



Report on the Interpretation, Implementation and Impact of Va. Code § 19.2-306.1: Virginia's Probation Reform Statute

Introduction

In 2021, Virginia passed legislation reforming probation supervision and procedures for adjudicating probation violations. Included among the reforms were limits on the duration of community supervision, and caps on the amount of jail or prison time courts could impose for “technical” violations of probation.

Even before Va. Code § 19.2-306.1 went into effect on July 1, 2021, opponents of the reforms began scrutinizing the statutory language, as reflected in the Virginia Criminal Sentencing Commission’s 2021 Annual Report (<http://www.vcsc.virginia.gov/2021AnnualReport.pdf>). As the report notes, “[s]ince the passage of House Bill 2038,” in March of 2021, the Commission began receiving “questions related to the legislation and requests for guidance regarding interpretation of the new law.” *Id.* at 52. These questions were posed by unspecified “criminal justice stakeholders,” and in the opinion of VCSC, “suggest” “potential unintended consequences of the legislation.” *Id.* On closer scrutiny, it appears these comments came from those who opposed probation reform generally and resisted implementation of the new law.

In the context of a legislative session where Republicans have made it a top priority to fully repeal Va. Code § 19.2-306.1, these “questions” have been interpreted by some as well-founded criticisms of the new law, backed by data and practical experience. This is false, as discussed at length below. First, the VCSC report was intended only to document comments received from the field, and explain what their import might be—the Commission cannot and did not take any position on whether the effect of the new law was good or bad.

Second, even if VCSC were permitted to take such a position, it did not have any reliable evidence, empirical or anecdotal, regarding the effects of the law. As the Annual Report itself indicates, and as confirmed by members of the Virginia Criminal Sentencing Commission, the “questions” were collected between the time the bill passed the General Assembly in the Spring of 2021, and about three months after the law went into effect on July 1, 2021. This is why, in explaining the various questions, VCSC does not cite cases, sentencing trends, data, or other evidence, but rather merely describes the arguments levied by opponents, using language like the following:

- “Some have argued... others have indicated.”
- “Criminal justice stakeholders have advised...”
- “Commission staff has been informed that...”
- “Criminal justice stakeholders have questioned...”
- “Based on feedback provided to the Commission...”
- “[M]any criminal justice stakeholders have expressed concern...”

Third, it appears likely that none of the unspecified “criminal justice stakeholders” were proponents of probation reform. On information and belief, none of the following groups or individuals “informed,” “indicated,” or “advised” VCSC of any concerns regarding interpretation or implementation of the law: the Virginia Indigent Defense Commission, Virginia Association of Criminal Defense Lawyers, ACLU Va., Justice Forward Virginia, REFORM Alliance, American Conservative Union, Nolef Turns, or individual public defenders or leaders of the criminal defense bar.

The purpose of this brief is to provide reliable evidence—lacking in the current debate over probation reform—regarding interpretation and implementation of the new laws. The evidence is three-fold:

- 1) A survey of 109 Virginia criminal defense attorneys, asking the same questions listed in the VCSC report to determine if speculated concerns, and others raised during the current legislative session, have materialized
- 2) Data regarding the most common grounds for probation violations, to demonstrate the likely impact of the two House repeal bills (HB758/760).
- 3) Written feedback from public defenders regarding the practical impact of Va. Code § 19.2-306.1 since July 1, 2021.

Part I: Survey of Stakeholder Concerns Regarding Implementation of Va. Code § 19.2-306.1

Between February 14 and February 16, 2022, Justice Forward Virginia and the Virginia Indigent Defense Commission surveyed public defenders, court-appointed attorneys, and members of the Virginia Association of Criminal Defense Lawyers, using questions adapted from those listed on pages 52-58 of the Criminal Sentencing Commission's 2021 Annual Report (<http://www.vcsc.virginia.gov/2021AnnualReport.pdf>)¹.

- A total of 109 attorneys responded to the survey.
- A combined 1141 years of practice; average of 10.5 yrs each.
- Mostly public defenders, who since July 1, 2021, have observed probation revocations in 58 of Virginia's Circuit Courts:
 - Albermarle, Alexandria, Alleghany, Arlington, Augusta, Bath, Bedford, Bland, Botetourt, Buena Vista, Charlottesville, Chesapeake, Chesterfield, Clarke, Craig, Fairfax, Fauquier, Franklin, Frederick, Fredericksburg, Halifax, Hampton, Hanover, Henrico, Henry, Isle of Wight, King George, Lexington, Loudoun, Lunenburg, Lynchburg, Martinsville, Mecklenburg, Newport News, Norfolk, Page, Patrick, Petersburg, Portsmouth, Powhatan, Prince William, Pulaski, Radford, Rappahannock, Richmond, Roanoke, Rockbridge, Rockingham, Shenandoah, Southampton, Spotsylvania, Stafford, Staunton, Virginia Beach, Warren, Waynesboro, Winchester, Wythe.

Key findings

- On 6 of 8 issues surveyed, interpretation and implementation is essentially uniform across the 58 Circuits noted above.
- Only one judge in the entire Commonwealth (Arlington County Circuit Court) is treating each specific instance of a probation condition violated (e.g. every positive drug screen listed in a Major Violation Report) as a separate probation violation, even though submitted to the court as a single probation violation.

¹ Two questions from the VCSC report—regarding whether caps on incarceration are being applied in misdemeanor cases in district courts, and whether absconding violations are taking “precedence” over other technical violations—were included in the survey but have been omitted here, since follow-up with respondents indicated confusion over what the questions were asking. Anecdotally, however, it does appear that some courts have adopted a minority position as to each issue, but the overall impact is insubstantial, given the infrequency of jail sanctions for technical violations of misdemeanor probation, and the relatively uncommon circumstance of an individual with more than two prior technical violations who subsequently only violates the absconding condition of probation.

