

# Feedback from the Field

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Comments, suggestions, and concerns  
from judges, attorneys, clerks and  
probation officers .



# Categories of Feedback



## Interpretation

What are the statutory requirements?



## Impact

Potential unintended consequences



## Intervention

Who can make changes to the guidelines and/or the statute?

## **§ 19.2-306. Revocation of suspension of sentence and probation. —**

A. In any case in which the court has suspended the execution or imposition of sentence, the court may revoke the suspension of sentence for any cause the court deems sufficient that occurred at any time within the probation period, or within the period of suspension fixed by the court. If neither a probation period nor a period of suspension was fixed by the court, then the court may revoke the suspension for any cause the court deems sufficient that occurred within the maximum period for which the defendant might originally have been sentenced to be imprisoned.

B. The court may not conduct a hearing to revoke the suspension of sentence unless the court issues process to notify the accused or to compel his appearance before the court within 90 days of receiving notice of the alleged violation or within one year after the expiration of the period of probation or the period of suspension, whichever is sooner, or, in the case of a failure to pay restitution, within three years after such expiration. If neither a probation period nor a period of suspension was fixed by the court, then the court shall issue process within six months after the expiration of the maximum period for which the defendant might originally have been sentenced to be incarcerated. Such notice and service of process may be waived by the defendant, in which case the court may proceed to determine whether the defendant has violated the conditions of suspension.

C. If the court, after hearing, finds good cause to believe that the defendant has violated the terms of suspension, then the court may revoke the suspension and impose a sentence in accordance with the provisions of § 19.2-306.1. The court may again suspend all or any part of this sentence for a period up to the statutory maximum period for which the defendant might originally have been sentenced to be imprisoned, less any time already served, and may place the defendant upon terms and conditions or probation. The court shall measure the period of any suspension of sentence from the date of the entry of the original sentencing order. However, if a court finds that a defendant has absconded from the jurisdiction of the court, the court may extend the period of probation or suspended sentence for a period not to exceed the length of time that such defendant absconded.

D. If any court has, after hearing, found no cause to impose a sentence that might have been originally imposed, or to revoke a suspended sentence or probation, then any further hearing to impose a sentence or revoke a suspended sentence or probation, based solely on the alleged violation for which the hearing was held, shall be barred.

E. Nothing contained herein shall be construed to deprive any person of his right to appeal in the manner provided by law to the circuit court having criminal jurisdiction from a judgment or order revoking any suspended sentence. (Code 1950, § 53-275; 1958, c. 468; 1970, c. 275; 1975, c. 495; 1978, c. 687; 2002, c. 628; 2016, c. 718; 2021, Sp. Sess. I, c. 538.)

### **§ 19.2-306.1. Limitation on sentence upon revocation of suspension of sentence; exceptions. —**

A. For the purposes of this section, "technical violation" means a violation based on the probationer's failure to (i) report any arrest, including traffic tickets, within three days to the probation officer; (ii) maintain regular employment or notify the probation officer of any changes in employment; (iii) report within three days of release from incarceration; (iv) permit the probation officer to visit his home and place of employment; (v) follow the instructions of the probation officer, be truthful and cooperative, and report as instructed; (vi) refrain from the use of alcoholic beverages to the extent that it disrupts or interferes with his employment or orderly conduct; (vii) refrain from the use, possession, or distribution of controlled substances or related paraphernalia; (viii) refrain from the use, ownership, possession, or transportation of a firearm; (ix) gain permission to change his residence or remain in the Commonwealth or other designated area without permission of the probation officer; or (x) maintain contact with the probation officer whereby his whereabouts are no longer known to the probation officer. Multiple technical violations arising from a single course of conduct or a single incident or considered at the same revocation hearing shall not be considered separate technical violations for the purposes of sentencing pursuant to this section.

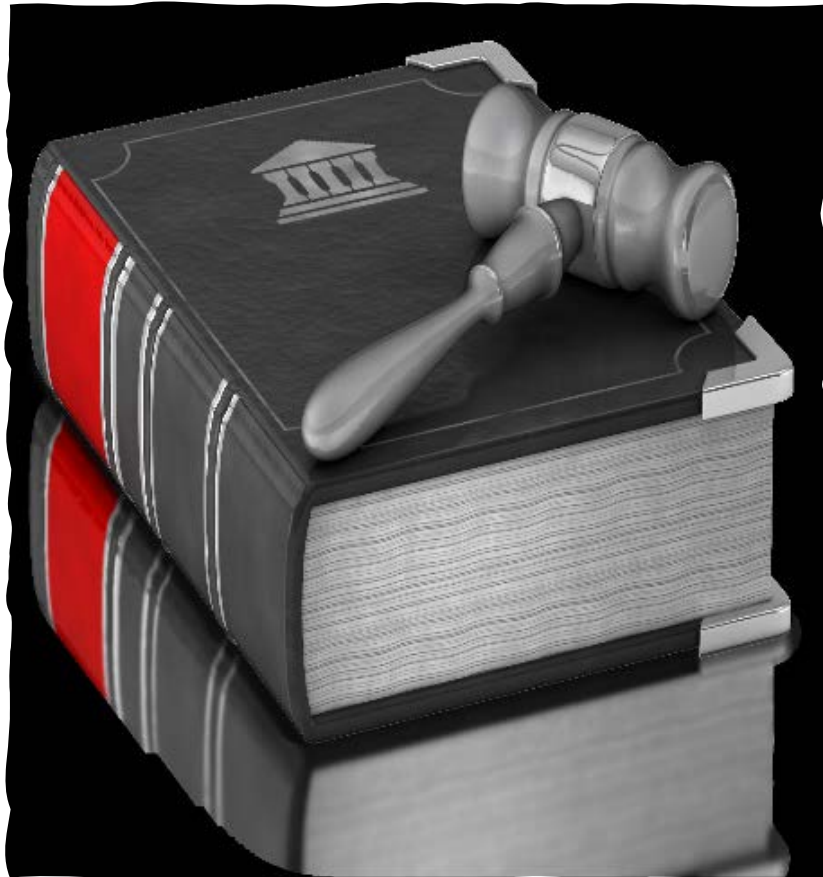
B. If the court finds the basis of a violation of the terms and conditions of a suspended sentence or probation is that the defendant was convicted of a criminal offense that was committed after the date of the suspension, or has violated another condition other than (i) a technical violation or (ii) a good conduct violation that did not result in a criminal conviction, then the court may revoke the suspension and impose or resuspend any or all of that period previously suspended.

C. The court shall not impose a sentence of a term of active incarceration upon a first technical violation of the terms and conditions of a suspended sentence or probation, and there shall be a presumption against imposing a sentence of a term of active incarceration for any second technical violation of the terms and conditions of a suspended sentence or probation. However, if the court finds, by a preponderance of the evidence, that the defendant committed a second technical violation and he cannot be safely diverted from active incarceration through less restrictive means, the court may impose not more than 14 days of active incarceration for a second technical violation. The court may impose whatever sentence might have been originally imposed for a third or subsequent technical violation. For the purposes of this subsection, a first technical violation based on clause (viii) or (x) of subsection A shall be considered a second technical violation, and any subsequent technical violation also based on clause (viii) or (x) of subsection A shall be considered a third or subsequent technical violation.

D. The limitations on sentencing in this section shall 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. In such case, the court shall order the shortest term of incarceration possible to achieve the required evaluation or participation. (2021, Sp. Sess. I, c. 538.)

