

THE GUIDELINE MESSENGER

The official newsletter of the Virginia Criminal Sentencing Commission

IN THIS EDITION

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GUIDELINES MODIFICATION FOR SUBSTANTIAL ASSISTANCE, ACCEPTANCE OF RESPONSIBILITY OR EXPRESSION OF REMORSE:

ADDITIONAL GUIDANCE FROM THE COMMISSION

Overview of Modification

In 2020, the Sentencing Commission examined cases in which judges, when departing from the Guidelines, cited the defendant's substantial assistance in the apprehension or prosecution of others, the defendant's acceptance of responsibility, or his/her expression of remorse. Based on this study, the Commission recommended changes to the Guidelines, which were accepted by the 2021 General Assembly. Effective July 1, 2021, if a judge determines at sentencing that the defendant provided substantial assistance, accepted responsibility or expressed remorse, the low end of the Guidelines recommended range will be adjusted. In such cases, if the calculated low end of Guidelines range is three years or less, the low end will be reduced to zero. If the calculated low end of the Guidelines range is more than three years, the low end will be reduced by 50%.

Guidance from the Commission

Judges and attorneys have requested additional guidance in applying the Guidelines modification, particularly for acceptance of responsibility. The Commission's study revealed that judges cited acceptance of responsibility in their departure reasons when the **defendant demonstrated a change in attitude or behavior prior to sentencing**. Below are specific reasons used by judges in the past to explain a sentence below the Guidelines.

1. Showed positive or promising behavior while awaiting sentencing (e.g., drug free, employment, education, lifestyle change, etc.).
2. Began rehabilitation process without court intervention; took initiative to make change (e.g., enrolled in or completed drug treatment, mental health counseling, found housing, etc.).
3. Demonstrated responsibility for the support and care of family members (e.g., providing financial support, working with social services, etc.).
4. Maintained or secured employment or obtained job skills before sentencing.
5. Completed school, college, or a training program before sentencing.
6. Admitted guilt shortly after the offense, during arrest, etc., and prior to an appearance in court.
7. Prevented the crime from escalating into more serious offense (e.g., prevented a death, rape, etc.).
8. Current offense is an old crime that was committed when the defendant had a different lifestyle.
9. Behavior was out of the norm and likelihood of recidivism is low (e.g., no prior record or limited record; extremely young or elderly).
10. Time served is sufficient based on the defendant's demeanor in court or the defendant's demonstrated acceptance of responsibility/expression of remorse prior to appearance in court.
11. Substantial assistance as determined by the Commonwealth and accepted by the judge.

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GUIDELINES MODIFICATION FOR SUBSTANTIAL ASSISTANCE, ACCEPTANCE OF RESPONSIBILITY OR EXPRESSION OF REMORSE:

ADDITIONAL GUIDANCE FROM THE COMMISSION

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Differences from the Federal System

This modification of Virginia's Guidelines is not analogous to the adjustments used in the federal sentencing guidelines system. For example, in the federal system, 97% of defendants receive some sort of reduction in recommendation for accepting responsibility. Because the adjustment applies to nearly all federal defendants, it does not effectively distinguish among individuals. The federal reduction almost always corresponds to the defendant pleading guilty. This does not reflect the way the data were analyzed in the Commission's study and was not the intent of the modification to Virginia's Guidelines. In the Commission's study, when judges gave detailed reasons for identifying substantial assistance, acceptance of responsibility or expression of remorse, the defendant did more than plead guilty.



To address the critical need for information, the Commission recently approved a Case Details Worksheet that was incorporated into the Sentencing Guidelines beginning July 1, 2021. Since Pre-Sentence Reports are prepared in only 40% of felony cases statewide, this one-page worksheet will be a vital and essential tool for providing information to the court and to the Commission. ***This worksheet must be completed by the individual preparing the guidelines for the court and included in the Sentencing Guidelines packet*** submitted for sentencing.

The majority of the worksheet captures details of the offense(s) that must be known to accurately score the sentencing guidelines, as well as other elements that judges have indicated as relevant in the sentencing decision. The last question (#21) is designed to capture other factors that may be known at the time of sentencing, such as a defendant's substance abuse issues, that the judge may wish to consider in the sentencing decision.

Application in the Courtroom

To reflect historical sentencing and remain true to the data, the decision to modify the Guidelines recommendation must be made by the judge at sentencing. Historically, judges have given a variety of compelling reasons for departing from the Guidelines. Attorneys will continue to make arguments as to why a specific sentence was included in a plea agreement or why the judge should modify the Guidelines recommendation. The attorneys' arguments should be compelling enough that, without the new Guidelines modification factor, the judge would depart below the recommended range and cite a reason such as those listed on page 1. In such cases, the Commission suggests that the judge make use of the modified Guidelines range on the Disposition section of the cover sheet. When a judge agrees, he/she need only check the Modification of Recommendation box and the low end of the Guidelines is adjusted. If the effective sentence ordered by the judge is within the adjusted Guidelines range, the case is in concurrence and no written departure reason is required.