- Almost every circuit court believes it has the authority to detain defendants before their revocation hearings, but very few do so, finding that technical violators of probation facing 0-14 days in jail neither pose a risk of flight nor a danger to the community (see Part II).
 - Problems with implementation mainly appear to be the result of probation officers, prosecutors and judges attempting to circumvent the spirit of the legislation by adding “special conditions” (see Part II).
 - There is no evidence at all that the two prominent concerns cited by the House patrons of proposed repeal legislation (HB 758 and 760)--regarding distribution of narcotics and gun possession--have any basis in fact.
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Question 1: Under the new probation laws, have courts in which you practice treated each specific instance of a condition violated (e.g. every positive drug screen listed in a Major Violation Report) as a separate probation violation, even though it was submitted to the court as a single probation violation?

Yes: 3

No: 105

Note: All three who answered “yes” were referring to the same Arlington judge—the Hon. Louise M. DiMatteo).

Question 2: Have courts in which you practice counted technical violations in the same case from prior to July 1, 2021 in determining whether a violation is a second or third?

Yes: 77

No: 18

NA/no experience: 15

Note: Respondents who answered no practice in the following jurisdictions—Fairfax County; Petersburg; Pulaski/Radford/Wythe/Bland; Halifax/Mecklenburg/Lunenburg; Virginia Beach; Lynchburg; Chesterfield/Henrico/Powhatan/Hanover.

Question 3: Have courts in which you practice counted technical violations from other cases (not the case for which the defendant is on probation) in determining whether a violation is a second or third?

No: 106

Yes: 3

Note: Practitioners answering yes are based in Fauquier/Rappahannock; Halifax/Mecklenburg/Lunenburg; Bedford.

Question 4: Have courts in which you practice held that a probation officer may create their own “special conditions,” not contained in the sentencing order, such that a violation of those conditions will not be subject to the incarceration limits in the probation reform statute?

Yes: 21

No: 88

Note: All respondents who answered “yes” were asked the circumstances in which violations of “special conditions” created by the probation officer have been deemed exempt from the incarceration limits in 19.2-306.1. Those who answered follow-up outreach indicated that this mainly has happened with respect to court costs, restitution, gang involvement and sex offender treatment. Others noted that probation officers in numerous jurisdictions have unsuccessfully attempted to turn standard rules of probation into special conditions, seemingly because they are unhappy with the law.

Question 5: Have any courts in which you practice found that “good conduct” is anything other than a synonym for “good behavior”?

Yes: 1

No: 108

Note: Respondent who answered “yes” is a Loudoun practitioner; numerous other Loudoun attorneys answered “no.”

Question 6: Do courts in which you practice believe that the probation reform statutes prohibit holding defendants in jail before their violation hearing when the defendant is only facing 0-14 days as a sanction?

Yes: 1

No: 108

Note: Practitioner who answered “yes” practices in Halifax, Mecklenburg, and Lunenburg counties. Many other respondents stated that judges release defendants as a matter of course, but mainly because they do not believe that someone facing a 0-14 day sentence for a technical violation of probation presents a risk of flight or a danger to the community.

Question 7: Condition 8 of the standard rules of probation apparently makes it a violation of probation not only for a probationer to use drugs, but also to DISTRIBUTE them. Have you ever had a case in which “drug distribution” was alleged as a Condition 8/technical violation ONLY -- meaning that the defendant was not also charged with the substantive offense of drug distribution?

Yes: 0

No: 109

Question 8: Similar to the foregoing, have you ever had a case in which “gun possession” was alleged as a technical violation only, and not also as the crime of felon in possession of a firearm?

Yes: 0

Only once or twice: 3

No: 106

Note: one of the respondents who answered “once or twice” indicated that the case involved a probationer who, during a polygraph, showed deception when he stated he had not possessed firearms while on probation.

Part II: Case Examples

In addition to the survey questions, those who responded were asked to provide examples of how probation reform has changed outcomes for their clients. Feedback was almost universally positive, with long-time practitioners offering many anecdotes about how probation reform has brought about long-needed change.

- 1. More people are allowed to remain at liberty before their probation revocation hearings, which allows them to keep their jobs, get reconnected to therapeutic services, and better prepare for court.**

Chief Public Defender #1

“I think overall the change has helped with getting clients bond on probation violations. This appears to act as a wake-up call for them—I have seen clients who are released on bond before their probation violations get re-connected with probation or other services, and then come back to court for their hearings in a better place: in treatment, or employed, or able to deal with pending charges in a real way (i.e. have a full and fair hearing) rather than just plead out. This also encourages more hearings, which is good! For example, during one contested probation revocation hearing, the probation officer admitted on the stand she doesn't check all her voicemails and she doesn't keep a log of her voicemails. This was a very big deal, because the allegation was that the client “failed to maintain contact” with the probation officer! This is a huge positive as far as accountability for probation officers.”

Chief Public Defender #2

“Before the new probation reform laws, the process for initiating a probation violation, scheduling a revocation hearing, and granting a client a hearing on bond in our Circuit was absurd. It generally took about two weeks following arrest on a probation violation bench warrant for the court to get around to appointing an attorney for the defendant. Even at that point, neither the court, nor the client, nor the new attorney would have any idea what the nature of the violation was or the allegations against them. It wasn't uncommon for a client to be held 3-4 weeks before they appeared for a bond hearing. It wasn't uncommon at all for our bond hearings to be scheduled just a few days before the violation hearings themselves.

Up until the restrictions of 19.2-306.1 the Circuit Court judges were completely insulated from any concern about holding clients for weeks prior to their bond hearings. The logic being, “eh, I have discretion to give them every day of their suspended sentence back, so why should I be in a hurry to arraign them, or release them pending the hearing.” Also, they were quite disinterested in finding out if that allegation of “absconding” took place two days after they started probation or they moved three weeks before they got off probation. So by the time we got to the bond hearing to try and have this client released, the client has potentially served more time than they would be willing to give at the hearing, but the client has already lost his job, his apartment, his car, etc. etc. etc.

Since 19.2-306.1 became law, we have seen a complete about-face by the court. One judge in particular now seems very sympathetic to the notion that clients shouldn't be held pretrial for more time than they can be sentenced to for the violation (0-14 days). This urgency has not changed the way we handle arraignments, but it has resulted in this Judge issuing many many more show causes [which allow the defendant to remain at liberty before the hearing] in lieu of capiases [which require the defendant to be arrested and probably detained] and setting bonds on the capiases that are issued. The judge also began asking probation to prepare Major Violation Reports much earlier than before, so he can make an informed decision on bond.