# Interpretation

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- **UNCONSTITUTIONAL**

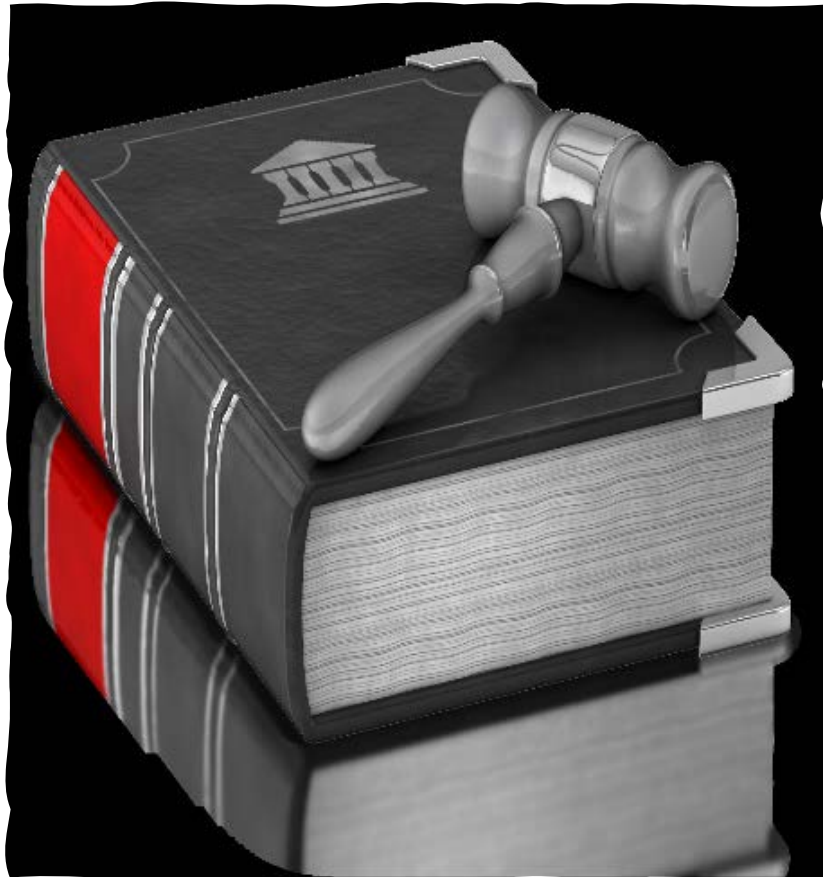
- Several issues were cited including the separation of powers

- **DUE PROCESS**

- Concern about due process violations for holding a defendant on a capias for the first or second technical violation. The statutory requirement for a first technical violation is zero time and for the second technical violation the presumption is zero time up to 14 days.
- Some probation officers have questions on how to proceed with a defendant who is a threat to themselves or the community. Do officers issue a PB-15 for the first technical violation?

# Interpretation

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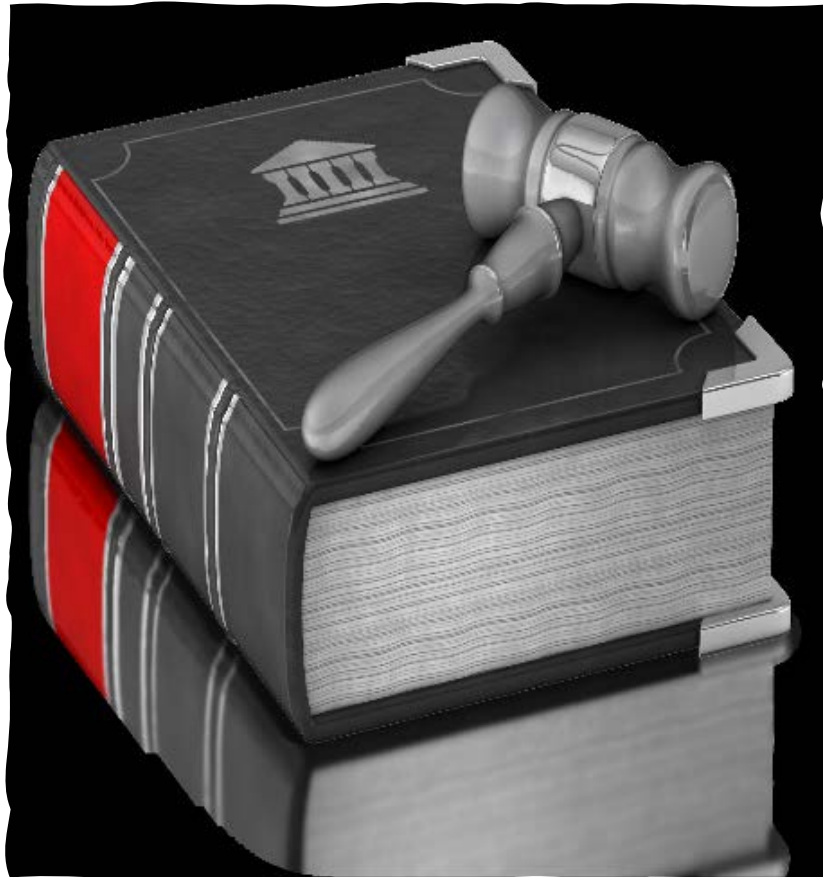


- SPECIAL CONDITIONS

- Special conditions have historically been defined as other than Conditions 1-11. Special sex and gang instructions were also defined as special. Some have redefined “special conditions” to mean out of the ordinary.
- Financial obligations are not specified in probation conditions 1-11. The statute makes an exception for restitution review under § 19.2-305.1. Historically, financial obligations were identified as special conditions.
- Does the special condition need to be cited in the court order? Can the requirement be open ended: any conditions imposed by the probation officer? If not cited in the initial court order, may a judge find the defendant in violation of special conditions at the hearing?

# Interpretation

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- **LOCAL PROBATION**

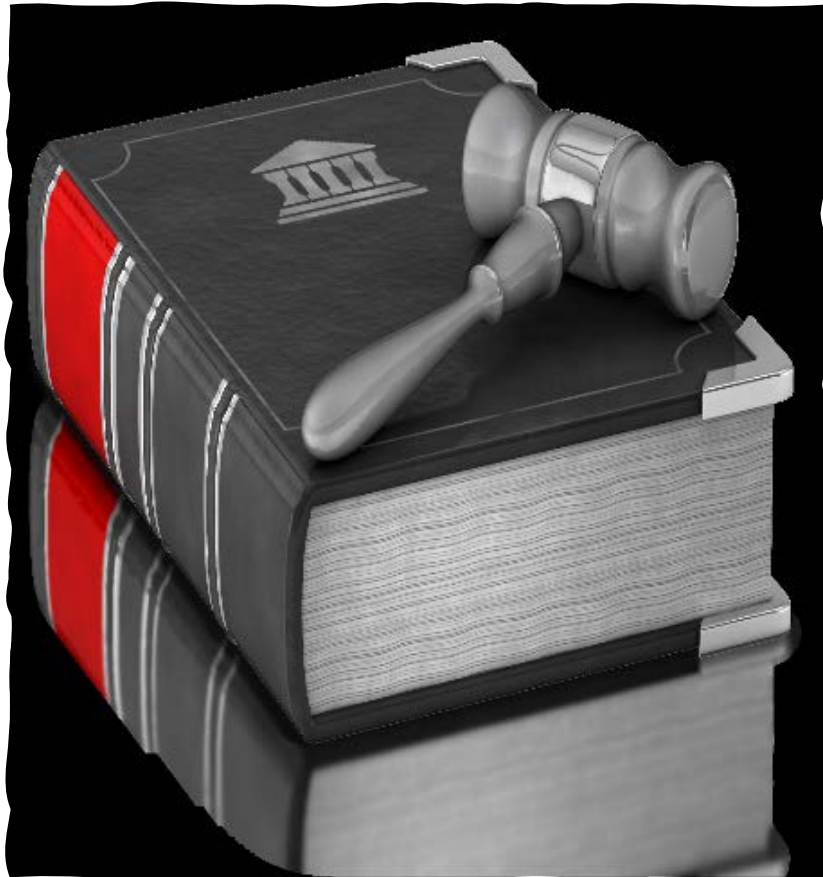
- Does the new statute apply to local probation for felonies and misdemeanors?

- **STATUTORY REQUIREMENTS**

1. Does the 14-day maximum requirement apply to the revocation event or to each technical violation (i.e., can the sentences be stacked)
2. Does the statute apply to offenders sentenced prior to July 1, 2021, or only to offenders sentenced on or after July 1, 2021? (TV3/Special Conditions Worksheet Should Apply Instead of Old Guidelines)
3. Do previous technical violations from prior to July 1, 2021, count?

