines worksheets, or, with the concurrence of the
 25 accused, the court and the attorney for the Commonwealth, the worksheets shall be prepared by the
 26 attorney for the Commonwealth.

27 D. Except as provided in subsection E, discretionary sentencing guidelines worksheets prepared
 28 pursuant to this section shall be subject to the same distribution as presentence investigation reports
 29 prepared pursuant to subsection A of § 19.2-299.

30 E. Following the entry of a final order of conviction and sentence in a felony case, *or following a*
 31 *deferred disposition as authorized by § 18.2-251, 18.2-258.1, 19.2-298.02, or 19.2-303.6,* the clerk of the
 32 circuit court in which the case was tried shall cause a copy of such order or orders, the original of the
 33 discretionary sentencing guidelines worksheets prepared in the case, and a copy of any departure
 34 explanation prepared pursuant to subsection B to be forwarded to the Virginia Criminal Sentencing
 35 Commission within five days. Similarly, the statement required by §§ 19.2-295 and 19.2-303 and
 36 regarding departure from or modification of a sentence fixed by a jury shall be forwarded to the
 37 Virginia Criminal Sentencing Commission.

38 F. The failure to follow any or all of the provisions of this section or the failure to follow any or all
 39 of the provisions of this section in the prescribed manner shall not be reviewable on appeal or the basis
 40 of any other post-conviction relief.

41 G. The provisions of this section shall apply only to felony cases in which the offense is committed
 on or after January 1, 1995, and for which there are discretionary sentencing guidelines. For purposes of
 the discretionary sentencing guidelines only, a person sentenced to a community corrections alternative
 program pursuant to § 19.2-316.4 shall be deemed to be sentenced to a term of incarceration.

ENROLLED

HB2019ER



02 Calculation of Concurrency

RELEVANT REMINDERS

STATUTORY REQUIREMENTS & GENERAL INFO

VCSC SUPPORT SERVICES FOR JUDGES

- ANALYSIS OF CONCURRENCE WITH THE GUIDELINES
- PROVIDE LIST OF CASES MISSING DEPARTURE REASONS
- UPDATE GUIDELINES DATA TO REFLECT AMENDMENTS
- TRAINING
- RESOLUTION OF USER ISSUES



Sentencing Guidelines are designed to reflect the collective pattern of sentencing for the typical case across the Commonwealth. The Sentencing Commission is not a policy making body and relies on judges, through their sentencing above or below the recommendation, to alert us when the sentencing guidelines do not reflect a realistic sentence. The Commission is also required by law to implement risk assessment, enhancements based on prior violent convictions and probation violation guidelines.

calculation of concurrence and written departure reasons

The following are in concurrence with the guidelines recommendation but, for public consumption, judges are encouraged to provide a written reason if not in strict concurrence with the recommendation.

STRICT CONCURRENCE

The effective sentence is exactly within the recommended range.

SEX OFFENDER RISK ASSESSMENT

The effective sentence is within the low end of the recommendation and the adjusted high end of the recommendation.

NONVIOLENT RISK ASSESSMENT

When an alternative is recommended, a less restrictive sentence is given instead of a sentence within the traditional recommendation. Examples:

- Jail or probation instead of prison
- HEM or time served instead of jail
- No effective time instead of prison/jail

TIME SERVED

- The "time served" box is checked and the Section B recommendation is one day up to six months.

- The "time served" box is checked and the Section B recommendation is probation/no incarceration. *The effective sentence is less than three months and specified in days.*

- The "time served" box is checked and the low end of the Section C recommendation is 7 months.

ROUNDING

If the effective sentence is at least six months and it is within 5% of the recommendation.



JUVENILE SENTENCING

Judges must review and Clerks must submit sentencing guidelines for juveniles convicted in circuit court, even if the judge imposes a juvenile sanction. There is no exception for juveniles in § 19.2-298.01.