So in our circuit, the probation reform law has revolutionized how we go about arraigning and bonding the clients. It created urgency in our judges to either get them arraigned quicker, or bond them immediately while probation gets its act together.”

Senior Public Defender #1

“I wish I had time for an extensive review of how much the probation changes have helped clients. It has been incredible. In my jurisdictions, the judges do not believe it is proper to hold someone on a technical violation. As a result, many of my clients have been released to bail at their first appearances. Last week a judge commented that so many of my clients who were released to bail immediately seem to have “turned it around” between the time they were arrested on the violation and the time of the probation violation hearing. The judge said they wondered why. I replied, honestly, that the opportunity to have a court interaction without a sanction (being pulled in for first appearance) often seems to be the only intervention needed for people to realize that they need to address noncompliance and get their act together. As you know, substance use disorder is the most common basis for a probation violation—releasing clients before their hearings has given them the opportunity to start treatment to address their substance use disorder. They usually take the opportunity!

I have two clients in recent hearings who benefited from this.

One is a young woman [under age 25] who was on probation for a felony drug possession; following a conviction and sentence entered last year. A few months after she was convicted, she had a relapse, tested positive for drugs, and returned to court on a first technical violation of probation. The court arraigned her, and rather than hold her in jail pending her probation revocation hearing, released her back to bond with requirements that she re-engage with probation. She did so and was able to enter inpatient treatment for her substance use disorder, and is now living in a sober-living facility. She has received wonderful reports from both institutions and has expressed gratitude at the opportunity for treatment instead of jail.

Another beneficiary is a client who had been out of touch with probation. He did his initial meeting, then his assessments for services, and was recommended for outpatient classes. He was supposed to be enrolled in outpatient substance use disorder treatment classes and enrolled but missed some. Probation submitted a major violation report, and the court initiated revocation proceedings. Like the other client, after being arraigned on the violation, the judge, considering the limits on incarceration (19.2-306.1), released him on bond until his revocation hearing. After being released, and before his probation hearing, he enrolled in his substance abuse treatment classes, re-engaged with probation, and completed his other requirements by the time the case was heard. The judge was so pleased, he actually ended up dismissing the probation violation and removing my client from supervised probation! My client as he left the courtroom, expressing that he had been on probation for the last 12 years (various charges) and no one had ever acknowledged, commended or believed in him when he was making progress.

I have a few other similarly heartwarming stories. Another common scenario is violations where the only issue is non-payment of restitution. Under the new probation reform law, clients are remaining out on bond more often, which allows them to get their act together and make the restitution payments they missed BEFORE the judge hears the case. Of course, paying restitution is MUCH easier when a person can keep their job, and they are much more likely to keep their job (and maintain other pro-social ties in the community) if they aren't sitting in jail. Most clients in that restitution scenario easily get back on track because they are not held and have the incentive and ability to get their cases in order.”

Assistant Public Defender #1

“After clients are charged with violating probation, our judges look to see whether it is a first or second technical violation, and if so, they prioritize our bond motions, or in some circumstances see if we can set the probation violation hearing quickly. They have released on bond almost everyone (if not everyone) who is charged with a first or second violation. It appears those decisions are based not on whether they're prohibited from

detaining someone, but rather on the overall fairness of holding someone who is only facing up to 14 days. I believe all of our Judges in this circuit feel this way.”

2. Alternatives to incarceration are more available and easier to secure.

Chief Public Defender #3

“Overall, I believe that the probation reform statute has helped clients suffering with addiction. We can focus our efforts on securing treatment for the client without the client sitting in jail for extended periods of time getting no help. Even with the small number of clients who relapsed several times and burned through their first and second technical violations in a matter of weeks—we were better able to find treatment alternatives for the client even under those circumstances. Before the reform statute, that client would have sat in jail for several months before a final revocation hearing. While some technical adjustments to the statute may be in order, repeal in any form would definitely harm our clients.”

3. Sentences are shorter, without compromising community safety.

Chief Public Defender #4

“Our Judges know the new rules, they just do not like them and let it be known every chance they get. For example, there appears to be a concerted effort to get everyone past the first two technical violations, so they can issue as long a sentence as they want (our Circuit was known to sentence very harshly on probation violations before the law went into effect—it was not uncommon for individuals coming in on their first tech violation to receive at least a year.). Most clients are being held without bail, even if they are only facing 0-14 days as a sanction. It often feels like the judges are trying to punish our clients because of how much they don’t like the new rules, and how much they want things to be like they were before. That said, we have been fighting hard, objecting to all of the above, and at least with respect to the caps on incarceration, we have been winning. So yes, at the end of the day, the new probation reforms have helped tremendously in this jurisdiction.”

Assistant Public Defender #2

“I recently had a case involving an alleged good behavior violation that occurred years ago. My client was never arrested, and the Commonwealth never attempted to prove the case beyond a reasonable doubt to a jury. Nevertheless, they went forward on a probation

violation—as noted, years after the incident happened—with the much lower burden of proof. At the initial violation hearing, the judge found a condition 1 violation—for violating “uniform good behavior,” i.e. allegedly engaging in criminal conduct. The judge initially revoked my client’s previously suspended sentence, and ordered that he serve several years in prison. But I then advised the court of the changes in the law as a result of Va. Code 19.2-306.1, which does not allow a suspended sentence to be reimposed for a good behavior violation that does not result in a conviction. The judge ultimately granted my motion and resentenced the client, suspending all of the time he initially imposed.”

4. Supervision periods are shorter, allowing clients to move on with their lives.

Private Defense Attorney #1

“The only confusing situation that arises has been "how much time on probation once a violation has occurred is someone subjected to" . They used to just do indeterminate supervision in this jurisdiction on everything prior to the rule change. Now they just say indeterminate up to the max the law allows.”

5. Defendants who don’t require supervision are being removed from probation, without unnecessarily lengthy jail sentences.