# Interpretation

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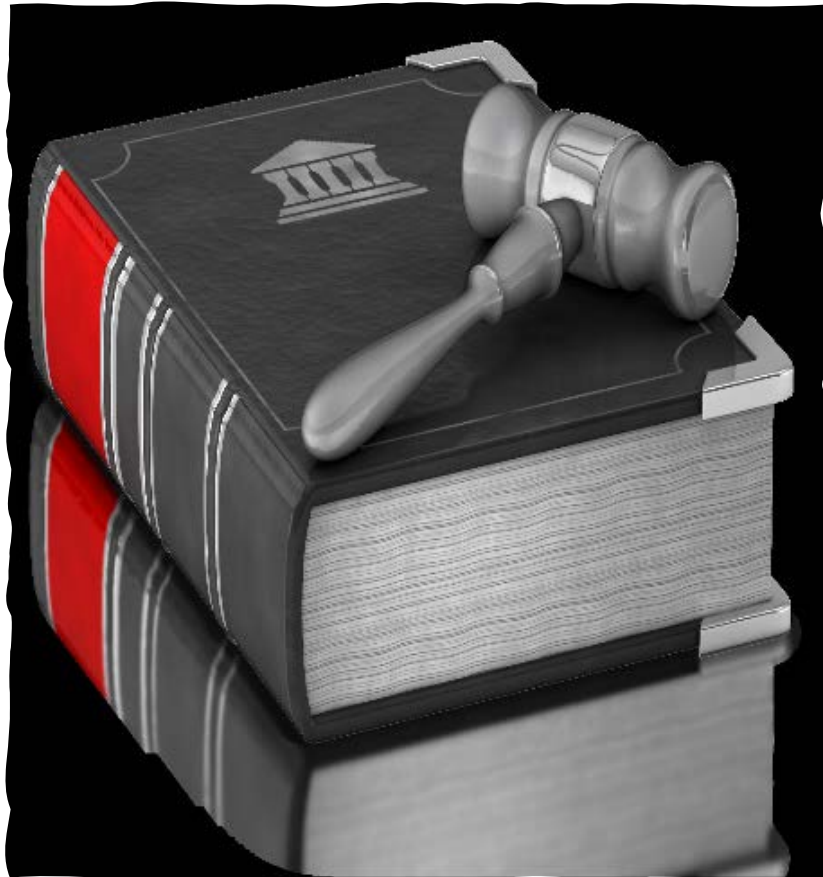


- **STATUTORY REQUIREMENTS** *(Continued)*

4. Do technical violations from prior probation terms in the defendant's history (current court, other court or out-of-state court) count?
5. Do technical violations for firearms (Condition 9) or absconding (Condition 11) restart the count?
6. Was the intent to limit the amount of supervised probation that can be imposed only if the offender received an active term of incarceration for the original offense?

# Interpretation

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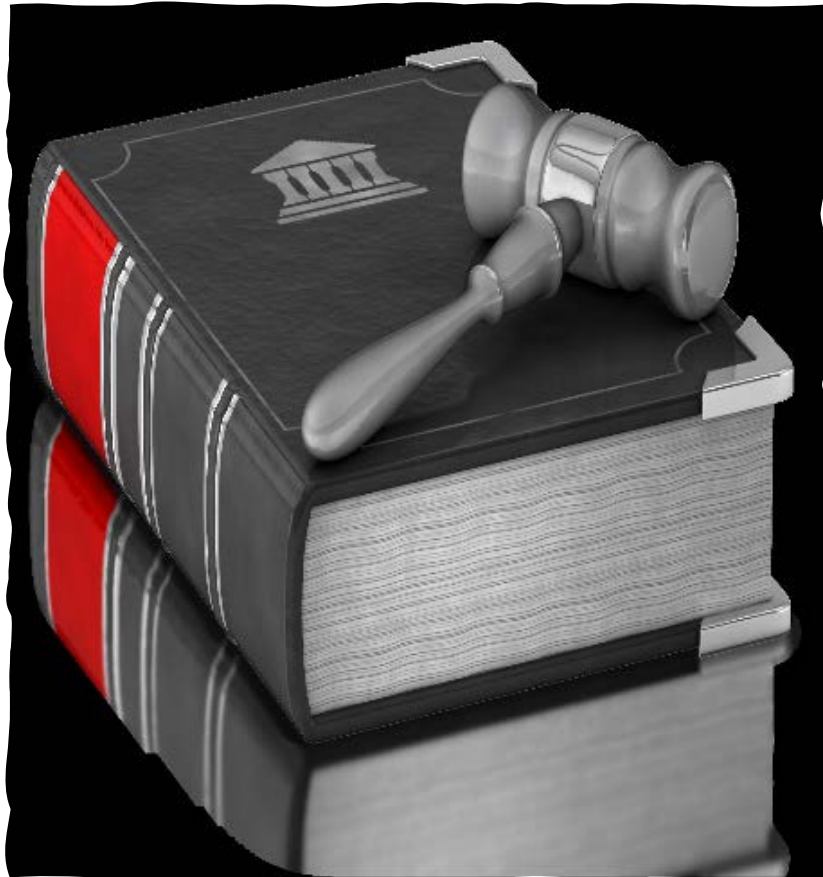
- **Capias, Show Cause and PB-15s**

7. Can the court hold a probation violator based on a capias or PB-15 if the statutory requirement is no time for the violation?
8. The statute allows an additional period of supervision or incarceration (i)for an evaluation or for participation in a court-ordered program (drug, alcohol or mental health). However, how does a judge confine someone on a capias or PB-15 who is in substance abuse crisis and may overdose before a hearing is scheduled?



# Interpretation

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- Capias, Show Cause and PB-15s

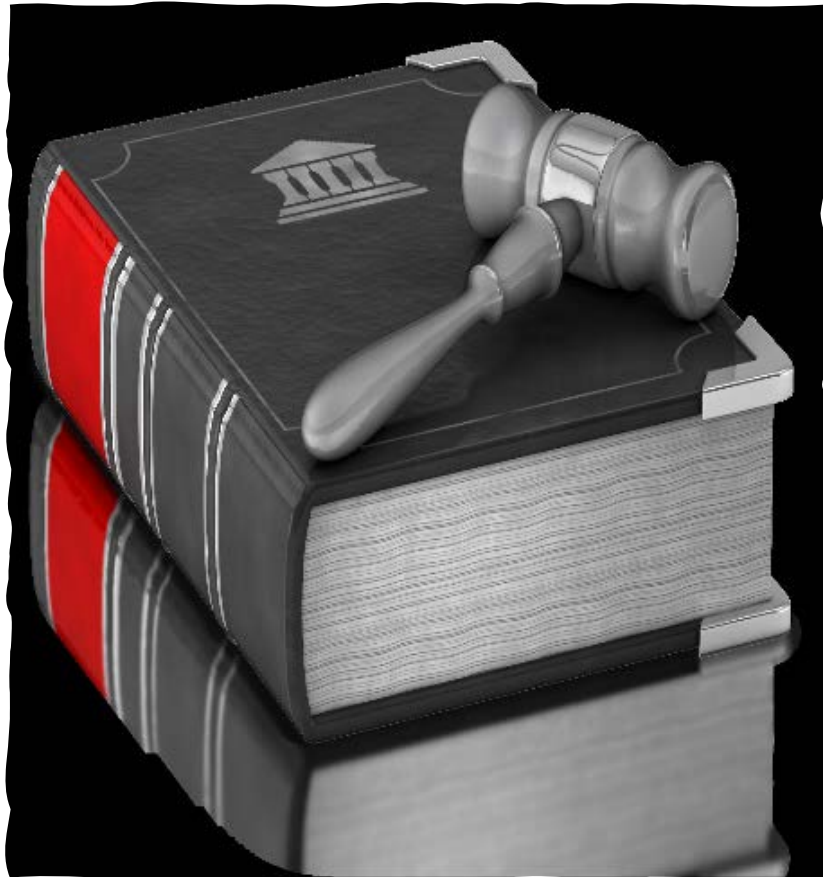
9. Is a **good conduct violation** the same as a good behavior violation or is good behavior “other than” a good conduct violation?

Are good behavior violations restricted to same limits as supervised probation? §§ 19.2-306 and 19.2-306.1 (B)(ii)

B. If the court finds the basis of a violation of the terms and conditions of a suspended sentence or probation is that the defendant was convicted of a criminal offense that was committed after the date of the suspension, or has violated another condition other than (i) a technical violation or (ii) a good conduct violation that did not result in a criminal conviction, then the court may revoke the suspension and impose or resuspend any or all of that period previously suspended.

