

Suspended Sentences in Virginia

EXAMINING A LITTLE-KNOWN CORNERSTONE OF
CRIMINAL SENTENCING IN THE COMMONWEALTH OF
VIRGINIA



JUSTICE
FORWARD
VIRGINIA



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FRANK BATTEN SCHOOL
of LEADERSHIP *and* PUBLIC POLICY

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EXECUTIVE SUMMARY

A suspended sentence is imposed in conjunction with an active sentence and refers to the amount of time an individual can be compelled to serve if they violate terms of probation or commit a new offense after the original sentencing event.

90% of sentencing events in Virginia include the imposition of a suspended sentence, but very little public or political attention has been directed to the effects of these sentences (VCSC Data, 2022). Developed as a tool to reduce active incarceration periods while still communicating the gravity of a crime to both the offender and society, assessing their tangible impacts reveals a harsh reality: almost 40% of the incarcerated population in Virginia is serving an originally suspended sentence due to a violation of community supervision, including both technical violations and new offenses (Council of State Governments, 2019). While measures to increase the fairness and regularity of active sentences exist, **the VCSC does not provide guidance to judges or monitor outcomes of suspended sentences. The lack of attention to this foundational element of sentencing in Virginia is cause for concern and evaluation.**

Based on findings from the literature, this report proposes three alternatives that Justice Forward Virginia can pursue:

1. Advocate for the development of recommended guidelines for suspended sentences
2. Advocate for the elimination of statutory minimums
3. Maintain the status quo

Each policy alternative is assessed according to four criteria: effectiveness, feasibility, equity, and cost. Based on research and analysis of sentencing data provided by the Virginia Criminal Sentencing Commission, Justice Forward Virginia should pursue Alternative One: Advocate for the Development of Suspended Time Guidelines. This option will have the greatest effect on decreasing excessive suspended sentences and increasing fairness in sentencing in Virginia.

ACRONYMS AND DEFINITIONS

Suspended Sentence: a term of incarceration that only takes effect when its suspension is revoked by a judge, due to probation violations

Effective/Active Sentence: the term of incarceration imposed upon an individual by a judge, to be served directly after imposition

Imposed Sentence: The sum of both the suspended and effective sentence imposed upon an offender.

Revocation of Suspension: A court imposes some or all of the originally suspended time as an effective sentence. Can be triggered by more than two technical violations of probation, or if an individual living under a suspended sentence commits a new offense.

Probation: a period of time when an offender must behave well and not commit any more crimes in order to avoid being sent to prison.

Technical Violation: A violation of community supervision rules that could result in a sanction.

VCSC: Virginia Criminal Sentencing Commission

PROBLEM DEFINITION

90% of sentencing events in Virginia include the imposition of a suspended sentence, but no efforts currently exist to monitor or regulate their use. Suspended sentences have an outsized impact on incarceration rates, with almost 40% of the incarcerated individuals currently serving originally suspended sentences. **Suspended sentences given by judges in Virginia may result in inconsistent outcomes, creating unfairness for those subject to the criminal justice system and raising incarceration rates.**

BACKGROUND ON THE PROBLEM

The Commonwealth of Virginia's suspended sentencing practices are discussed in scholarly literature and reviews with remarkable infrequency considering their ubiquity in the state. Suspended sentences are generally understood to be a form of conditional hard treatment that in most cases is never actually carried out—but Virginia's high rates of incarceration due to probation violations (almost 40% of incarcerated individuals) show that suspended sentences are deeply relevant to state criminal justice discussions (Council of State Governments, 2019). The scope of this report is limited to a discussion and analysis of the length of suspended sentences in Virginia imposed at the original time of sentencing.

GENERAL CONTEXT

Anatomy of a Suspended Sentence

A suspended sentence represents one portion of the total imposed sentence given to an offender by a judge at their original sentencing event for a specific offense. The second portion is the *effective time sentence*, which communicates the amount of time an offender will be incarcerated as an immediate consequence of the offense. Judges are constrained in some instances when imposing effective time sentences, such as when an offense is tied to a mandatory minimum or statutory maximum sentence. In many sentencing events, the effective time sentence imposed is zero years. Regardless of the length of an effective time sentence, a judge also has the power to impose a suspended sentence. Judges face no constraints concerning length in the imposition of suspended sentences and are similarly provided no guidelines determining their length. Once the effective time sentence has been completed, an offender must avoid re-offending or committing more than two technical violations of probation after serving their effective time sentences to avoid triggering this additional period of incarceration (see *appendix A* for a list of technical violations).



Types of Suspended Sentencing

There are two types of suspended sentences: suspended-execution prison sentences (SEPS) and suspended imposition prison sentences (SIPS). In a SEPS scenario, the judge imposes a prison term and specifies an amount to be suspended at the original time of sentencing. If the offender violates the conditions of probation severely enough (through multiple technicality violations or another criminal offense), a judge can decide to revoke the suspension of some or all of the originally suspended sentence. The second type of suspended sentence is a suspended imposition prison sentence (SIPS), in which sentencing is deferred and the offender is placed on probation immediately without any decision being made about the specific prison term that will be imposed if the conditions of probation are violated (Fras, 2019). Currently, SEPS is much more common than SIPS in Virginia, though both are available to judges for use. SEPS gives the original sentencing judge more control by allowing them to specify the maximum amount of time an offender can be incarcerated after revocation, but the second judge still maintains the ability to revoke suspension of a portion of the sentence rather than all, ultimately allowing discretion at both stages of sentencing.