Chief Public Defender #5

“A major benefit we’ve observed in at least one circuit court is that a judge is simply taking folks OFF PROBATION following their first technical violation! It is a common sense move, and it is awesome. I've seen clients where I work kept on probation for literally over a decade for something as minor as drug possession for personal use. Ten years of supervision for drug possession is nuts, so seeing a judge feel liberated to use common sense is a huge benefit. As a side note, I've never understood active probation for a simple possession charge.”

6. No more probation violations for acquitted conduct.

Chief Public Defender #4

“Our court initiates condition 1 violations (“good behavior”) as soon as the probationer is arrested on a new offense, even if that case won’t be adjudicated for months or years. In

the past, the way our court has handled those violations is by continuing the probation violations over and over while the potential condition 1 matter is pending (i.e. until the person is found guilty or not guilty on the new charges). Based on the new probation law, our court has signaled that judges will no longer allow violations to be continued until the conclusion of a potential condition 1 matter. Instead the court will make them go forward on what's ready and have another violation issued if the person is convicted. This is good for our clients because often it was only the pending probation violation that was keeping them held in jail while they awaited trial.”

7. Outcomes will improve with time

Chief Public Defender #1

“Overall this change needs TIME to make a difference. This system is so aggressively bent towards incarceration: I mean 5 years from now I think probation will look fundamentally different and our clients will be better. it isn't going to happen in a year. But I know you know this.”

8. It's resistance from judges and probation that's causing implementation problems—not the statutory language

Chief Public Defender #1

“But the challenge has been the complete and utter commitment of our judges, prosecutors, and POs to continue to incarcerate for extended periods of time. The goal, from my perspective, was to not yank individuals from their communities/jobs/treatment programs for weeks at a time before their PV hearing (because we know this doesn't help with rehabilitation or re-entry), but with PB-15s, setting hearings for weeks or months away, and prosecutors continuing to object to bonds many of our clients are still held for weeks even when a 0 or 14 day violation. One stupid hiccup has been we had to fight to get guidelines on PVs so we could get hearings heard more quickly-judges refused to proceed without guidelines and some POs were refusing to submit guidelines. Unfortunately, this has resulted in a lot of ‘pleading out to get out’ situations for clients. I think the interesting thing would be to see how many of those clients are coming back on a second or third technical.

We are also seeing POs starting to classify court costs as special conditions, which we are in the process of litigating.

Judges have compared probation violations to drug court, citing the ‘need’ to send people to jail for a few days to get on the right track. If drug court is in fact effective, though, jail

is definitely not the reason why (in fact, recent research has led to drug court's moving away from jail sanctions). The resources expended on drug court clients are immense—they have an entire treatment team working for them and wraparound services. If ordinary probation clients had those sorts of resources dedicated to their success, that might improve outcomes. But jail time certainly doesn't—let alone when it lasts weeks even before violations are heard. The real source of discontent from judges isn't that they can't 'straighten people out' with jail time—it's that they demand obedience to their orders, even orders that don't have a clear rehabilitative purpose. They have actually said they can't stand it when they are unable 'to vindicate a violation of their order.'”

Deputy Public Defender #1

“Where I work, probation officers are blatantly attempting to create their own special conditions out of thin air, so that clients face lengthier periods of incarceration if they're violated. I can't tell you how angry I became during one particular case, where the probation officer attempted to raise condition 8 (refrain from using drugs) to special condition status simply because the judge emphasized compliance with that condition in open court during a hearing. As a supervisor in my office, I've warned my staff to be on the lookout for this type of end-run around the legislature. We all know what the statute says. PO's simply don't like it. They are clearly and intentionally overstepping their bounds and must be stopped. If a person violates a legitimate special condition (like sex offender conditions), then the PO's are well within their rights to put it in the violation report. However, trying to manufacture special conditions smacks of nefarious motives and I would like to know if the PO's are being trained or coached to do this.

Everything about what they're doing is so troubling to me. Our clients face an uphill battle in violation hearings as is, and it usually feels like the deck is stacked high against them. Just when they appear to have gotten some relief from the legislature, the executive branch decides to take it upon itself to nullify the legislature's intent. Maybe it doesn't seem like a big deal to outsiders, but to us it smacks of injustice. I see it as a separation of powers issue that could leak over into other areas if allowed to stand. I, for one, plan to fight it as far and as long as I can.”

Assistant Public Defender #3

“Our probation officers and judges are trying to circumvent probation reform by using special conditions. Probation is claiming special conditions on violations, primarily when it comes to testing positive for drugs and for noncompliance with drug treatment/classes. They haven't been listed as special conditions in the sentencing order but the reports are listing them as special conditions. As for our judges, they are taking the standard conditions/rules of probation but making them ever-so-slightly different. For example,

they might order that a “special condition” of probation is for the defendant not just to report as instructed to the probation officer, but to do so on a very specific schedule—e.g. meet with the PO face-to-face exactly once a month for the first 12 months. Or the court might set a very specific schedule for drug testing, and call it a special condition (e.g. urine screens twice a month for the first 12 months).”

Assistant Public Defender #4

“Less surprising is that probation/the court seems like it’s trying to use restitution as a out-clause to avoid the incarceration limits in 19.2-306.1. In fact, most of my clients who would otherwise fall within the incarceration limits in 19.2-306.1 are disqualified for non-payment of restitution, which is always listed as a special condition. I find this highly problematic especially for our clients, who are, of course, indigent.”

Part III: Data–Summary

The reforms passed in 2021 categorized certain low-level probation violations as technical violations and created separate procedures for revocations alleging these violations. The Virginia Sentencing Commission provides annual data on felony probation revocation cases including breakdowns of revocations based on the condition alleged to have been violated. Analysis of this data provides a measure of how impactful the 2021 reforms were and the degree to which the current repeal efforts would destroy the progress that has been made.