# Interpretation

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- **SEX OFFENDERS**

10. The statute limits time for sex offender violations that may be technical, but indicative of predatory behavior.

- **TYPE OF PRIOR REVOCATIONS**

11. Can anyone confirm what conditions were violated in the past for the same underlying offense? The major violation report (MVR) documents the alleged violations and not the court decision. No mechanisms in place to capture or transfer this type of information (e.g., VCCs, standardize capias request forms, court databases, etc.)

# Unintended Consequences ?

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- **ADMINISTERING THE STATUTORY REQUIREMENTS**

- Do the court orders need to indicate the conditions violated and the amount imposed based on 1st, 2nd or 3rd violation?
- **How can the conditions violated in the past for the same underlying offense be verified?** The major violation report (MVR) documents the alleged violations and not the court decision. Historically, in most cases, judges have found defendants in violation of all the alleged violations.
- **Who** is the best source for identifying prior technical violations: the Commonwealth's Attorney or the Probation Officer? **What** is the best source of information: DOC case notes, major violation reports and letters or court records?



# Unintended Consequences ?

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- **Changes in Behavior**

- Statutory mandates have resulted in changes in behavior among some judges, prosecutors, defense attorneys and probation officers.

- **Increase in Criminal History**

- Each time a defendant is found in violation, that violation adds to the prior record. The statute is encouraging the return of defendants for the first technical violation. Often defendants were only returned to court after several attempts were made by the probation officer to resolve the technical supervision issues in-house.

- **Increase in Length of Probation Supervision**

- Length of probation may be increasing to the 5 Years specified by statute.

Note: According to Sentencing Guidelines data for FY2019 and FY2020, among 48,318 felony offenders, only 1,426 offenders (3.0%) were sentenced to a probation term of more than five years. The median probation sentence for felony offenders during this time period was 18.0 months and the mean was 20.9 months.



# Unintended Consequences ?

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- **Increase in Initial Sentence**

- Some prosecutors may be adjusting plea agreements to include incarceration or increases in the initial sentence because of the limited possibilities for returning defendants to court for public safety reasons.

- **Increase in Disparity**

- There is concern about the increase in disparity given the different interpretations and application of the statute.
  - Pretrial  
(Some similarly situated defendants will be detained, others will not)
  - Application of statutory requirements  
(Some similarly situated defendants will be limited to no more than 14 days, others up to the revocable time)
  - Scoring of Sentencing Guidelines  
(Some similarly situated defendants will be recommended for no time and others will be recommended up to 4 years.)



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

◆ **OFFENDER** \_\_\_\_\_  
 First: \_\_\_\_\_ Middle: \_\_\_\_\_ Last: \_\_\_\_\_ Suffix: \_\_\_\_\_  
 Date of Birth: \_\_\_\_\_ SSN: \_\_\_\_\_ SID/CCRE: \_\_\_\_\_ CORIS Offender ID: \_\_\_\_\_

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

◆ **TYPE OF REVOCATION** \_\_\_\_\_  
 (Complete SRR and Guidelines):  State Supervised Probation for Felony  
 (Complete SRR only, guidelines do not apply):  Local Probation  Good Behavior /Suspend Sentence  CCAP  Procedural  
 (NOTE: This form is not completed for First Offender Violations, Deferred Finding Violations or Parole Violations)

Technical Violation 2-8 or 10:  1st  2nd  3rd or sub  
 Technical Violation 9 or 11:  1st  2nd  3rd or sub  
 Special Conditions:  Yes  
 New Law Violation:  Felony  Misdemeanor

◆ **CONDITIONS CITED IN VIOLATION BY PROBATION/PAROLE OFFICER** (check all that apply)

1. Fail to obey all Federal, State, and local laws.  
 2. Fail to report any arrests within 3 days to PO.  
 3. Fail to maintain employment or to report changes.  
 4. Fail to report as instructed  
 5. Fail to allow probation officer to visit home or job.  
 6. Fail to follow instructions, be truthful, and cooperative.  
 7. Use alcoholic beverages  
 8. Use, possess, distribute controlled substances or paraphernalia  
 9. Use, own, possess, transport or carry firearm  
 10. Change residence or leave Virginia without permission  
 11. Abscond from supervision  
 Fail to follow special conditions (specify) \_\_\_\_\_

Special Sex Offender Conditions  
 (Enter Letter for Condition(s) Violated): **D F**

Special Gang Member Conditions  
 (Enter Letter for Condition(s) Violated):

◆ **DATE ARRESTED FOR THIS VIOLATION:** \_\_\_\_/\_\_\_\_/\_\_\_\_

◆ **PRETRIAL CONFINEMENT FOR THIS VIOLATION**  No  
 Confined Since Arrest for Violation Dates Confined \_\_\_\_/\_\_\_\_/\_\_\_\_ to \_\_\_\_/\_\_\_\_/\_\_\_\_ Dates Confined \_\_\_\_/\_\_\_\_/\_\_\_\_ to \_\_\_\_/\_\_\_\_/\_\_\_\_  
 (For Judicial Review. There is no indication that the times served will be applied to this case)

◆ **PRETRIAL STATUS RELEASE :**  
 Bond: \_\_\_Secured \_\_\_Unsecured  Own Recognizance  Third Party Release  N/A

◆ **RECOMMENDATION RANGE:**  No Time  
 Time Served    to     
Years Months Days Years Months Days

(Note to Judge: If you find the defendant has good rehabilitation potential, mark the box on the disposition page.  
 The low end of the recommendation will be time served or zero additional days.)

◆ **TREATMENT, SANCTIONS, EDUCATIONAL PROGRAMS & ALTERNATIVES UTILIZED**  
 (For Judicial Review)

	Enrolled	Ordered	Completed	Not Completed	Ineligible
Anger management	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
CCAP	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Community Service	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Drug Screens increased/ordered	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Employment Skills Program	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Gang Supervision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Incarceration - jail or prison	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Increase in supervision level	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Mental health counseling	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Parenting class	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Recidivist Prevention Program	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Reprimand	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Salvation Army Program	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sex offender treatment	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Specialty Court	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Substance Abuse Program, Jail/DOC	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Substance Abuse treatment, inpatient	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Substance Abuse treatment, outpatient	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Substance Abuse treatment: AA or NA	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Thinking for a Change	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Voice Verification Biometrics Monitoring	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

# Disparity Example

- **Two Different Cases Same Facts:** The sex offender, who reviewed and signed the special sex offender conditions/instructions, contacted a minor by Facebook. The minor's parent intercepted the conversation in messenger. The probation officer was made aware of the incident and prepared a major violation report. The report cited that the defendant did not have approval to use a social network (*Condition F*) and was not to have any contact with anyone under the age of 18 (*Condition D*).
- One Probation Officer cited violation of Condition 6 (Fail to Follow Instructions). Officer two, cited violation of special conditions and Condition 6.
- This is the defendant's first violation of probation after being released from jail for aggravated sexual battery.