Broad Impacts

In many states, imposed sentences that include both suspended and effective time, called “split sentences,” are viewed as a lenient form of sentencing (Lehmann and Gomez, 2021). If an offender is able to avoid re-offending or committing technical violations while on probation, for the entire duration of time a judge has “suspended” their sentence, they will never serve the time. In Virginia, however, the imposition of suspended sentences is not limited to cases where judges wish to be merciful: instead, they are present in the vast majority of felony sentencing events, being utilized in approximately 90% of cases (VCSC Data, 2022). This ubiquity clearly indicates that suspended sentences are the norm rather than the exception in Virginia. Unsurprisingly, incarceration data also reflects the impact of suspended sentences: in 2018, 38% of the incarcerated population in Virginia were there due to violations of community supervision (Council of State Governments, 2019). This means a significant portion of the incarcerated population is serving some or all of their sentences which were originally suspended. The current lack of regulation or monitoring of suspended sentences by the VCSC is cause for significant concern, given their large impacts on incarceration in Virginia.

POTENTIAL DRIVERS OF SUSPENDED SENTENCING

This report identifies three potential drivers of suspended sentences: Truth in Sentencing laws, statutory minimums, and judges’ desires to express societal values through sentencing. These conditions build upon each other to create the current high prevalence of suspended sentences currently present in Virginia.

Truth-In-Sentencing

One factor in the shift to widespread dependence of the judicial system on suspended sentencing is the practical elimination of parole in Virginia in 1995. After the Truth-in-Sentencing laws went into effect, offenders were required by law to serve at least 85% of their imposed effective sentences (Ostrom et al., 1999). Individuals facing incarceration no longer had the prospect of an early release incentivizing good behavior while incarcerated. In addition, the elimination of parole would have reduced the influence of the justice system on offenders after release, as the absence of early release greatly reduced the number of individuals who could be sent back to prison for the remainder of their sentence if they violated terms of community supervision. Suspended sentences likely spread to their current ubiquity in reaction to Truth-in-Sentencing, as they allowed judges to continue imposing sentences which offered contingencies to offenders based on their post-release behavior.

Statutory Minimums

Statutory minimums and maximums apply to a variety of classes of offenses and pose looser constraints to judges than the well-known mandatory minimums. A statutory minimum refers to the total sum of time imposed, both effective and suspended (King and Noble, 2004). For example, in a case with a particular drug offense with a statutory minimum of five years, a judge may find that their guidelines sheet recommends only one year of active incarceration. In this situation, a judge would likely choose to suspend all but approximately one year of the statutory five-year minimum sentence (McCloy, 2021). This would result in the individual being vulnerable to having a four-year sentence enacted if they did not comply perfectly with probation requirements. It is worth noting that the recent changes to Virginia's jury sentencing process, which previously did not allow for juries to recommend a portion of the recommended sentence be suspended but now does, may cause the frequency of suspended sentences to rise even more (McCloy, 2021).

Suspended Sentences as an Expression of Values

Suspended sentences are the strongest unregulated option judges have to make offenders aware of the seriousness of their offense with potentially few tangible consequences. When assessing the value of a suspended sentence to society, many writers have argued that punishment serves important expressive purposes. It conveys to the offender, other potential offenders, and to the rest of society not only the moral wrongfulness and harmfulness of the crime, but also the degree of wrongfulness and harmfulness relative to other crimes (Frase, 2019). The length of a suspended-execution prison term also sends the important expressive message that, even though a particular offender was deemed a low-enough risk to be put on probation, his crime was a serious wrong against the victims, society, or both (Frase, 2019). Through this lens, suspended sentences are a low-impact way of making a big statement through any given sentence—unfortunately, the ease with

which a person can be re-incarcerated in Virginia significantly increases the tangible impact of suspended sentences

RELEVANT POLICY RESEARCH ON SUSPENDED SENTENCES

Custodial Backup Sanctions

Custodial backup sanctions are an alternative to incarceration for judges to sanction probation violations. Instead of sending offenders to prison, judges using CBS are either encouraged or required to respond to violations by imposing local jail terms. Proponents argue that CBS maintains power as a disincentive to break terms of probation while mitigating the harmful factors of extensive jail times incurred by fully revoking a suspended sentence (Frase, 2019).

An analysis by Richard Frase, one of few legal scholars studying suspended sentencing practices, discusses CBS's potential for courts in place of suspended sentences. Courts can implement CBS in two ways: first, when probation is imposed as a free-standing sentence, with only non-prison backup sanctions available as a response to probation violations; secondly, when SEPS and/or SIPS are available to courts, but non-prison CBS options are encouraged. Frase reviewed sentencing practices in states with guidelines systems for sentencing (similar to Virginia's guidelines sentencing system) that use SEPS, SIPS, or CBS, in both implementations described above.

Frase attempts to determine the efficacy of the different approaches by assessing the rate of individuals incarcerated under sentences of more than one year per 100,000 residents of each state. This analysis found that, in general, the sole use of or encouragement of non-prison CBS did correlate to lower average prison rates in the states. Beyond the averages, however, significant disparities remained: North Carolina and Utah, which both employ use of SEPS and SIPS with non-prison CBS encouraged, had incarceration rates of 438 and 287 per capita in 2016. North Carolina's rates are even slightly higher the average rate of 428 from states that utilize both SEPS and SIPS but do not encourage non-prison CBS. Given the limited scope of the study, Frase concluded that much more research is needed to specify the relative contribution of these and other determinants of state incarceration rates (Frase, 2019).