1. Removing Drug Possession/Use and Absconding from the Technical Violation Category Would Dramatically Weaken the Impact of the 2021 Reforms

HB760 would remove drug use/possession from the technical violation category. Other proposals seek to exclude absconding. This would have a dramatic impact on the number of cases that would no longer be governed by the 2021 reforms. Between 2015 and 2019 violations including allegations of drug use/possession consistently made up 50% or more of all felony technical probation revocation cases, and in 2021, drug use/possession

was present in 59.3% of all technical violations. Meanwhile, absconding has consistently been alleged in 20-25% of all probation revocations.

Data from the Sentencing Commission does not differentiate between allegations of drug use, possession, or distribution. However, a survey of 109 defense attorneys and comparative data of drug possession violations indicates that this is because a probationer suspected of distributing drugs is always charged with a new substantive violation of law instead of merely a probation violation.

2. Broader Changes to the Treatment of Technical Violations would Negatively Impact a Significant Number of Probation Revocation Cases

The 2021 reforms also put a number of other low-level probation violations into the technical violation category. HB758 seeks to make sweeping repeals to how these types of violations are handled. This bill would not make small tweaks to the 2021 reforms; it would gut the impact of the reforms entirely.

Data from 2015-2019 shows that these technical violation cases make up the majority of probation revocation cases heard in Virginia courtrooms. Among the affected cases would be allegations of failing to report an arrest or traffic ticket (5-7%); failure to maintain employment (1-3%); failure to keep meetings with probation officers (10-11%); failure to follow instructions from probation officer (40-48%); failure to refrain from alcohol use (2-4%); failure to notify probation of a change of residence (12-13%); and absconding from probation 21-25%).

3. Possession of a Firearm is Almost Never Alleged as a Violation of Probation

Advocates for the repeal of the 2021 reforms have argued that possession of a firearm should not be handled as a technical violation. In reality, possession of a firearm has very rarely ever been alleged as a violation of probation. Possession of a firearm has never made up more than 1% of all probation revocation cases in data going back to 2011. This is unsurprising given that a person convicted of a felony can and will be charged with new substantive criminal offenses for this violation of law.

4. Data on the Effectiveness of the 2021 Reforms is Simply Not Yet Available

Advocates for the repeal of the 2021 reforms have relied solely on vague anecdotes and cynical predictions. No attempt has been made to use data to argue against the 2021 reforms. This is because the data on the effectiveness of the 2021 reforms mostly does not yet exist, and to the extent it does, it supports the efficacy of the reforms.

After its passage in the 2021 legislative cycle, the reforms took effect on July 1, 2021. It has only been seven months since the new procedures have been in effect in courtrooms across the Commonwealth. The 2021 reforms were significant changes to the administration of probation revocation cases. There has simply not been enough time for data to be compiled and analyzed to evaluate all the impacts of these reforms.

There is no data to support the contention that the 2021 reforms are negatively impacting recidivism rates, probation compliance, or public safety more broadly. As noted, the 2021 VCSC Annual report documents a decrease in total probation violations in 2021, and the Justice Forward survey discussed above suggests the reforms are being applied uniformly with very few implementation problems—other than a small but vocal minority of judges, prosecutors and probation officers being unhappy that they cannot put probation violators in jail, which of course was the point of the legislation.

What we do know is that because of the 2021 reforms Virginia courts are much less likely to over-incarcerate and over-supervise probationers. More importantly we know that probation and court resources are more available to deal with higher public safety priorities than low-level probation violations.

Data–Appendix (Next Page)

Part 3 Appendix: Data—Tables and Analysis

SUMMARY

From 2011 to 2019, the total number of revocations in Virginia rose dramatically by 44% (4,806 additional revocations). During that time, the number of violations for drug use, possession, etc. rose by 109%, failure to follow instructions rose by 90%, absconding from supervision rose by 61%, and condition 1 violations rose by 31%. Conversely, the distribution, or share, of violations by condition within each year has remained largely stable with most conditions staying within 10% from 2011 to 2019. The exceptions to this trend were the percent of failing to follow instructions increasing 12 points from 36% to 48% and drug use, possession, etc. increasing 16 points from 35% to 51%.

Table 1. Comparison between 2011 and 2019 revocations and conditions violated.

Year	2011	2019	Change in number of violations (percent)	Change in number of violations (count)
Number of Revocations	10,983	15,789	44%	4,806
(1) Laws	5,718	7,471	31%	1,753
(2) Fail to Report Arrest	1,096	851	-22%	-245
(3) Fail to Maintain Employment	505	219	-57%	-286
(4) Fail to Report to PO	1,862	1,625	-13%	-237
(5) Fail to Allow Officer to Visit	61	72	18%	11
(6) Fail to Follow Instructions	3,953	7,502	90%	3,549
(7) Alcohol Use, Possession, etc.	553	365	-34%	-188
(8) Drug Use, Possession, etc.	3,856	8,045	109%	4,189
(9) Firearm Possession	73	94	29%	21
(10) Change Residence without Permission	1,582	1,972	25%	390
(11) Abscond from Supervision	2,492	4,006	61%	1,514
(12) Special Court Condition Violation	2,409	2,577	7%	168

Table 2. Comparison of the share/distribution of conditions violated between 2011 and 2019.

Year	2011	2019	Change in distribution of conditions violated.
Number of Revocations	10983	15789	x
(1) Laws	52%	47%	-5%
(2) Fail to Report Arrest	10%	5%	-5%
(3) Fail to Maintain Employment	5%	1%	-3%
(4) Fail to Report to PO	17%	10%	-7%
(5) Fail to Allow Officer to Visit	1%	0%	0%
(6) Fail to Follow Instructions	36%	48%	12%
(7) Alcohol Use, Possession, etc.	5%	2%	-3%
(8) Drug Use, Possession, etc.	35%	51%	16%
(9) Firearm Possession	1%	1%	0%
(10) Change Residence without Permission	14%	12%	-2%
(11) Abscond from Supervision	23%	25%	3%
(12) Special Court Condition Violation	22%	16%	-6%

The figures and tables below present this data in visual and table form:

- Figure 1. Counts of violations by condition by year.
- Figure 2. Distributions of violations by condition by year.
- Figure 3. Year-over-year change in number of violations by conditions.
- Table 2. Counts of probation conditions violated by year. (See, Figure 1)
- Table 4. Distribution of conditions violated by year among the 12 types of conditions. (See, Figure 2)
- Table 5. Year-over-year change in counts of probation conditions violated. For example, “2012” is the count of 2012 minus 2011. (See, Figure 3)
- Table 6. Year-over-year change in counts of probation conditions violated.