SENTENCING GUIDELINES CASE DETAILS WORKSHEET

REQUIRED AS OF JULY 1, 2021

Information for Question #21 may be submitted to the preparer by the defendant or his/her attorney. With more complete and accurate information submitted to the court, the judge has a better opportunity to structure an appropriate sentence that can address the needs of the defendant.

When the primary offense at sentencing is not covered by the guidelines, users should nonetheless complete the Sentencing Guidelines Cover Sheet and the Case Details Worksheet. This is critically important in robbery cases, as revisions to § 18.2-58 resulted in the suspension of the Robbery Guidelines pending analysis of new sentencing data (see the April 2021 Newsletter for further detail).

Based upon the information gathered through the Case Details Worksheet, the Commission will be able to recommend revisions to the Guidelines to ensure that judges receive the most accurate benchmark of the typical sentencing outcome in similar cases.

LEGISLATIVE CHANGES AND LIMITS ON PROBATION AND SENTENCES FOR TECHNICAL VIOLATIONS:

NEW Commission Policy for Completing Probation Violation Guidelines



Overview of Recent Legislative Changes

House Bill 2038, passed by the General Assembly in 2021, specifies limits for periods of probation and supervision terms, as well as caps on sentences for technical violations. Among the changes, § 19.2-306.1 defines a technical probation violation as 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; be truthful and 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; or
- Maintain contact with the probation officer (not abscond).

In addition, § 19.2-306.1 limits the amount of active incarceration a court can impose for a technical violation as follows:

Violation	Sentence specified in § 19-306.1
1st technical violation not related to firearm or absconding	No active incarceration
2nd technical violation OR 1st technical violation related to firearm or absconding	Presumption against incarceration or, if the defendant cannot be safely diverted, incarceration up to 14 days
3rd or subsequent technical violation OR 2nd or subsequent technical violation related to firearm or absconding	Whatever sentence may have been originally imposed (up to the amount of remaining revocable time)

Finally, § 19.2-306.1 specifies that multiple technical violations arising from a single course of conduct or considered at the same revocation hearing must not be considered separate technical violations for the purposes of sentencing.

Sentences for violations arising because of new offense convictions and sentences for violations of special conditions set by the court, such as gang or sex offender restrictions, are not affected by § 19.2-306.1. Moreover, the limitations on sentencing do not apply to the extent that an additional term of incarceration is necessary to allow a defendant to be evaluated for, or to participate in, a court-ordered drug, alcohol, or mental health treatment program.

Probation Violation Guidelines Are Compatible with New Law

Following enactment of the legislation, the Commission adjusted the new Probation Violation Guidelines, which took effect on July 1, 2021, to ensure they were compatible with the requirements of the new law. Specifically, the Guidelines have been adjusted to reflect the caps on sentences for technical violations specified in § 19.2-306.1.

NEW Commission Policy for Completing Probation Violation Guidelines

At the request of Circuit Court judges, the Commission recently amended its policy regarding completion of the Probation Violation Guidelines. Previously, the Commission’s policy required that Probation Officers complete all Probation Violation Guidelines for the court. Without a Major Violation Report and information regarding the number and type of prior revocations committed by the defendant, Commonwealth attorneys simply cannot complete the Guidelines accurately.

With the Commission’s policy change, a Commonwealth’s attorney may complete the Probation Violation Guidelines IF 1) it is the probationer’s 1st or 2nd technical violation and it does not involve possessing, etc., a firearm (Condition 9) or absconding (Condition 11), and 2) the Commonwealth’s attorney has a copy of the Major Violation Report prepared by the Probation Officer. In these types of cases, the statutory caps will apply and less information is needed to complete the Guidelines. As noted above, the Guidelines have been adjusted to reflect the statutory limits.

Application in the Courtroom

When a Probation Officer sends a letter to the court requesting that a *capias* or show cause be issued for a probationer due to alleged violations, the court may not be aware of the number or type of prior revocations the probationer has accumulated. Due to the sentence caps specified in § 19.2-306.1, this is critical information for the court. Whether the court elects to issue a *capias* (requiring the defendant’s arrest) or a show cause may depend on the number of previous technical violations the defendant has, since the court may be limited in the amount of incarceration it can order if the defendant is found in violation. Ultimately, at the revocation hearing, the judge must know whether it is the defendant’s 1st, 2nd, or 3rd technical violation.