**Probation Violation Guidelines Worksheet TV1/2**  
**First or Second Technical Violation**

**CONDITION 6**  
 (Fail to Follow Instructions)

◆ **Dates (use to score factors three and four)**  
 Earliest Original Sentencing Date \_\_\_\_\_ Start of Current Supervision Period \_\_\_\_\_

◆ **Number of Felony Revocation Events for Current Offense(s) (This Court Only)**

Conditions 2, 3, 4, 5, 6, 7, 8 or 10 Current Revocation Event Only ..... 2 Prior Revocation Event ..... 11	Points Conditions 9 or 11 Current Revocation Event Only ..... 4 Prior Revocation Event ..... 12
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2

◆ **Felony Offense Convictions Between Original Sentencing Date and Start of Current Supervision Period (ALL Courts)**

Conditions 2, 3, 4, 5, 6, 7, 8 or 10 Do Not Score	Points Conditions 9 or 11 If 1st Violation of Condition 9 or 11 ..... 0 If 2nd Violation of Condition 9 or 11 ..... 13
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0

◆ **Prior Felony Revocation(s) Before Original Sentencing Date (This Court Only)**

Conditions 2, 3, 4, 5, 6, 7, 8 or 10 One or More Prior Felony Revocation Events ..... 1	Points Conditions 9 or 11 If 1st Violation One or More Prior Felony Revocation Events ..... 1 If 2nd Violation One or More Prior Felony Revocations Events ..... 19
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0

◆ **Condition 8 Violation: Drug Violation**

Conditions 2, 3, 4, 5, 6, 7, 8 or 10 Do Not Score	Points Conditions 9 or 11 If 1st Violation of Condition 9 or 11 ..... 1 If 2nd Violation of Condition 9 or 11 ..... 7
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0 0

◆ **Condition 11 Violation: Abscond**

Conditions 2, 3, 4, 5, 6, 7, 8 or 10 Do Not Score	Points Conditions 9 or 11 If 1st Violation of Condition 9 or 11 ..... 3 If 2nd Violation of Condition 9 or 11 ..... 10
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0

Last Date whereabouts were known \_\_\_\_/\_\_\_\_/\_\_\_\_ Date whereabouts verified \_\_\_\_/\_\_\_\_/\_\_\_\_

◆ **Primary Offense VCC Prefix of SEX, RAP, OBS**

Conditions 2, 3, 4, 5, 6, 7, 8 or 10 Do Not Score	Points Conditions 9 or 11 If 1st Violation of Condition 9 or 11 ..... 1 If 2nd Violation of Condition 9 or 11 ..... 22
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0

**Recommendation Score** → 2

Go to SRR Cover sheet and fill out the violation guidelines recommendation range.

Score	Guidelines Sentence
<input checked="" type="checkbox"/> 0-3	19 to 33 ..... 3 months to 1 year
<input type="checkbox"/> 4-12	34 to 43 ..... 1 year to 1 year 6 months
<input type="checkbox"/> 13-18	Time Served to 6 months
	<input type="checkbox"/> 44 or more ..... 1 year to 4 years

**Statutory Requirement**

**Probation Violation Guidelines Worksheet TV 3/SCV**  
**Third or Subsequent Technical Violation or Any Special Condition Violations**

**SPECIAL CONDITIONS & CONDITION 6**  
 (Use Social Media to Contact Minor & Fail to Follow Instructions)

Offender Name: \_\_\_\_\_

◆ **Dates (use to score factors three and four)**  
 Earliest Original Sentencing Date \_\_\_\_\_ Start of Current Supervision Period \_\_\_\_\_

◆ **Number of Felony Revocation Events for Current Offense(s) (This Court Only)**

Conditions 2, 3, 4, 5, 6, 7, 8 or 10 Current Revocation Event Only ..... 2 One Revocation Event Prior to Current Revocation Event ..... 12 Two or More Revocation Events Prior to Current Revocation Event ..... 24	Points Conditions 9 or 11 Current Revocation Event Only ..... 4 Prior Revocation Event ..... 12
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0 2

◆ **Prior Felony Revocation(s) Before Original Sentencing Date (This Court Only)**

One Prior Felony Revocation ..... 18 Two or More Prior Felony Revocations ..... 19	Points Conditions 9 or 11 If 1st Violation of Condition 9 or 11 ..... 0 If 2nd Violation of Condition 9 or 11 ..... 13
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0 0

◆ **Felony Offense Conviction(s) Between Original Sentencing Date and Start of Current Supervision (ALL Courts)** — If YES, add 13 → 0 0

◆ **Condition 8 Violation: Drug Violation** — If YES, add 7 → 0 0 0

Factor 7 captures cases when the sex offender violation is cited as a Condition 6 or Special Condition Violation. (Scored even if not specifically cited in the court order)

◆ **Primary Offense VCC Prefix of SEX, RAP, OBS or Violation of Sex Offender Special Conditions (Court or DOC)** — If YES, add 22 → 0 2 2

**Recommendation Score** → 2 4

Go to SRR Cover Sheet and fill out the violation guidelines recommendation range.

Score	Guidelines Sentence
<input type="checkbox"/> Under 19	Time served to 6 months
<input checked="" type="checkbox"/> 19 to 33	3 months to 1 year <b>Historically Based</b>
<input type="checkbox"/> 34 to 43	1 year to 1 year 6 months
<input type="checkbox"/> 44 or more	1 year to 4 years



# Intervention

- **WHO CAN DETERMINE IF THE ISSUES ARE VALID?**
  - The policymakers
  - The courts
  - The VCSC attempted to implement the statute as written. The statutory requirements were merged with the historically based sentencing guidelines.
- **IF VALID, WHO MAKES THE DECISION TO CORRECT?**
  - The legislature would need to revise the language and requirements
  - The courts will interpret the statutes
  - The VCSC can only determine how the guidelines are completed
- **COMMENTS?**





# Feedback on the Case Details Worksheet



## Sentencing Guidelines Case Details Worksheet

SWIFT/DCN: \_\_\_\_\_

1. Defendant's Name: \_\_\_\_\_

2. Defendant Information: Gender: \_\_\_\_\_ Race: \_\_\_\_\_ Ethnicity: \_\_\_\_\_ Age: \_\_\_\_\_ Handicapped: \_\_\_\_\_
3. Type of Counsel:  Retained  Court Appointed  Public Defender  Other
4. Pretrial Status:  Secured Bond  Unsecured Bond  Own Recognizance  Confinement  Third Party Release  Unknown
5. Pretrial Supervision by Pretrial Services Agency:  No  Yes  Yes, ordered but did not complete/attend
6. Posttrial Status:  Secured Bond  Unsecured Bond  Own Recognizance  Confinement  Third Party Release  Unknown
7. Source of Bond:  Personal  Family  Other  Bonding Company  N/A  Unknown
- Total Time Served Prior to Sentencing: Years \_\_\_\_\_ Months \_\_\_\_\_ Days \_\_\_\_\_

Number of Codefendants: \_\_\_\_\_

**Weapons at Offense (check all that apply):**

- |  |   |  |
|--|---|--|
| <input type="checkbox"/> Inmate              | <input type="checkbox"/> Mandatory Parole           | <input type="checkbox"/> Discretionary Parole                      |
| <input type="checkbox"/> Fire - § 53.1-40.01 | <input type="checkbox"/> Post Release - §19.2-295.2 | <input type="checkbox"/> Probation                                 |
| <input type="checkbox"/> Community Program   | <input type="checkbox"/> Pre-Trial Supervision      | <input type="checkbox"/> Good Behavior                             |
| <input type="checkbox"/> Juvenile Parole     | <input type="checkbox"/> Summons                    | <input type="checkbox"/> Other _____ <input type="checkbox"/> None |

None  Possessed  Used to Injure  Used to Threaten (Includes by voice, note, text, etc.)

Form  Knife  Explosive  Simulated/Feigned Weapon  Blunt Object

Verbal  Vehicle  Animal  Other \_\_\_\_\_  N/A

Leader  Accomplice  Police Officer/LEO  Not Determined

Highest value for one item \$ \_\_\_\_\_ Total value of all items \$ \_\_\_\_\_

Residence  Street/Outside  Automobile  Other \_\_\_\_\_  N/A

Personal  Life Threatening  Serious Physical  Physical

Threatened  None  N/A

Offender:  None/Stranger  Known  Friend

Family  Police Officer/LEO  Other \_\_\_\_\_

Gender: \_\_\_\_\_ Race: \_\_\_\_\_ Ethnicity: \_\_\_\_\_ Age: \_\_\_\_\_ Handicapped: \_\_\_\_\_

Primary Drug: \_\_\_\_\_ Quantity of Primary Drug: \_\_\_\_\_

Number of Felony Juvenile Adjudications: Person \_\_\_\_\_ Property \_\_\_\_\_ Drug \_\_\_\_\_ Other \_\_\_\_\_

Role for Question #21:  Defense Attorney  Defendant  PSI/PSR  Commonwealth's Attorney  Probation Officer