METHOD

These results are based on “SRR_PVG CY2011-FY2020” data from the Virginia Criminal Sentencing Commission, containing information from CY2011 to CY2019. This data is available from the Virginia Criminal Sentencing Commission.

Analysis was performed in R using RStudio software. The documented code and data for this analysis have been retained by the author.

FIGURES AND TABLES

Number of Probation Revocations with Violations from 2011 to 2019

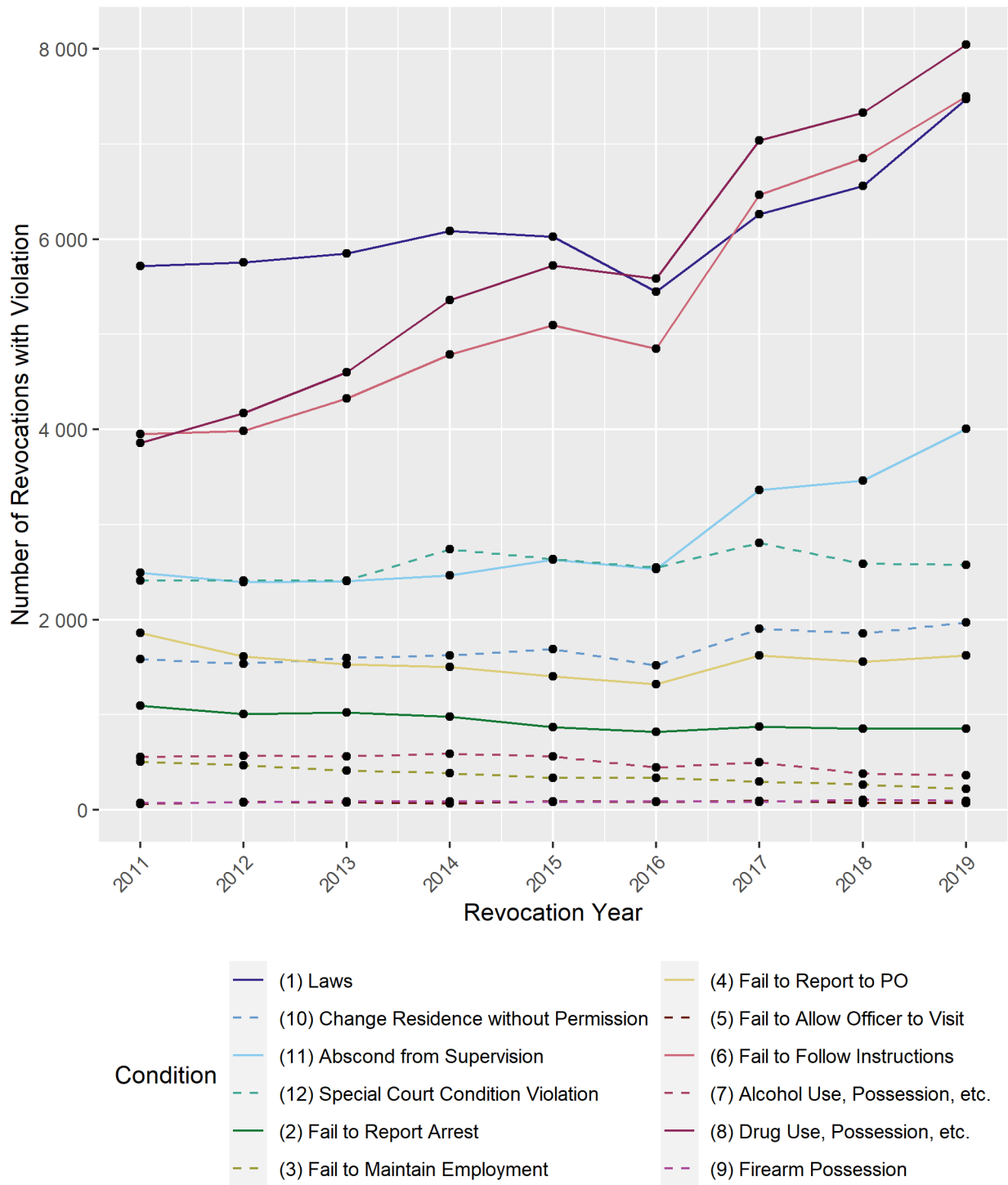


Figure 1. Number of violations by condition by year (count).