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LEGISLATIVE CHANGES AND LIMITS ON PROBATION AND SENTENCES FOR TECHNICAL VIOLATIONS:

Additional Information Available from the Probation Office
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Cover Letter to Accompany the Major Violation Report Submitted to the Court

To assist its Circuit Court judges, one Probation & Parole District in Virginia created a cover letter to accompany the Major Violation Report submitted to the court (shown below). The cover letter, originally developed by Probation & Parole District 14, provides the judge with pertinent information regarding the defendant’s prior revocations for technical violations and whether or not the current violations involve any special condition of supervision or new law violations. Circuit Court judges are likely to find this type of cover letter helpful when making bond decisions pertaining to probation violators, and the Commission recommends its use.



SAMPLE

Commonwealth of Virginia

Department of Corrections
Division of Community Corrections
Adult Probation and Parole
District 14

220 Deer Run Road
 Danville, Virginia 24540

TELEPHONE NO.

 FAX NO.

August 23, 2021

NAME
 CORIS: 00000000
 DOB: 01/23/1988
 SSN: 123-45-6789

This letter will constitute as a cover letter from PO John Doe for the above mentioned individual. Attached is a Major Violation Report from **Jane Doe**, Probation and Parole Officer from Martinsville Probation and Parole.

Pittsylvania County Circuit Court

CR16000624 Distribution of Imitation Schedule I Controlled Substance

Total Revocable Time: 2 years, 3 months, 10 days ←

Previous Violation(s) for current court and docket numbers only: ←

03/21/2021 Violation of conditions 6 and 8

This violation constitutes the second technical violation of conditions 2-8 and 10. ←

Special condition violation: YES [] NO [] ←

New law violation: YES [] NO [] ←

- Documents Remaining Revocable Time
- Documents Prior Revocation Events
- Identifies Nature of Current Violation
- Indicates Any Special Condition Violation
- Indicates a New Law Violation

Cover letter developed by Kristy Bailey, Becki Quarles and Taylor Brandon of Probation & Parole District 14



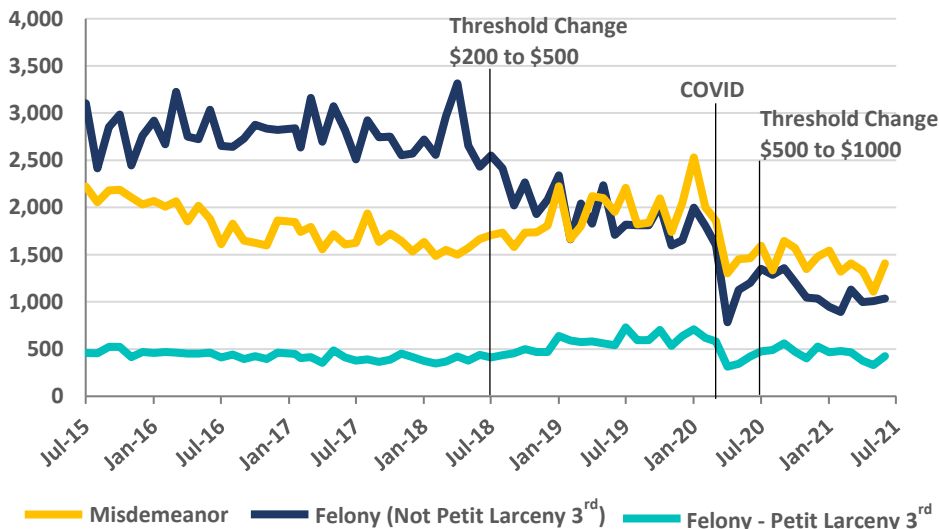
SENTENCING SNAPSHOT: Trends in Larceny and Other Offenses Affected by the Felony Larceny Threshold

Between 1980 and 2018, Virginia’s felony larceny threshold was \$200, meaning that thefts involving \$200 or more were subject to felony prosecution. By 2018, Virginia was tied with one other state as having the lowest felony larceny threshold in the nation. The 2018 General Assembly passed legislation to increase the felony larceny threshold from \$200 to \$500. In 2020, the General Assembly further increased the threshold to \$1,000. Virginia’s felony larceny threshold is now equivalent to the median felony threshold value for all 50 states. Many offenses in the *Code of Virginia* are “deemed larceny” (punishable in the same manner as larceny) or were otherwise affected by changes in the felony larceny threshold. Prior to July 1, 2021, conviction for a third or subsequent petit larceny (misdemeanor) could be punished as a Class 6 felony. This felony was eliminated as of July 1, 2021.

Early data suggest that the number of felony charges for larceny and other offenses affected by the felony larceny threshold declined as the dollar threshold was increased by the General Assembly (Figure 1). By March 2020, however, COVID-19 began to impact Virginia and it is difficult to separate the pandemic’s impact from other factors. At the same time, the proportion of charges filed as felonies has decreased compared to charges filed as misdemeanors or as petit larceny third offense. As an example, charges filed in Virginia’s General District Courts are shown in Figure 2.