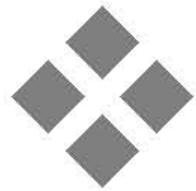
- Other factors known at the time of sentencing (check all that apply)**
- |  | Yes   | Treatment: (in or completed treatment)   |
|--|---|--|
| a. Drug abuse (admitted, family information, documented in reports).....           | <input type="checkbox"/>  | <input type="checkbox"/> prior to offense ..... <input type="checkbox"/> after arrest  |
| b. Alcohol abuse (admitted, family information, documented in reports).....        | <input type="checkbox"/>  | <input type="checkbox"/> prior to offense ..... <input type="checkbox"/> after arrest  |
| c. Mental health issues (admitted, family information, documented in reports)..... | <input type="checkbox"/>  | <input type="checkbox"/> prior to offense ..... <input type="checkbox"/> after arrest  |
| d. Under the influence of drugs/alcohol at the time of the offense .....           | <input type="checkbox"/>  |  |
| e. Employment (Last 2 years):  | <input type="checkbox"/> Full or part-time for at least 18 months <input type="checkbox"/> Full-time student <input type="checkbox"/> Disabled                            | <input type="checkbox"/> Stay-at-home spouse/parent <input type="checkbox"/> Retired <input type="checkbox"/> Unemployed/Not stable                                |
| f. Housing (Last 2 years):   | <input type="checkbox"/> Stable/same residence 1+ yrs <input type="checkbox"/> Multiple Changes <input type="checkbox"/> Homeless at the time of the offense              |  |
| g. Provides support:   | Enter Number dependents or family members supported _____   |  |
| h. Education:  | <input type="checkbox"/> Less than High school <input type="checkbox"/> High school/GED <input type="checkbox"/> Technical Training <input type="checkbox"/> Some College | <input type="checkbox"/> College Degree <input type="checkbox"/> Post-graduate/Professional <input type="checkbox"/> Currently Enrolled (School, College Training) |
| i. Military:   | <input type="checkbox"/> Active <input type="checkbox"/> Reserve <input type="checkbox"/> Honorably Discharged <input type="checkbox"/> Undesirable Discharge             | <input type="checkbox"/> Medical Discharge <input type="checkbox"/> General Discharge <input type="checkbox"/> Bad Conduct Discharge                               |
| j. Defendant's Response:   | <input type="checkbox"/> Accepts Responsibility <input type="checkbox"/> Sought Treatment <input type="checkbox"/> Developed Rehabilitation Plans                         | <input type="checkbox"/> Remorseful <input type="checkbox"/> Paid All or Part Restitution  |
| k. Other:  | _____   |  |

# Case Details Worksheet

This worksheet is vital to the Commission. Without reliable and consistent information, staff cannot compete analysis in a timely manner to respond to policy changes, criminal justice reforms and changes in sentencing patterns. **The reliability of this worksheet is being questioned by the field.**

---

SWIFT/DCN: \_\_\_\_\_



## Sentencing Guidelines Case Details Worksheet

1. Defendant's Name: \_\_\_\_\_

2. Defendant Information: Gender: \_\_\_\_\_ Race: \_\_\_\_\_ Ethnicity: \_\_\_\_\_ Age: \_\_\_\_\_ Handicapped: \_\_\_\_\_

3. Type of Counsel:  Retained  Court Appointed  Public Defender  Other

4. Pretrial Status:  Secured Bond  Unsecured Bond  Own Recognizance  Confinement  Third Party Release  Unknown

5. Pretrial Supervision by Pretrial Services Agency:  No  Yes  Yes, ordered but did not complete/attend

6. Posttrial Status:  Secured Bond  Unsecured Bond  Own Recognizance  Confinement  Third Party Release  Unknown

7. Source of Bond:  Personal  Family  Other  Bonding Company  N/A  Unknown

8. Total Time Served Prior to Sentencing: Years \_\_\_\_\_ Months \_\_\_\_\_ Days \_\_\_\_\_

9. Number of Codefendants: \_\_\_\_\_

9. Number of Codefendants: \_\_\_\_\_

10. Legal Status at Offense (check all that apply):

- |   |   |  |  |
|---|---|--|--|
| <input type="checkbox"/> Escaped                          | <input type="checkbox"/> Inmate                     | <input type="checkbox"/> Mandatory Parole      | <input type="checkbox"/> Discretionary Parole                      |
| <input type="checkbox"/> Geriatric Release - § 53.1-40.01 | <input type="checkbox"/> Post Release - §19.2-295.2 | <input type="checkbox"/> Probation             | <input type="checkbox"/> Bond                                      |
| <input type="checkbox"/> Recognizance                     | <input type="checkbox"/> Community Program          | <input type="checkbox"/> Pre-Trial Supervision | <input type="checkbox"/> Good Behavior                             |
| <input type="checkbox"/> Juvenile Probation               | <input type="checkbox"/> Juvenile Parole            | <input type="checkbox"/> Summons               | <input type="checkbox"/> Other _____ <input type="checkbox"/> None |

11. Weapon Use:  None  Possessed  Used to Injure  Used to Threaten (Includes by voice, note, text, etc.)

12. Weapon Type:  Firearm  Knife  Explosive  Simulated/Feigned Weapon  Blunt Object  
 Note/Verbal  Vehicle  Animal  Other \_\_\_\_\_  N/A

13. Offender's Role  Alone  Leader  Accomplice  Police Officer/LEO  Not Determined

14. Value of Property Taken/Damaged: Highest value for one item \$ \_\_\_\_\_ Total value of all items \$ \_\_\_\_\_

15. Location:  Bank  Business  Residence  Street/Outside  Automobile  Other \_\_\_\_\_  N/A

16. Injury to Victim:  Death  Life Threat  Emotional  Threatened

Comments and questions about 2-20 are about missing choices, wording and source of the information.

17. Victim Relationship to Offender:  None/Stranger  Known  Friend  Family  Police Officer/LEO  Other \_\_\_\_\_

18. Victim Information: Gender: \_\_\_\_\_ Race: \_\_\_\_\_ Ethnicity: \_\_\_\_\_ Age: \_\_\_\_\_ Handicapped: \_\_\_\_\_

19. Type of Primary Drug: \_\_\_\_\_ Quantity of Primary Drug: \_\_\_\_\_

20. Number of Felony Juvenile Adjudications: Person \_\_\_\_\_ Property \_\_\_\_\_ Drug \_\_\_\_\_ Other \_\_\_\_\_

Source for Question #21:  Defense Attorney  Defendant  PSI/PSR  Commonwealth's Attorney  Probation Officer

21. Other factors known at the time of sentencing (check all that apply) Yes \_\_\_\_\_ Treatment (if completed treatment) \_\_\_\_\_

20. Number of Felony Juvenile Adjudications: Person \_\_\_\_\_ Property \_\_\_\_\_ Drug \_\_\_\_\_ Other \_\_\_\_\_

Source for Question #21:  Defense Attorney  Defendant  PSI/PSR  Commonwealth's Attorney  Probation Officer

21. Other factors known at the time of sentencing (check all that apply)

Yes

Treatment: (in or completed treatment)

- a. Drug abuse (admitted, family information, documented in reports) .....  .....  prior to offense .....  after arrest
- b. Alcohol abuse (admitted, family information, documented in reports) .....  .....  prior to offense .....  after arrest
- c. Mental health issues (admitted, family information, documented in reports) .....  .....  prior to offense .....  after arrest
- d. Under the Influence of drugs/alcohol at the time of the offense .....

- e. Employment (Last 2 years):
  - Full or part-time for at least 18 months
  - Stay-at-home spouse/parent
  - Full-time student
  - Retired
  - Disabled
  - Unemployed/Not stable

- f. Housing (Last 2 years):
  - Stable/same residence 1+ yrs
  - Multiple Changes
  - Homeless at the time of the offense

- g. Provides support: Enter Number dependents or family members supported \_\_\_\_\_

- h. Education:
  - Less than High school
  - College Degree
  - High school/GED
  - Post-graduate/Professional
  - Technical Training
  - Currently Enrolled (School, College Training)
  - Some College

- i. Military: 
  - Active
  - Reserve
  - Honorably Discharged
  - Undesirable Discharge
  - Medical Discharge
  - General Discharge
  - Bad Conduct Discharge

- j. Defendant's Response:
  - Accepts Responsibility
  - Remorseful
  - Sought Treatment
  - Paid All or Part Restitution
  - Developed Rehabilitation Plans

k. Other: \_\_\_\_\_

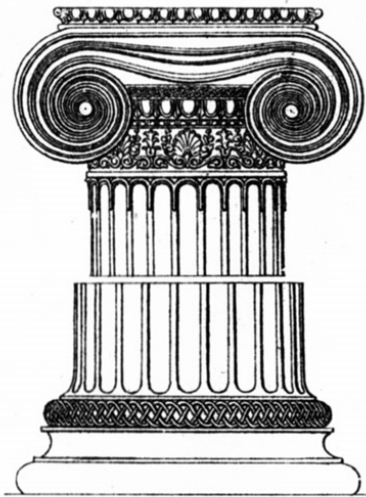
Comments?