In his book *Just Sentencing*, Frase looks at the specific case of Washington, which abolished most suspended sentencing when it developed sentencing guidelines in 1981. SEPS is only authorized for sex offenders and certain drug-dependent offenders; SIPS is used only in rare circumstances. For all other offenders, violations of conditional release-- usually referred to as "community custody," not probation-- may only be sanctioned with jail terms. Frase concludes that although the percentage of felons receiving an immediate prison sentence fell slightly in the first few years of guidelines, those rates then went back up and stabilized at rates almost double what they had been before the guidelines (Frase, 2013). One concern raised by the concept of restricting SEPS or SIPS from judges' free use is that they may be more likely to impose active sentences more frequently than CBS measures in cases with individuals who would have received shorter active sentences paired with a

suspended sentence under alternate guidelines. Judges may feel non-prison CBS measures are too lenient and do not reflect the severity of the crime appropriately compared to a lengthy suspended sentence, which theoretically communicates to both the offender and society the seriousness of the original offense more accurately.

Equity in Suspended Sentencing

There is some research showing that some courts do not deliver suspended sentences equally: a comprehensive review of felony sentencing data in Florida found that Blacks and Hispanics, and particularly minority males, are less likely than Whites to receive a split sentence relative to a traditional prison sentence (Lehmann and Gomez, 2021). However, this concern of racial inequality is less prevalent in the context of Virginia, where suspended sentences are given to the vast majority of offenders. It is impossible to accurately assess whether the race of the offender influences suspended sentence length, as the sentencing data provided by the VCSC does not include the racial identity of any offenders.

RELEVANT POLICIES IN VIRGINIA

Virginia has attempted to integrate more CBS measures in concert with SEPS and SIPS in its 2012 Immediate Sanction Probation pilot program, which engaged four different sites (VCSC, 2016). The program was modeled after Hawaii's famous HOPE program, which found that implementation of timely and proportionate consequences to probation violations significantly improved the conduct of individuals on probation. However, Virginia's pilot jurisdictions were unable to replicate the program effectively, as fewer than half of probation violations flagged made it to trial within the requisite three days. The commissioned report on the pilot found that participants in the Immediate Sanction Program were more likely to have their probation revoked than comparison probationers and, when revoked, were much more likely to be sentenced to prison. These results obviously bode poorly for the limited rollout of immediate sanctions using CBS without significant resources and funding support to enable its faithful implementation. Additionally, a cost analysis indicated that the Immediate Sanction Probation Program costs more than traditional probation in Virginia. Though some promising results were identified, the program outcomes were too mixed to recommend it be scaled up. Instead, report authors noted that more research was needed in the area. Though this program did not address length of suspended sentences at the original sentencing event, it is relevant to this topic as it demonstrates the failure of this strategy to reduce prison rates of individuals on probation. The outcome of this pilot would likely influence state policymakers to doubt the effectiveness of non-prison CBS measures as a viable strategy.

Guidelines for Effective Sentences

One Virginian sentencing policy that has undeniably increased fairness and regularity is that of effective sentence guidelines. Judges in Virginia routinely follow guidelines when imposing sentences on offenders who have committed felonies. To determine what length of effective sentence to impose, a judge will complete a sentencing worksheet provided by the Virginia Criminal Sentencing Commission (VCSC) pertaining to the type of offense (e.g., Assault, Drug, Fraud, and Murder/Homicide). The worksheet is designed to ascertain the appropriate level of punishment based on scores attached to information such as additional offenses, prior convictions, and other amplifying or mitigating factors (VCSC Worksheets, 2020). Resultant from this practice is a low, mid, and high point of the recommended sentencing range for the detailed circumstance. These guidelines are fully discretionary for judges, who have near total control over sentencing time. Despite this, there is a high rate of compliance: data analyzed by the VCSC itself demonstrates that judges accepted guideline recommendations in 83.9% of cases and mitigated or aggravated sentences at roughly similar rates (8.7% and 7.4%, respectively) (2019 VCSC Report). These recommendations are "effective time" sentences: they represent the time remaining after suspended time is subtracted from imposed time (Robina Institute, 2016). If a judge wishes to depart from the recommendation in both jury and non-jury cases, they are required to file an explanation for the departure with the record of the case" (McCloy, 2021).

It is reasonable to presume that development of guidelines for suspended sentences would have some effect on disparities in sentencing in Virginia, based on the current high rate of compliance by judges to active sentence recommendations. One challenge to this are statutory minimums, which by nature will continue to extend suspended sentences if a judge wishes to give a shorter active sentence. This roadblock will remain for offenses with statutory guidelines as long as they remain in effect in Virginia.

Current Policy Context in Virginia

The 2021 legislative session in Virginia saw the passage of House Bill 2038 by the General Assembly. Marking a significant step forward in probation reform, the bill raised the number of technical violations of probation that can trigger a revocation of suspension to three. Additionally, it introduced the first and only limitation to judges when imposing suspended sentences: the time of suspension of a sentence may not exceed the maximum time recommended for any offense. Effectively, this reform limits the time before a suspended sentence functionally expires, and an individual is no longer subject to incarceration by violating terms of probation or reoffending (HB2038, 2021).

COSTS TO SOCIETY

The lack of sentencing guidelines for judges in Virginia means that many judges may choose to recommend long incarceration sentences for individuals whose sentences have been suspended, in the event that the suspension of said sentence is revoked. When the revocation of a suspended sentence occurs, individuals who were previously participating in society are removed to the confines of incarceration. Protections against this outcome are growing: HB2038, which went into effect on July 1, 2021, ensures that individuals may not have their sentences revoked on their first technical violation of probation. A second technical violation of probation can legally result in the imposition of a sentence no greater than fourteen days. The third (or any subsequent) technical violation, however, can result in the imposition of a sentence that was originally suspended.

The process by which an individual's suspension of a prison sentence is revoked by a court is important because the act of incarceration—and especially over-incarceration-- triggers a wealth of social costs.