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Figure 1
Charges in Virginia for Larceny and Other Offenses Affected by the Felony Larceny Threshold (All Court Levels)¹



Source: Virginia Criminal Sentencing Commission analysis of the Supreme Court of Virginia’s Case Management Systems (CMS) for the Circuit, General District and JDR Courts

¹ In order to avoid double-counting in this chart, charges filed in General District Court or JDR Court that were certified to the grand jury or otherwise transferred to Circuit Court were excluded (these charges will be counted in Circuit Court files). Similarly, appeals from General District and Juvenile & Domestic Relations Court were excluded. Circuit Court data do not include cases from Fairfax or Alexandria as clerks in those jurisdictions do not participate in the statewide Case Management System. Analysis of JDR Court data includes only adult offenders.

Figure 2
All Charges Filed in General District Court for Larceny and Other Offenses Affected by the Felony Larceny Threshold²

General District Court - All Charges Filed ²	FY2016	FY2017	FY2018	FY2019	FY2020	FY2021
Felony (Not Petit Larceny 3 rd offense)	49%	53%	54%	41%	36%	32%
Felony for Petit Larceny 3 rd Offense	9%	9%	9%	14%	15%	15%
Misdemeanor	42%	38%	37%	45%	48%	53%
Number of Charges	55,325	50,210	47,890	45,411	42,581	23,962

Source: Virginia Criminal Sentencing Commission analysis of the Supreme Court of Virginia’s Case Management Systems (CMS) for the General District Court

² General District Courts hold hearings for felony charges filed in those courts. Such felony charges may be nolle prossed, dismissed, reduced to misdemeanors, certified to the grand jury or otherwise transferred to Circuit Court.



**SENTENCING SNAPSHOT:
Trends in Larceny and Other Offenses Affected by the
Felony Larceny Threshold**
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When the felony larceny threshold increased from \$200 to \$500 and then to \$1,000, cases involving amounts below the new threshold that, in the past, had been prosecuted as felonies began to be prosecuted as misdemeanors. Thus, cases that remained felonies involved a higher dollar value, on average, compared to prior years. Given the higher average dollar value in felony cases, it was possible that sentencing patterns might begin to change. Figure 3 shows that, among defendants convicted of felony larceny (or other offense affected by threshold), the percentage who were given a state-responsible prison sentence (one year or more) did not increase significantly as the felony threshold moved higher. However, the proportion of felony offenders given a local-responsible jail sentence (up to 12 months) did increase, with a lower proportion of felony offenders receiving probation without an active term of incarceration.

Similarly, as the felony threshold was increased, cases involving dollar amounts that were previously felonies dropped into the misdemeanor category. It was possible that sentences for misdemeanor larceny would increase, reflecting the higher dollar values in many cases. For misdemeanor convictions, however, a different pattern emerged. In misdemeanor cases affected by

the threshold, the proportion receiving probation without incarceration has increased, while jail dispositions have decreased. This was not the expected result.

It is important to note that the trends revealed in the early data may not be attributable to changes in the felony larceny threshold alone. The COVID-19 pandemic and policies implemented specifically to reduce the spread of the virus also affected Virginia’s criminal justice system. It remains unclear as to when, and to what extent, court caseloads, court case processing, and jail and prison populations will return to pre-pandemic levels or trends.

**Figure 3
Type of Disposition resulting from Conviction
for Larceny and Other Offenses Affected by the Felony Larceny Threshold³**

Cases were assigned to the applicable felony threshold based on the date of the offense. →		Felony Threshold \$200	Felony Threshold \$500	Felony Threshold \$1000
Felony (Not Petit Larceny 3 rd offense)	Probation/No Active Incarceration	54.0%	52.6%	46.5%
	Jail up to 12 months	28.1%	29.9%	34.9%
	Prison 1 year or more	17.9%	17.4%	18.6%
	Total	100.0%	100.0%	100.0%
Misdemeanor	Probation/No Active Incarceration	59.7%	61.3%	65.1%
	Jail up to 12 months	40.3%	38.7%	34.9%
	Total	100.0%	100.0%	100.0%

Source: Virginia Criminal Sentencing Commission analysis of the Supreme Court of Virginia’s Case Management Systems (CMS) for the Circuit Court, General District and JDR Courts

³ In order to avoid double-counting, appeals from General District and Juvenile & Domestic Relations Court were excluded. Circuit Court data do not include cases from Fairfax or Alexandria as clerks in those jurisdictions do not participate in the statewide Case Management System. Analysis of JDR Court data includes only adult offenders.

How to contact the Virginia Criminal Sentencing Commission



VIRGINIA CRIMINAL SENTENCING COMMISSION



Hotline (804) 225-4398



Text (804) 393-9588



E-mail SWIFT@vcsc.virginia.gov

Additional resources can be found on the Sentencing Commission’s website

www.vcsc.virginia.gov