Most of the questions are about the reliability of Question 21 (a, b, c, d and j). **Defense counsel** often believes that the information provided is not beneficial to the client or may be used against them in some future case. The **Commonwealth** does not have the information to answer most of the questions. **Probation and parole officers** are being bullied into answering the question about the defendant's response when the documentation does not support acceptance of responsibility and/or remorse. **Guideline users in the field believe that Question 21 taints the validity of the entire worksheet and the information collected.**

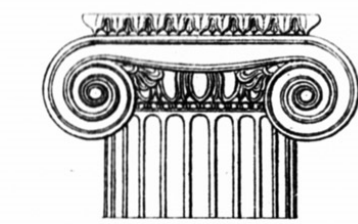
Korinthische Ordnung



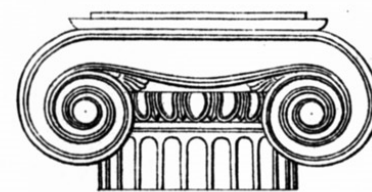
Jonische Ordnung



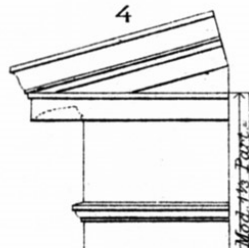
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Kapital vom Tempel der Athene zu Priene.

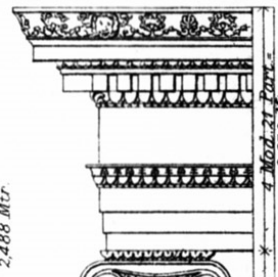


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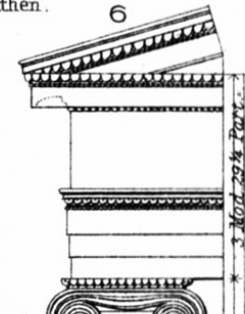
4

3 Mod. 2 1/4 Par. = 2,488 Mtr.



5

4 Mod. 2 1/4 Par. = 2,976 Mtr.



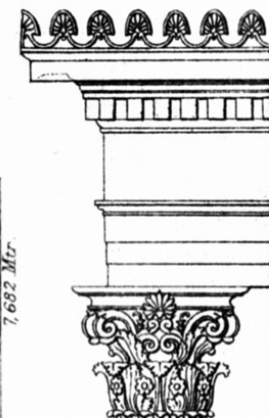
6

3 Mod. 2 1/4 Par. = 1,682 Mtr.

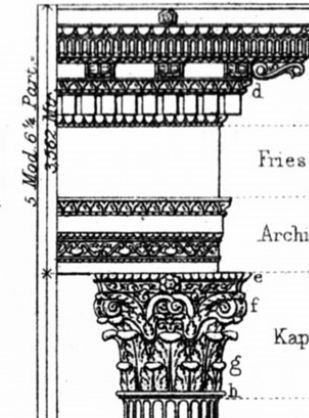
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8



a Kranzgesims  
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# Implementation Issue

Substantial Assistance, Acceptance of Responsibility & Remorse Factor

# Implementation Issue



Review Last Year's  
Presentation



Identify Proposal as Agreed to by the  
Commission



Identify Issue with the Implementation

Suggest a Solution to  
Maintain the Integrity of  
the Factor as Approved



# VIRGINIA CRIMINAL SENTENCING COMMISSION



## Sentencing Guidelines and Acceptance of Responsibility and Timeliness

September 14, 2020

# Federal Sentencing Guidelines and Acceptance of Responsibility

## 2019 Sourcebook of Federal Sentencing Statistics

<u>Acceptance of Responsibility (§ 3E1.1)</u>	<u>Percent of Cases</u>	<u>Guilty Pleas</u>	<u>Percent of Cases</u>
Offender accepted responsibility (-3 levels)	56.5%	US Total	97.6%
Offender accepted responsibility (-2 levels)	39.8%	Fourth Circuit	96.9%
Offender did not accept responsibility	3.7%	Virginia	96.8%





# Virginia Sentencing Guidelines Data

**Felony Sentencing Events by Trial Type  
FY2014-FY2019**

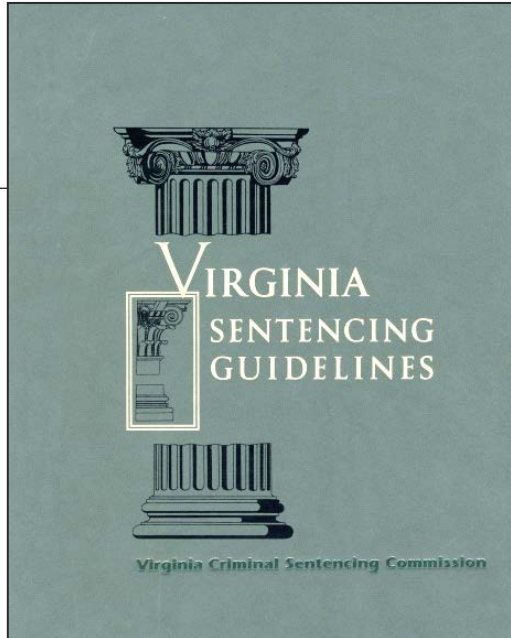
Fiscal Year	Guilty/Alford Plea	Bench Trial	Jury Trial	Missing	Total
2014	89.2%	8.9%	1.2%	0.7%	25,608
2015	90.3%	8.2%	1.1%	0.4%	25,006
2016	90.3%	8.0%	1.2%	0.5%	24,101
2017	90.6%	8.0%	1.2%	0.2%	24,894
2018	89.2%	8.1%	1.2%	1.5%	25,180
2019	88.8%	8.7%	1.3%	1.3%	25,906
Total	89.7%	8.3%	1.2%	0.8%	150,695

Note: Sentencing events in which at least one charge was adjudicated by a jury are included in the "Jury Trial" category, even if some charges in the sentencing event were adjudicated by other means.

**Felony Sentencing Events, FY2014-FY2019  
Overall Median Sentence by Offense Group and Trial Type**

Offense Group	Overall Median Sentence (in years)		
	Guilty/Alford Plea	Bench Trial	Jury Trial
Assault	1.0	1.5	4.0
Burglary-Dwelling	1.5	2.5	10
Burglary-Other Structure	1.0	2.0	3.1
Schedule I/II Drug	0.2	0.4	7.0
Other Drug	0.2	0.3	1.0
Fraud	0.5	0.6	1.5
Kidnapping	1.5	3.0	9.0
Larceny	0.3	0.5	1.3
Murder/Manslaughter	12.0	10.0	20.5
Child Pornography/Online Solicitation	3.0	5.0	7.5
Rape/Forcible Sodomy/ Obj Sexual Penetration	12.0	13.9	17.5
Robbery	5.0	7.5	10.0
Sexual Assault	2.0	3.0	5.0
Weapon	1.0	1.9	5.0

Source: Sentencing Guidelines Data System (downloaded February 17, 2020)  
Prepared: February 28, 2020



## Proposed Recommendation 6:

Revise the Guidelines recommendations to reflect current judicial sentencing when defendants provide substantial assistance or accept responsibility



**Issue:** How to modify the sentencing guidelines to reflect a historically based sentence when a defendant provides substantial assistance or accepts responsibility and expresses remorse

▪ **Accepts Responsibility & Assistance Cases Identified**

– Departure Codes, Provided by the Judge, Were Used

• **FY2016-FY2020 (Number of Cases: 122,627)**

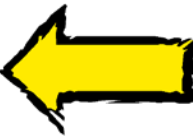
– Providing Substantial Assistance = **889** Sentencing Events

– Accepting Responsibility/Remorse = **580** Sentencing Events

– 16 Sentencing Events Included Both Departure Reasons

– 9 Cases Had Errors and Were Removed From the Analysis

– **1,428** Sentencing Events Identified as **Mitigating** (1.1% of total cases)



**Notes:** Plea agreements may take both circumstances into consideration and recommend a sentence within the guidelines. There are still cases when defendants provide assistance or accepts responsibility, and the judges or plea agreements result in sentences above the guidelines. Staff has added departure codes to better capture those aggravating cases.