NONVIOLENT RISK ASSESSMENT: ALTERNATIVES

If recommended for an alternative on the Drug, Fraud or Larceny worksheets, any less restrictive sanction is considered an alternative, including probation. The specific alternative is left to the judge and may depend on program availability.

PROBATION VIOLATION GUIDELINES

As of July 1, 2022, a Sentencing Revocation Report (SRR) and, if applicable, the Probation Violation Guidelines, must be presented to the court and reviewed by the judge for any violation hearing conducted pursuant to §§ 19.2-306 & 19.2-306.2.



VIRGINIA CRIMINAL SENTENCING COMMISSION

100 N. 9TH STREET • 5TH FLOOR • RICHMOND, VA 23219 • PHONE 804.225.4398 • FAX 804.786.3934 • TEXT 804.393-9588



Concurrence

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- The “time served” box is checked and the Section B recommendation is one day up to six months.
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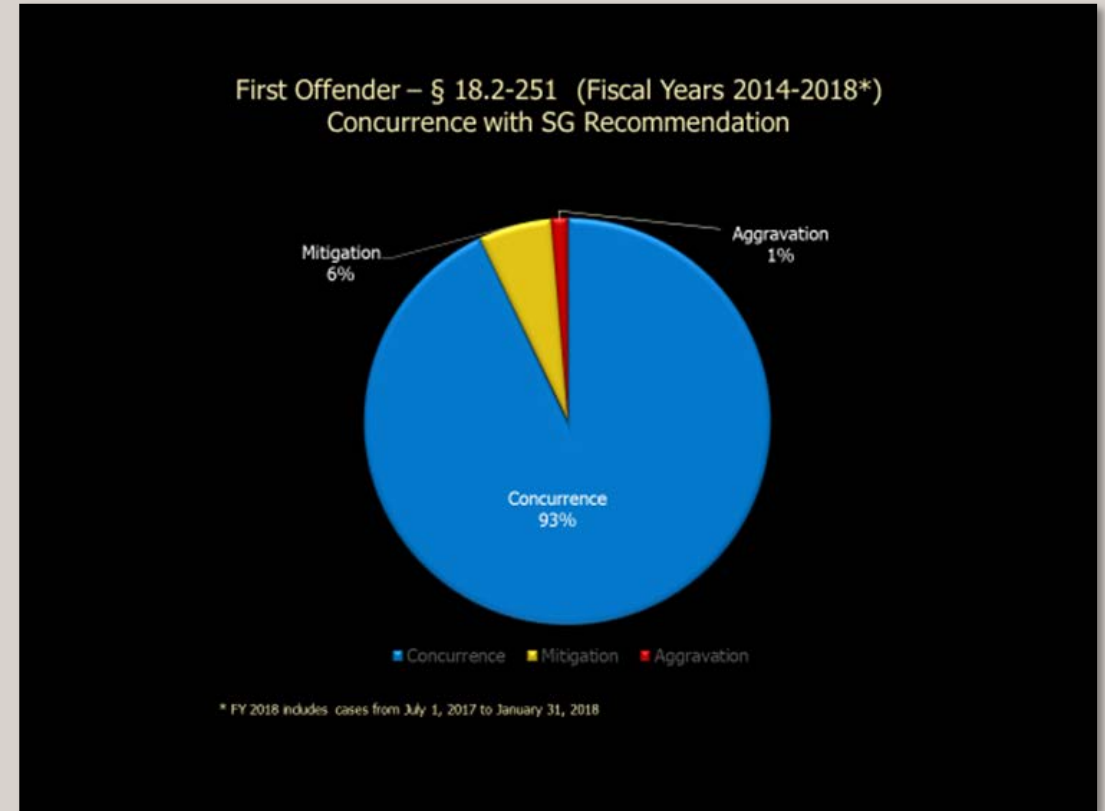
As of July 1, 2018, by a vote by Commission Members on June 4, 2018, any deferred sentence under “” 18.2-251 or 18.2-258.1 is calculated as strict concurrence. (First Offender Statutes)

With the expansion of deferred findings under “” 19.2-298.02 and 19.2-303.6 the policy adopted in 2018 is having an impact on the calculations of concurrence when deferred finding cases are included.