The first direct cost of incarceration is the cost of housing an inmate in a jail or prison. Data from a study by the Vera Institute for Justice made estimates of these costs in Virginia based data from state correctional agencies and departments. Researchers summarized that Virginia spent \$824,010,613 in 2015 on its various prison systems, which housed approximately 38,688 prisoners at the time. Accounting for inflation, the state likely spent an average of \$24,350 per inmate in 2021 (Mai and Subramanian, 2017).

Data from the Virginia Criminal Sentencing Commission on the effects of suspended sentence revocations was analyzed by Department of Planning and Budget (DPB) in their Fiscal Impact Statement prepared for HB2018. This report, using data from fiscal years FY 2019 and FY 2020 shows that among 14,427 offenders with a suspended sentence revoked for a technical violation, 10,606 offenders (73.5 percent) received a sentence of more than 14 days. 10,488 offenders (72.7 percent) received a sentence of more than 30 days. The median sentence among technical violators for this time period was 4.0 months, and the mean was 7.9 months. The report goes on to add that limiting the length of sentences that can be imposed on probation violators is expected to reduce bedspace needs in local and regional jails.

Data from a study conducted by the Council of State Governments found that 51% of new prison admissions were the result of supervision violations. Compared to total admissions, 9.2% of prison admissions in Virginia in 2016 were triggered by technical violations specifically (CSG, 2019). Using the DPB's combined information from FY 2019 and FY2020, it can be estimated that 5,244 offenders receive sentences greater than a month for technical violations per year (10,488 offenders for both years divided by two years). Using the CSG data that approximately one fifth of new prison admissions are technical, it can be roughly approximated that almost 30,000 individuals in 2016 were incarcerated for more than a month due to a supervision violation, including both technical violations and new offenses.

To determine the financial impacts of suspended sentences that are longer than average, one could conservatively estimate that even 10% of the of the 30,000 were sentenced to the entirety of their previously suspended time (using the state average of 6.65 years, calculated using VCSC data from FY 2019-2021) this would cost Virginia \$485,782,500.

One other major, direct cost to consider is the cost of incarceration to individuals, which influences, among other things, their ability to support friends and family and generally participate in their communities. While incarcerated, inmates lose the opportunity to keep a job and earn income in society. A 1999 study on the costs of criminal behaviors estimated that the average incarcerated person incurs \$23,286 in lost productivity per year (Anderson, 1999). Accounting for inflation, that value would be \$36,993 in 2021. If, again, we use the conservative estimate that at least 3,000 individuals in a year have been imprisoned for the full length of the average suspended sentence of 6.64 years, that results in \$736,900,560 of productivity for that group.

ALTERNATIVES

The following alternatives include Advocating for the development of suspended sentence guidelines, eliminating statutory minimums, and maintaining the status quo.

ALTERNATIVE ONE: DEVELOP SUSPENDED SENTENCE GUIDELINES

The Virginia Criminal Sentencing Commission should develop guidelines worksheets similar to effective sentence guideline worksheets to reduce extreme or unpredictable suspended sentences from judges. This alternative addresses one potential driver of unfairness and over-incarceration in Virginia: the lack of guidance provided to judges in determining the lengths of suspended sentences. Because almost all felony sentencing events result in some length of suspended sentence, the impacts of this unpredictability are widespread. While judges are provided recommendations for “active” sentences, which both increase the predictability of sentence length and reduce occurrences of overly long sentences, no comparable resources are provided to shape the length of suspended sentences.

The creation of a guidelines system would mirror that of the active sentence guidelines worksheets. Using data collected from suspended sentences in the past five years of sentencing events, the VCSC would produce descriptive statistics on the imposed sentences for specific offenses, including sentence lengths in the 25th, 50th, and 75th percentile. These would be provided to judges based on information specific to each offense and offender, allowing the judges to choose the appropriate length of sentence within the given range. Similar to existing requirements for active sentence guidelines, Judges will also be asked to submit a justification to the VCSC if they choose to either aggravate or mitigate the suspended sentence recommended by the guidelines (McCloy, 2021).

Accomplishing this data analysis would require the VCSC to reallocate its resources to a limited degree, such as adding this task as a short-term project to the workload of a small group of employees. After the calculations are made, the VCSC will need to review the information gathered and vote as a commission on whether to move forward with the guidelines. After this, excepting opposition from the General Assembly, the VCSC will move forward with publicizing the new worksheets to Virginia’s judges. Because they are already completing worksheets that require inputting the same or very similar information to determine effective sentence duration, no additional resources will need to be allocated to holding information and workshop sessions on how to fill out the worksheets. It is also possible that the suspended sentence worksheet could be integrated into the existing effective time worksheet, resulting in a streamlined process where judges use only one worksheet and generate both effective and suspended time recommendations.

ALTERNATIVE TWO: ELIMINATE STATUTORY MINIMUMS

Virginia’s General Assembly could vote to eliminate statutory minimums from judicial sentencing laws. This would remove the compulsion for a judge to give extended suspended sentences if they wished to impose an active sentence lower than the existing statutory minimum. Judges would be

free to follow the recommendations provided by the active sentence guideline worksheet, which suggests lower sentences than the existing statutory minimum for an offense in a variety of cases. They will be free to impose the suspended sentence they feel is most appropriate rather than being restricted by a required minimum length. This policy addresses the concern that many suspended sentences are longer than judges would impose if they had full control over the total active and suspended sentence duration. The elimination of statutory minimums would apply to all felony-level offenses and impact all state courts. It would require few administrative resources aside from communicating the shift to all state judges, which the VCSC would likely implement in its yearly trainings.