Percent of Probation Revocations with Violations from 2011 to 2019

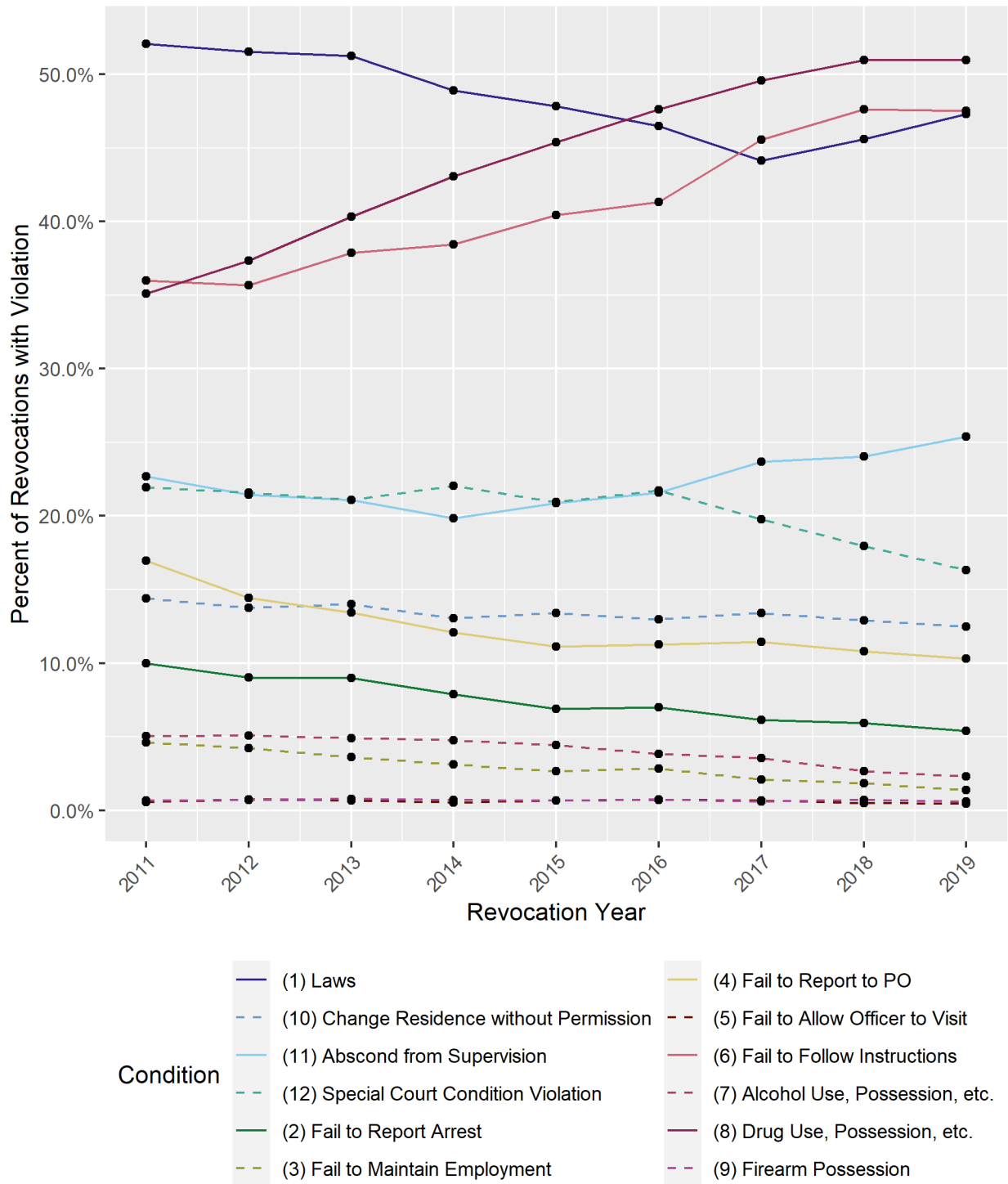


Figure 2. Share of violations by condition by year (percent).

Year-Over-Year Change in Probation Revocations with Violations from 2011 to 2019

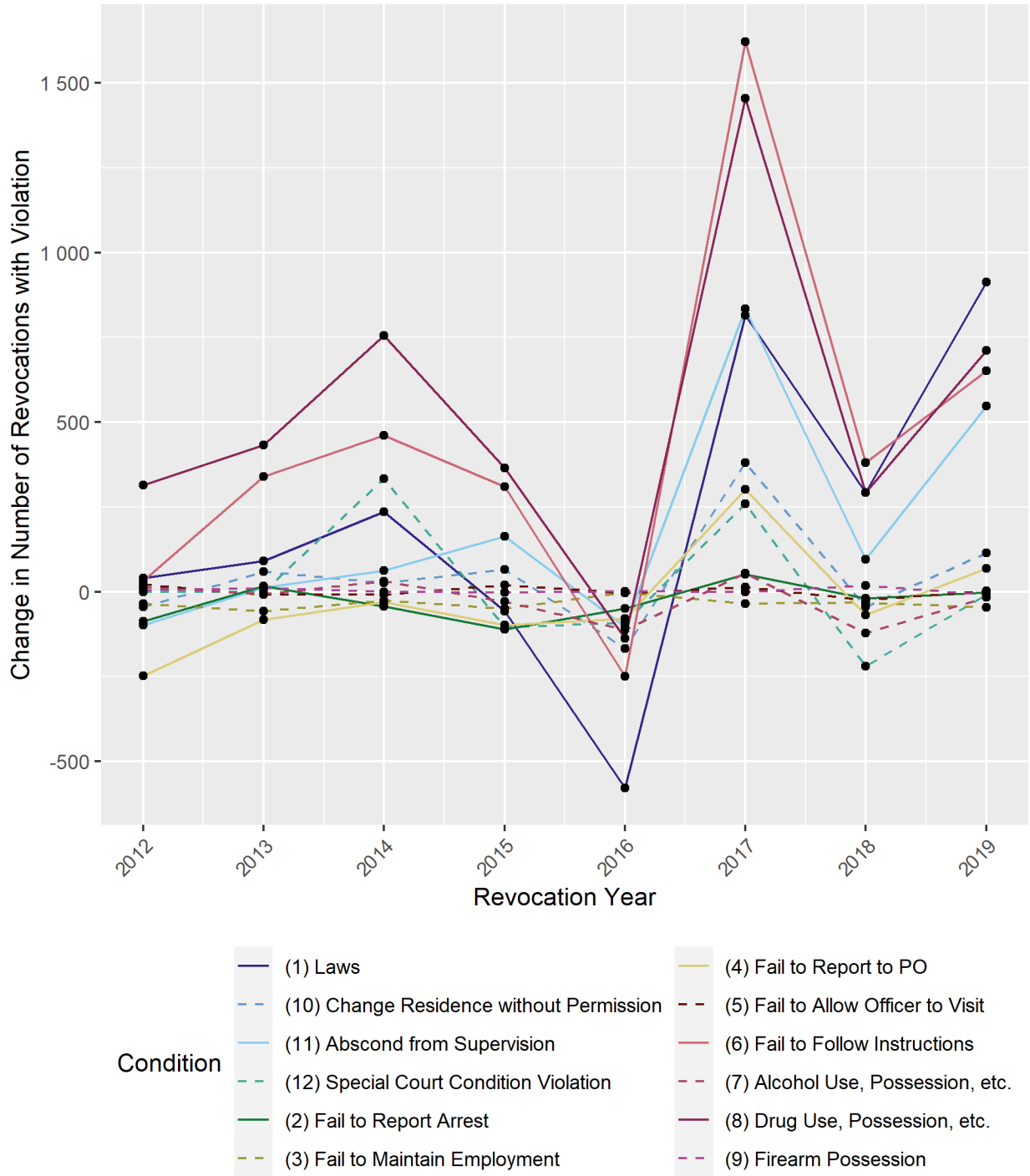


Figure 3. Year-over-year change in number of violations by conditions.