02 Concurrency

In **FY2014-FY2018**, most of the First Offender Cases (93%) were already in concurrence to the Guidelines recommendation. The proposed policy in 2018 reflected concurrence rates at that time.

Concurrency depicted in the chart is after time served and rounding rules were applied. Aggravation is possible when there are multiple convictions and only one count is deferred.



PowerPoint Slide from June 4, 2018, VCSC meeting

02 Concurrency

Offense	Total Cases
Assault	24
Burglary Dwelling	7
Burglary Other	2
Drug I/II (Not First Offender)	157
Drug Other (Not First Offender)	13
Fraud	24
Kidnapping	2
Larceny	31
Miscellaneous Other	2
Miscellaneous Person/Property	26
Rape	2
Robbery	1
Sexual Assault	5
Sexual Assault Obscenity	4
Traffic	18
Weapon	18
Total	336

In **FY2021-FY2022**, the type of cases that were deferred under §§ 19.2-298.02 or 19.2-303.6 included many cases for which the Guidelines recommended an active term of incarceration.

(Please note that many of the deferred cases were not submitted to the VCSC or were not identified on the disposition page of the Guidelines as deferred cases. The missing information for deferred cases underscores the need for the recent legislation.) This became apparent during the Child Accountability Report because judges advised staff to update a disposition from missing to deferred.

02 Concurrence

Skewed concurrence rates for identified deferred cases in FY2021-FY2022

The statistics below are meaningless

Offense	Concurrence	Mitigation	Aggravation	Total Cases
Assault	37.5%	62.5%	0.0%	24
Burglary Dwelling	57.1%	42.9%	0.0%	7
Burglary Other	50.0%	50.0%	0.0%	2
Drug M (Not First Offender)	75.8%	24.2%	0.0%	157
Drug Other (Not First Offender)	76.9%	23.1%	0.0%	13
Fraud	83.3%	16.7%	0.0%	24
Kidnapping	50.0%	50.0%	0.0%	2
Larceny	77.4%	22.6%	0.0%	31
Miscellaneous Other	50.0%	50.0%	0.0%	2
Miscellaneous Person/Property	73.1%	26.9%	0.0%	26
Rape	0.0%	100.0%	0.0%	2
Robbery	0.0%	100.0%	0.0%	1
Sexual Assault	20.0%	80.0%	0.0%	5
Sexual Assault Obscenity	50.0%	25.0%	25.0%	4
Traffic	22.2%	72.2%	5.6%	18
Weapon	61.1%	38.9%	0.0%	18

A case is in concurrence if the Guideline recommendation is probation/no incarceration or due to time served or rounding rules.

The aggravation rates are calculated when the sentencing event includes a deferred disposition for an additional offense.

The mitigation rates give a false impression that judges would sentence below the Guidelines if there were convictions. In these cases, the assumption is that the sentence is no time to serve.

02 Concurrency

Skewed concurrency rates for identified deferred cases in FY2021-FY2022

The statistics below are meaningless

Offense	Concurrency	Mitigation	Aggravation	Total Cases
Assault	100.0%	0.0%	0.0%	24
Burglary Dwelling	100.0%	0.0%	0.0%	7
Burglary Other	100.0%	0.0%	0.0%	2
Drug I/II (Not First Offender)	100.0%	0.0%	0.0%	157
Drug Other (Not First Offender)	100.0%	0.0%	0.0%	13
Fraud	100.0%	0.0%	0.0%	24
Kidnapping	100.0%	0.0%	0.0%	2
Larceny	100.0%	0.0%	0.0%	31
Miscellaneous Other	100.0%	0.0%	0.0%	2
Miscellaneous Person/Property	100.0%	0.0%	0.0%	26
Rape	100.0%	0.0%	0.0%	2
Robbery	100.0%	0.0%	0.0%	1
Sexual Assault	100.0%	0.0%	0.0%	5
Sexual Assault Obscenity	75.0%	0.0%	25.0%	4
Traffic	94.4%	0.0%	5.6%	18
Weapon	100.0%	0.0%	0.0%	18

If deferred dispositions are treated the same as First Offender dispositions, concurrency will be set to 100% in most of these cases. In other words, the Guidelines recommend no time to be served.