ALTERNATIVE THREE: MAINTAIN THE STATUS QUO

Maintaining the status quo would not interfere with current laws and practices regarding suspended sentences. Judges would maintain the ability to impose suspended sentences as they see appropriate, with the exception of having to lengthen in some cases to meet the criteria of a statutory minimum. It is likely that the effects of suspended sentences will reduce in gravity in the future, due to the 2021 passage of criminal justice reform bill HB2038. The bill limits probation terms to one year for misdemeanors and 5 years for most felonies (HB2038, 2021). By shortening probation terms, the bill will likely reduce the number of individuals re-incarcerated due to technical violations of probation, which can trigger a revocation of the suspension of an offender's sentence. Additionally, the bill limits the amount of time that can be imposed for probation violations, with the strongest limitations applied to technical violations (see appendix A for a list of technical violations). This prevents courts from incarcerating an individual immediately after the first or second technical violation of probation—a policy that will likely reduce rates of sentence revocation.

CRITERIA

CRITERIA 1: EFFECTIVENESS

Effectiveness comprises both increased predictability and fairness in sentencing, as well as reduced sentence lengths. Consistency of sentencing contributes to a more just system because it increases transparency and reduces instances of prejudice or poor discretion by judges. Reducing suspended sentence lengths would also be considered an effective pursuit, as one may assume that the current unregulated state has caused many suspended sentences to be disproportionately long compared to the offense. The limited staffing and resource capacity of Justice Forward Virginia pushes them to prioritize effectiveness so they can lobby policies that will have the largest impact on their agenda. The bulk of analysis related to this criteria results from a review of data gathered on all sentencing events in the state from fiscal years 2019 to 2021, provided by the VCSC. Almost 70,000 sentencing events are contained in these records, including details on locality, offense type, sentence length, aggravating or mitigating factors, and numerous other topics. The data has been analyzed in Excel and exported to Tableau when necessary to create visualizations.

CRITERIA 2: FEASIBILITY

Feasibility is an essential consideration for Justice Forward Virginia, whose chief mission is to successfully influence policies and legislation surrounding criminal justice to support best practice. It is the likelihood that the targeted organization accepts and enacts the recommended alternatives. While a public information campaign could increase the likelihood of legislation passing over time by bringing attention to the issue, the current policy landscape is the main concern of this criterion. Political feasibility is the main threat to the listed alternatives, as they are relatively easy to enact once passed through legislation. The political leanings and previously documented positions of influential Virginian legislators will indicate whether they would be open to developing the suspended sentence guideline worksheets or eliminating statutory minimums.

CRITERIA 3: EQUITY

Equity is a significant concern for Justice Forward Virginia, as the organization exists to combat injustice within the legal codes of Virginia. As the criminal justice system disproportionately impacts people of color compared to white individuals, it is important to be aware of the impact that proposed changes are likely to have on marginalized groups such as those of low socioeconomic status or those who are ethnic minorities. An ideal policy would help such groups equally or greater than it would benefit more privileged groups, while a policy that does not promote equity would

concentrate the benefits in groups of high socioeconomic status. This criteria is distinct from effectiveness, in that it focuses on the effects of each alternative on the relevant marginalized or underserved population groups, rather than the population as whole.

CRITERIA 4: COST

Cost will be assessed by the amount of money and resources the state of Virginia would need to allocate to implement the given alternative.

ALTERNATIVE ONE EVALUATION: DEVELOP SUSPENDED SENTENCE GUIDELINES

Effectiveness

Data from the VCSC shows that the majority of suspended sentences appear to fall within typical ranges for judges in Virginia. An analysis of the median suspended time given for crimes with effective sentences within 6 months of each other (e.g., between two and two and a half years) revealed that in general, suspended sentences and their upper and lower quartiles are relatively consistent. Of the almost 7,000 sentencing events in this category, the median suspended sentence for an effective sentence between one and one and a half years is four and a half years. Taken at face value, this would indicate an innate consistency in the imposition of suspended sentence that would only be reaffirmed by the addition of guidelines, rather than established.