Table 3. Counts of probation conditions violated by year from 2011-2019. (See, Figure 1)

Year	Number of Revocations	(1) Laws	(2) Fail to Report Arrest	(3) Fail to Maintain Employment	(4) Fail to Report to PO	(5) Fail to Allow Officer to Visit	(6) Fail to Follow Instructions	(7) Alcohol Use, Possession, etc.	(8) Drug Use, Possession, etc.	(9) Firearm Possession	(10) Change Residence without Permission	(11) Abscond from Supervision	(12) Special Court Condition Violation
2011	10983	5718	1096	505	1862	61	3953	553	3856	73	1582	2492	2409
2012	11170	5758	1008	470	1614	82	3985	566	4170	77	1537	2393	2409
2013	11414	5849	1024	412	1532	74	4325	559	4603	87	1597	2405	2408
2014	12444	6085	981	386	1502	65	4786	590	5358	86	1623	2468	2742
2015	12606	6028	870	336	1403	85	5096	561	5723	84	1688	2632	2638
2016	11726	5450	821	334	1323	81	4847	448	5586	85	1521	2529	2546
2017	14199	6265	873	298	1625	94	6469	503	7041	84	1902	3363	2805
2018	14387	6558	853	266	1556	69	6850	381	7333	102	1857	3459	2585
2019	15789	7471	851	219	1625	72	7502	365	8045	94	1972	4006	2577

Table 4. Distribution of conditions violated by year among the 12 types of conditions from 2011-2019. (See, Figure 2)

Year	Number of Revocations	(1) Laws	(2) Fail to Report Arrest	(3) Fail to Maintain Employment	(4) Fail to Report to PO	(5) Fail to Allow Officer to Visit	(6) Fail to Follow Instructions	(7) Alcohol Use, Possession, etc.	(8) Drug Use, Possession, etc.	(9) Firearm Possession	(10) Change Residence without Permission	(11) Abscond from Supervision	(12) Special Court Condition Violation
2011	10983	52%	10%	5%	17%	1%	36%	5%	35%	1%	14%	23%	22%
2012	11170	52%	9%	4%	14%	1%	36%	5%	37%	1%	14%	21%	22%
2013	11414	51%	9%	4%	13%	1%	38%	5%	40%	1%	14%	21%	21%
2014	12444	49%	8%	3%	12%	1%	38%	5%	43%	1%	13%	20%	22%
2015	12606	48%	7%	3%	11%	1%	40%	4%	45%	1%	13%	21%	21%
2016	11726	46%	7%	3%	11%	1%	41%	4%	48%	1%	13%	22%	22%
2017	14199	44%	6%	2%	11%	1%	46%	4%	50%	1%	13%	24%	20%
2018	14387	46%	6%	2%	11%	0%	48%	3%	51%	1%	13%	24%	18%
2019	15789	47%	5%	1%	10%	0%	48%	2%	51%	1%	12%	25%	16%

Table 5. Year-over-year change in counts of probation conditions violated. For example, “2012” is the count of 2012 minus 2011. (See Figure 3)

Year	Number of Revocations	(1) Laws	(2) Fail to Report Arrest	(3) Fail to Maintain Employment	(4) Fail to Report to PO	(5) Fail to Allow Officer to Visit	(6) Fail to Follow Instructions	(7) Alcohol Use, Possession, etc.	(8) Drug Use, Possession, etc.	(9) Firearm Possession	(10) Change Residence without Permission	(11) Abscond from Supervision	(12) Special Court Condition Violation
2012	187	40	-88	-35	-248	21	32	13	314	4	-45	-99	0
2013	244	91	16	-58	-82	-8	340	-7	433	10	60	12	-1
2014	1030	236	-43	-26	-30	-9	461	31	755	-1	26	63	334
2015	162	-57	-111	-50	-99	20	310	-29	365	-2	65	164	-104
2016	-880	-578	-49	-2	-80	-4	-249	-113	-137	1	-167	-103	-92
2017	2473	815	52	-36	302	13	1622	55	1455	-1	381	834	259
2018	188	293	-20	-32	-69	-25	381	-122	292	18	-45	96	-220
2019	1402	913	-2	-47	69	3	652	-16	712	-8	115	547	-8

Table 6. Year-over-year change in counts of probation conditions violated from 2011-2019.

Year	Number of Revocations	(1) Laws	(2) Fail to Report Arrest	(3) Fail to Maintain Employment	(4) Fail to Report to PO	(5) Fail to Allow Officer to Visit	(6) Fail to Follow Instructions	(7) Alcohol Use, Possession, etc.	(8) Drug Use, Possession, etc.	(9) Firearm Possession	(10) Change Residence without Permission	(11) Abscond from Supervision	(12) Special Court Condition Violation
2012	2%	1%	-8%	-7%	-13%	34%	1%	2%	8%	5%	-3%	-4%	0%
2013	2%	2%	2%	-12%	-5%	-10%	9%	-1%	10%	13%	4%	1%	0%
2014	9%	4%	-4%	-6%	-2%	-12%	11%	6%	16%	-1%	2%	3%	14%
2015	1%	-1%	-11%	-13%	-7%	31%	6%	-5%	7%	-2%	4%	7%	-4%
2016	-7%	-10%	-6%	-1%	-6%	-5%	-5%	-20%	-2%	1%	-10%	-4%	-3%
2017	21%	15%	6%	-11%	23%	16%	33%	12%	26%	-1%	25%	33%	10%
2018	1%	5%	-2%	-11%	-4%	-27%	6%	-24%	4%	21%	-2%	3%	-8%
2019	10%	14%	0%	-18%	4%	4%	10%	-4%	10%	-8%	6%	16%	0%