02 Concurrency

First Offender FY14-FY18

Strict Concurrency 85%

- 5,148 cases identified as receiving a First Offender disposition
- 0 cases were excluded
- 4,393 (85%) were in strict concurrency before applying rounding and time served rules. There was a **93%** concurrency rate after the NVRA, rounding and time served rules were applied.

First Offender FY21-FY22

Strict Concurrency 81%

Need to research, why a slight decrease in strict concurrency.

- 3,460 cases identified as receiving a First Offender disposition
- 445 cases were excluded because concurrency was not calculated
(Likely Missing Recommendation Range)
- 3,015 remaining cases,
- 2,442 (81%) were in strict concurrency before applying rounding and time served rules. There was a **94%** concurrency rate after the NVRA, rounding, time served, and substantial assistance rules were applied.

02 Concurrence

Example:

If deferred dispositions are included in concurrence calculations

Virginia Child Protection Accountability Reporting - § 63.2-1530						REVIEW FY 2022	
Sentencing Date	Victim's Age*	Offender's Age*	Relationship*	Concluded By*	Locality	Total Imposed Time*	Effective Time*
Conviction Description*				Statute	Felony/Misdemeanor *	Name of Def.	SG Compliance*
<u>3/23/2022</u>	Unknown	20.00	N/A*	Guilty Plea		0Y 0M 0D	0Y 0M 0D
Possess child porn (first offense)				18.2-374.1:1(A)	F		Within SG
<i>Departure Reason(s):</i> ACCEPTED PLEA AGREEMENT IN WRITING PUT FORTH DUE TO DEFENDANT'S AGE - DEFERRED DISPOSITION							
<u>11/12/2021</u>	Age 13 or 14	20.00	Known to Victim	Guilty Plea		5Y 0M 0D	0Y 6M 0D
Carnal knowledge/Statutory Rape Age of victim 13, 14				18.2-63(A)	F		Below SG
Consensual intercourse w/child age 15 or more (not parent)				18.2-371(ii)	M		
<i>Departure Reason(s):</i> PLEA AGREEMENT CAPPED ACTIVE INCARCERATION ON FELONY AT 12 MONTHS AND ON MISDEMEANOR TO 12 MONTHS SUSPENDED.							

If excluded from concurrence calculations, "Within SG" would be replaced with "Deferred".

03 Policy Proposal

Policy proposal

Remove all deferred findings, including First Offender, from the calculation of concurrence

1. Protects the integrity of the data.
2. Ensures consistency when calculating concurrence and reduces confusion during the “sentencing” phase
3. Reflects an accurate depiction of historically based recommendations without a false narrative that Guidelines are not historically accurate
4. Concurrence based on a First Offender disposition masks any needed changes to the Guidelines (concurrence will always be artificially high)
5. Deferred cases may be different from other cases and should be analyzed separately. The deferred disposition cases should have no impact in modifying future sentencing guidelines for convicted offenses.

Policy proposal

Violations of deferred findings, including First Offender violations, that result in a conviction would be included in the calculation of concurrence

1. If the defendant returns to court for violation of deferred disposition, the sentence ordered by the court would be included in concurrence calculations
2. Updated Guidelines must be prepared for the felony conviction after violating the conditions of the deferral
3. Revised Guidelines must be prepared If the defendant is convicted of a lesser included felony offense after successfully completing the deferral period
4. If the case is dismissed, no Guidelines are submitted. Updated Guidelines are only required when there is a violation or the case is continued for review/supervision

03 Policy Proposal