Figure 1: Suspended and Effective Sentences for Nonviolent Offenses by Locality

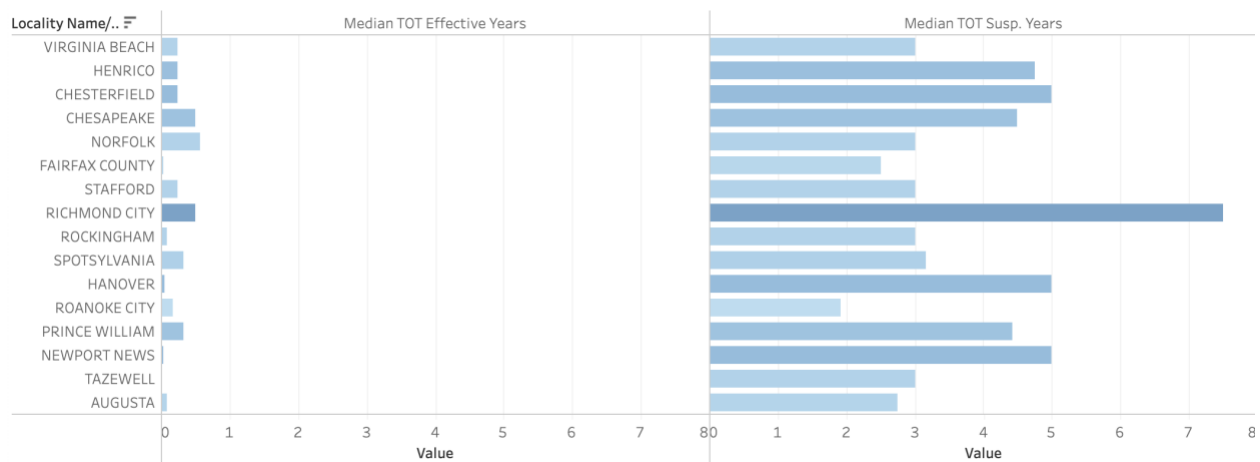
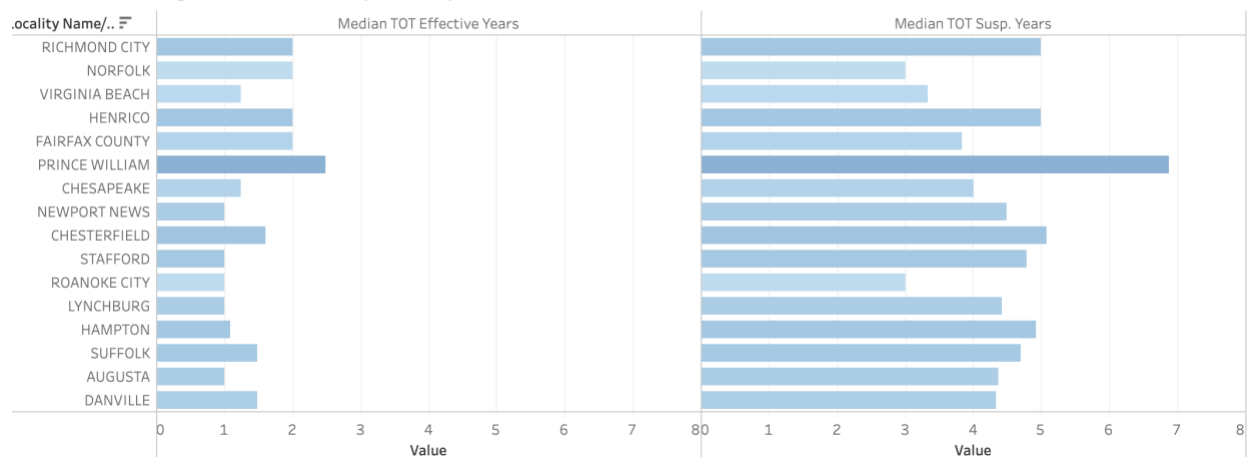


Figure 2: Suspended and Effective Sentences for Violent Offenses by Locality

Effective and Suspended Sentences by Locality



However, a review of locality-specific sentencing outcomes reveals that suspended sentence lengths have the potential vary widely from one court to the next. Figures 1 and 2 demonstrate the range of sentences one can receive by assessing median sentences of suspended years for both violent and nonviolent offenses. The localities displayed for each visualization represent the court systems with the highest numbers of nonviolent and violent sentencing events respectively. The filter of localities is included to increase the clarity of the visualizations and reduce the distractions caused by skewed medians due to low sample sizes. Median suspended years are observed, rather than mean, to further align with the VCSC's policy of basing its recommendations off of median sentences given by judges. Especially within the nonviolent offenses, the lack of consistency is apparent. Just within the sample, there is a difference of more than five years in suspended time between Roanoke City at a median of 1.92 years and Richmond City at 7.5 years of suspended time. The overall median for suspended time for nonviolent offenses across Virginia is 4.25 years. These representations are more generalized to demonstrate broad trends, while median data based on specific offenses will be used to determine recommendations.

The effectiveness of this alternative is high. If judges continue established trends of complying with guidelines in at least four out of five sentencing events, it is highly likely that implementing guidelines around suspended sentences would reduce existing large disparities across localities. This would increase consistency and fairness throughout the justice system in the state.

Feasibility

The feasibility of this option is medium to low. For these recommendations to be enacted, the first step would be a legislator introducing a study resolution for the VCSC into the House or Senate, and having it pass successfully through the General Assembly. After the study was conducted, and in the event that the VCSC agreed to move forward with guidelines, no movements against them would need to be developed by the House or Senate, who have the power to veto any proposed rules by the VCSC. The VCSC is a nonpartisan organization comprised of seven judges, who are appointed by the Chief Justice of the Virginia Supreme Court, a representative of the Attorney General, four appointments by the Governor, two appointments by the Senate, three by

the House of Delegates, and finally, a staff of eight within the Commission. The current governor of Virginia is Glenn Youngkin, a Republican who has recently spoken about his priority of equipping law enforcement to deter crime (Alachnowicz, 2022). The Senate is controlled by Democrats, who recently passed criminal justice reform bill HB2038. It is improbable to suppose that this change would pass without remark or attention by either Democrats or Republicans, so the threat of opposition by the Republican House of Representatives is high at this time. However, if future elections influence the makeup of the GA such that both houses are controlled by Democratic leadership, the potential the aforementioned VCSC proposal passes would be medium to high.

Cost

The largest and only unique cost of this alternative is a result of the development stage that would be necessary to create accurate guideline recommendations. Two analysts at the VCSC would spend approximately six months working on the project. According to government records, the pay of these two analysts can be estimated at \$40,000 a year each. **Devoting two of these employees to suspended sentence guideline model development for six months would make the cost to the state of Virginia approximately \$40,000.** This one-time investment represents performing due diligence on the guidelines, to ensure that the recommendations are accurate reflections of Virginia sentencing practices.

Equity

This alternative scores medium for equity. If racial bias is at work in causing some judges to recommend longer suspended sentences to people of color, the development of guidelines may help alleviate these injustices. Though the VCSC does not collect racial data, a review of federal sentencing data in 2014 revealed that black offenders receive sentences that are almost 10 percent longer than those of comparable whites arrested for the same crimes (Rehavi & Starr, 2014). Assuming that some similar level of prejudice is alive in the Virginia judiciary, it will likely be reduced by the presence of clear guidelines. However, as the guidelines would be optional, it is possible that judges would still choose to aggravate recommended sentences when dealing with a person of color more often than they would for a white person who had committed the same offense.

ALTERNATIVE TWO EVALUATION: ELIMINATE STATUTORY MINIMUMS

Effectiveness

To evaluate the effectiveness of this alternative, I analyzed VCSC data; I connected the provided VCCs to their corresponding statutory minimums. Out of the almost 70,000 sentencing events surveyed, statutory minimums were greater than the midpoint times recommended by guideline worksheets more than 64% of the time. It follows that if judges chose to follow guidelines strictly, they would be compelled to meet a minimum imposed sentence (which is the sum of effective and suspended time sentences) by also imposing a suspended sentence. Overall, judges' effective sentences were even lower than recommended sentences, and their imposed effective times per case were less than the statutory minimums more than 76% of the time.

Figure 3: Statutory Minimums Compared to Effective and Suspended Sentences Feasibility

Statutory Minimums

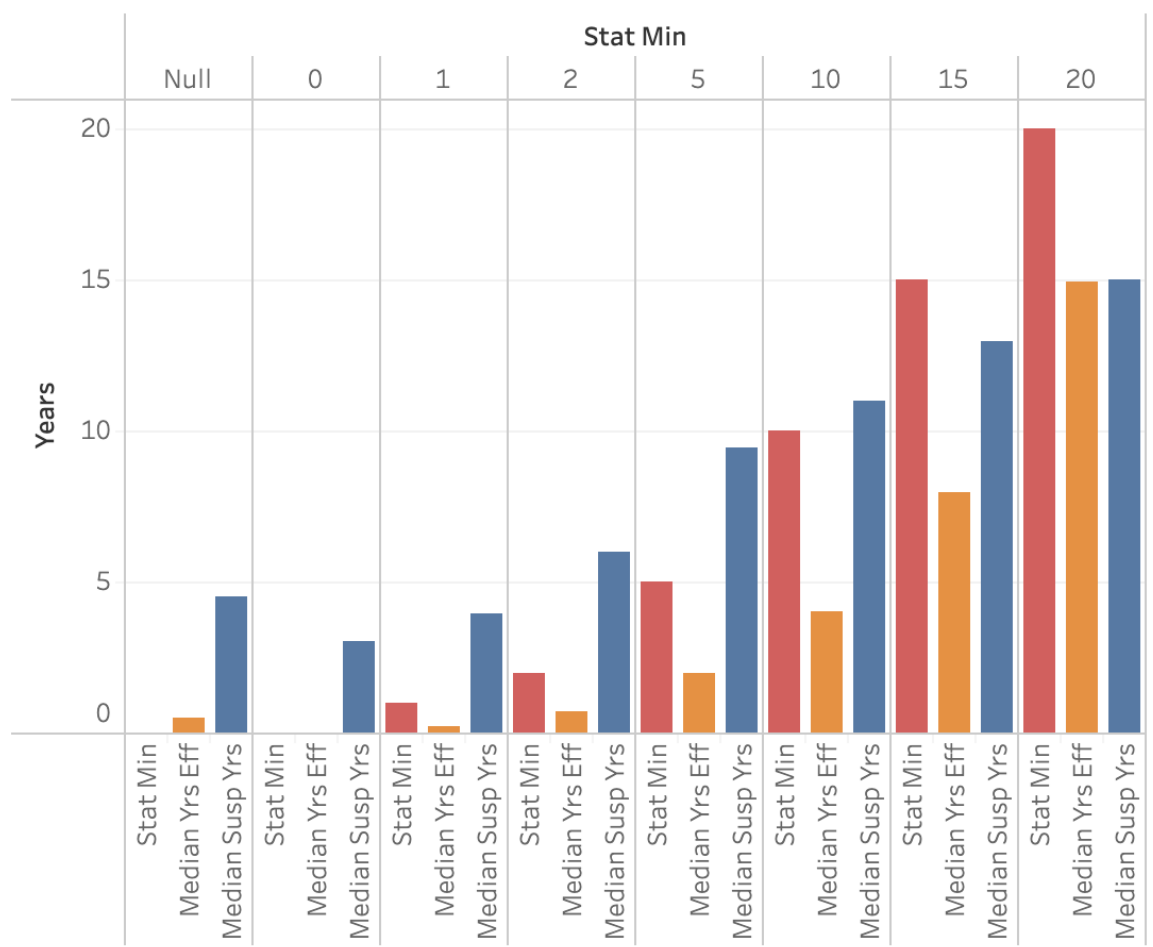


Figure 3 demonstrates, however, that the length of suspended sentences is likely to be long regardless of the presence of a statutory minimum. This visualization shows that though median effective time sentences are lower than suspended times, the length of the suspended time surpasses the amount of time that would be necessary to fulfill the minimum requirements of the statutory minimum. There is no evidence that supports the idea that the elimination of statutory minimums will influence many judges to reduce the length of suspended sentences they impose. **Because of this, alternative two scores low for effectiveness.**

Feasibility

The feasibility of this alternative is currently low. Though recent reforms such as HB2038 passed the GA, the current makeup of the General Assembly has since changed. This alternative would be required to be proposed and pass through the General Assembly and receive the Governor's signature to go into effect. Though the outcome of this action would simply be to increase judicial independence and discretion, it may be portrayed in the media as a threat to public safety. This would likely inspire Republican members of the General Assembly to mobilize against it. However, it is possible that if the makeup of the General Assembly returns to being Democrat-dominated in future years, the feasibility of passing this policy will rise significantly.

Cost

There are no direct costs associated with proposing, passing, and enacting legislation to realize this alternative.

Equity

This alternative scores medium for improving equity in Virginia sentencing. It is a blanket measure that will affect all felony offenders in Virginia, a category which skews disproportionately Black and Brown, as well as comprising a higher number of individuals in low socioeconomic status than is proportional to Virginia's population makeup. Therefore, the majority of individuals affected by this alternative will be from populations that are statistically marginalized and underserved within the state, making this an equitable change.

ALTERNATIVE THREE EVALUATION: MAINTAIN THE STATUS QUO

Effectiveness

This alternative has a low to medium effectiveness rating. Data for sentencing events that have taken place since HB2038 was enacted are not yet available to the public. While it is possible that overall incarceration rates will drop, continuing the status quo does nothing to increase predictability at the original sentencing event.

Feasibility

This alternative has a high feasibility, as the new laws which may improve outcomes for individuals with suspended sentences was passed into effect before the political makeup of the General Assembly was altered. Without action to reverse it taken by the governor or current General Assembly, it is likely that the effects will continue with no further intervention required.

Cost

This alternative bears no administrative cost, as all recent changes to the criminal justice system have already been processed and put into effect.

Equity

This option is more equitable than Virginia has been in the past, but still fails to make deeply necessary strides forward. **It scores low on equity.**

RECOMMENDATION AND OUTCOMES MATRIX

Alternative	<i>Effectiveness</i>	<i>Feasibility</i>	<i>Equity</i>	<i>Cost</i>
Alternative 1	High	Medium	Medium	\$40,000
Alternative 2	Low	Low	Medium	\$0
Alternative 3	Low-Medium	High	Low	\$0

Recommendation

I recommend that Justice Forward Virginia choose **Alternative 1: Advocating for the Development of Suspended Sentence Guidelines**. This option performs well in effectiveness and equity. While it is a slightly higher cost than all other alternatives, the money would be made available from the existing budget for VCSC research work. This policy will improve the consistency of suspended sentences across Virginia and reduce the number of excessively long sentences. While politically challenging to initiate, there is path to establishing guidelines already developed by the VCSC.

IMPLEMENTATION

Justice Forward Virginia's role as an advocacy organization allows them to address both the general public and legislators to increase the likelihood that guidelines recommendations for suspended sentences are adopted.

Partner with other Advocacy Organizations

Strength in numbers is essential for the successful lobbying of this bill. JFW should work with other advocacy organizations that operate in Virginia to amplify the effectiveness of all lobbying efforts. REFORM Alliance, a previous partner in JFW's work to pass HB2038, is a prime candidate to include in future efforts. REFORM Alliance works to bring together bipartisan experts, advocates, and policymakers on common sense solutions to transform community supervision throughout the nation. Developing guidelines aligns with their mission, and they will likely be willing to support JFW's efforts (REFORM Alliance, 2021).

Raise Public Awareness

The topic of suspended sentences is practically nonexistent in the average Virginian's understanding of our criminal justice system. Justice Forward Virginia and its advocacy partners should release infographics, memos, and other media pieces where appropriate to improve public understanding of this issue. By sharing to social media platforms or posting on their blog, and encouraging supporters to do the same, the average Virginian will be more likely to understand and support suspended sentence guidelines by the time they are up for vote in the General Assembly.

Advocate for Legislation

The first step to instituting guidelines is passing a study resolution on the topic through the General Assembly, calling on VCSC to perform a thorough review on the issue and develop policy. Justice Forward Virginia should frame this resolution as a common-sense action that fulfills a bipartisan goal for similar sentences for similar offenses, no matter which locality a person lives in or what their socioeconomic background is. As the state Senate is currently Democratic, and the 2021 Democratic Senate successfully passed HB2038, efforts to launch the study resolution should focus on the Senate for maximum success. Co-chairs of the Senate Judiciary Committee, Sen. John Edwards (D) and Senator R. Deeds (D) would both be ideal candidates to sponsor the resolution. JFW should engage in outreach to Republican leaders in the House of Delegates to advocate for the value of this resolution. If it is not able to pass in the coming legislative session, it is possible that the 2022 Midterms in Virginia will flip the House back to Democratic leadership, in which case the political feasibility of passage will rise significantly.

CONCLUSION

The ubiquity of suspended sentences is deeply concerning in context of the lack of attention provided to them by the general public, legislators, and VCSC (whose job is to monitor sentencing practices in Virginia). This report assesses relevant literature and policy, as well as the past three years of sentencing data to generate the best alternatives to address the issue. Further analysis is needed to fully understand the drivers and impacts of suspended sentencing. The passage of a study resolution on the need for suspended sentence guidelines will conduct such an analysis and is long overdue for the state of Virginia. If the alternative is successfully developed into a guidelines system, it is possible that judges will not adhere to recommendations with the same level of consistency currently found in effective time sentence guidelines adherence. Barring a united opposition by judges, however, the ultimate effect of this alternative will be to stabilize suspended sentences across localities and reduce the frequency and severity of sentences that stray far from the median.

APPENDIX TABLE 1

The following list includes all technical violations according to the Code of Virginia § 19.2-306.1. A technical violation refers to a failure to:

- Report an arrest within 3 days.
- Maintain regular employment or notify of job changes.
- Report within 3 days of release from incarceration.
- Permit a probation officer to visit home or employment.
- Follow instructions of the probation officer, be truthful/cooperative.
- Refrain from the use of alcoholic beverages to excess.
- Refrain from the use, possession, or distribution of drugs.
- Refrain from the use, ownership, or possession, of a firearm.
- Gain permission to change residence.
- Maintain contact with the probation officer such that the person's whereabouts are no longer known (absconding).

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