**Issue:** How to modify the sentencing guidelines to reflect a historically based sentence when a defendant provides substantial assistance or accepts responsibility and expresses remorse

■ Sentencing Patterns For the Assistance & Responsibility Cases

– A Substantial Number Were Sentenced to Probation

Offense Group	Probation Sentences
DRUG/SCHEDULE I/II	219
LARCENY	110
FRAUD	39
DRUG OTHER	30
WEAPONS/FIREARMS	29
TRAFFIC FELONY	23
MISC: PERSON/PROPERTY	13
OBSCENITY	9
ROBBERY	9
BURGLARY/DWELLING	8
BURGLARY/OTHER	8
ASSAULT	6
MISC: OTHER	6
KIDNAPPING	1
MURDER	1
OTHER SEXUAL ASSAULT	1
RAPE	0

**FY2016 - FY2020**

- 31.3% were sentenced to probation for providing assistance (n=278\*)
- 42.4% were sentenced to probation for accepting responsibility or expressing remorse (n=246\*)

\* Six cases appear in both groups n=512) 28



**Issue:** How to modify the sentencing guidelines to reflect a historically based sentence when a defendant provides substantial assistance or accepts responsibility and expresses remorse

- **Sentencing Patterns For the Assistance & Responsibility Cases**
  - **The Following Chart Details:**
    1. Average Recommended Low-End of the Guidelines Range
    2. Average Difference Between the Low-End Recommendation and the Effective Sentence
    3. Percentage of Cases Sentenced to Probation Within Each Recommendation Group



# OPTION 4



Low End Recommendation Groups	No. of Cases	Median Low-End Guidelines Recommendation	Median Months Difference Between Effective Sentence & Recommended Low End	Percentage Effective Sentence Less Than Recommended Low-End	Percentage Sentenced to Probation
Incar to 12 months	642	8.0	5.0	62.5%	53.6%
>12 Months to 16 Months	158	14.0	8.0	57.1%	38.0%
>16 Months to 24 months	191	20.0	10.0	50.0%	21.5%
>24 Months to 36 months	118	30.0	18.0	60.0%	20.3%
>36 Months to 48 months	122	42.0	20.0	47.6%	18.9%
>48 Months to 60 months	65	54.0	31.0	57.4%	15.4%
>60 Months to 120 months	88	82.0	36.0	43.9%	9.1%
> 120 months	44	171.0	77.0	45.0%	4.5%
Total	1,428	14.0	8.0	57.1%	35.9%

--- 12 MONTHS ---

Group 61% Effective Sentence Less Than Recommended Low-End

Will pull into Concurrence with the Guidelines 90.1% or 1,286 of the mitigating cases in this study.



# Proposed Adding a Section to the Final Disposition Page

- To Be **Historically Based**, The decision to Reduce the Guidelines Range Must be Made at the Time Of Sentencing by the Judge
- **Unable to Develop a Factor** Unique to Each Offense and Sentence Length to Be Scored by the CA or Probation Officer
- **Avoid the Issue** That the Federal Guidelines Have: 97% of the Defendants Have a Reduced Recommendation Because of a Similar Factor
- Of the Cases in the Virginia Sample With a Departure reason for a Mitigation Sentence Due to Assistance or Responsibility
  - **32.3%** of the Assistance Cases Had No Plea Agreement Identified
  - **62.4%** of the Responsibility Cases Had No Plea Agreement Identified

## ◆ Final Disposition Fill In After Sentence Has Been Pronounced

◆ **SENTENCE** \_\_\_\_\_

Total Time Imposed Before Suspension .....  Life Sentence +

Total Effective Time to Serve .....  Life Sentence +     Sentenced to Time Served

Post Release

Post Release Incarceration Term § 18.2-10 (suspended) .....

Post Release Supervision Period § 19.2-295.2(A) .....

Probation Period (Supervised) § 19.2-303 .....  Indefinite

Good Behavior Period (§ 19.2-306) \_\_\_\_\_

*Check all that apply*

Incarceration Sentence to Run Concurrently With Another Sentencing Event

Written Plea Agreement Accepted = Rule 3A:8(c)(1) (A) or (C)

Plea and Recommendation Accepted = Rule 3A:8(c)(1)(B)

Oral Sentence Recommendation Accepted

Restitution \$ \_\_\_\_\_  Fine \$ \_\_\_\_\_

**Other Sentencing Programs** *(check all that apply)*

<input type="checkbox"/> Day Reporting	<input type="checkbox"/> Community-Based Program _____
<input type="checkbox"/> Electronic Monitoring	<input type="checkbox"/> CCAP Detention/Diversion Center Incarceration, 22-28 weeks
<input type="checkbox"/> Intensive Probation	<input type="checkbox"/> CCAP Detention/Diversion Center Incarceration, 42-48 weeks
<input type="checkbox"/> Substance Abuse Treatment	<input type="checkbox"/> Drug Court <input type="text"/> <input type="text"/> <input type="text"/> <small>Office Use Only</small>
<input type="checkbox"/> § 18.2-251/§ 18.2-258.1	<input type="checkbox"/> Youthful Offender
	<input type="checkbox"/> DJJ Commitment <input type="checkbox"/> Indeterminate <input type="checkbox"/> Determinate
	<input type="checkbox"/> Other _____

◆ **REASON FOR DEPARTURE AND/OR MODIFICATION OF JURY SENTENCE**  
Must be completed pursuant to § 19.2-298.01(B) and/or § 19.2-295(B)/ § 19.2-303

\_\_\_\_\_    Office Use Only

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

◆ **SENTENCING DATE**

\_\_\_\_\_  
Month Day Year Office Use Only Judge's Signature

◆ **ATTACH COURT ORDER AND MAIL** Pursuant to § 19.2-298.01(E) \_\_\_\_\_

After sentencing, send to:

Virginia Criminal Sentencing Commission • 100 North Ninth Street • Fifth Floor • Richmond, Virginia 23219

# Implementation vs. Approved Guidelines Policy Making vs. Judicial Practice

## POLICY

1. Replicate Federal Guidelines
2. Increase Guilty Pleas & Agreements
3. Reduce Jury Trials
4. Apply in 97% of Cases
  - A. Reasons For
  - B. Reasons Against
5. Agreed to by Defense and the Commonwealth

## HISTORY

1. Reflect Judicial Sentencing
2. Not Designed to Change Process
3. Based on Departure Reasons
4. Refine the Sentence Recommendation to Reflect Sentencing Patterns for :
  - A. Substantial Assistance
  - B. Expression of Remorse
  - C. Acceptance of Responsibility
5. **Decision of the Judge**



## FEDERAL GUIDELINES §3E1.1 - ACCEPTANCE OF RESPONSIBILITY

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by **1** additional level.

### Commentary

#### Application Notes:

1. In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:

(A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under [§1B1.3](#) (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. A defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility, but the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous;

(B) voluntary termination or withdrawal from criminal conduct or associations;

(C) voluntary payment of restitution prior to adjudication of guilt;

(D) voluntary surrender to authorities promptly after commission of the offense;

(E) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;

(F) voluntary resignation from the office or position held during the commission of the offense;

(G) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and

(H) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

2. This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.



97%

## FEDERAL GUIDELINES §3E1.1 - ACCEPTANCE OF RESPONSIBILITY (Continued)

3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under [§1B1.3](#) (Relevant Conduct) (see Application Note 1(A)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

4. Conduct resulting in an enhancement under [§3C1.1](#) (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both [§3C1.1](#) and [§3E1.1](#) may apply.

5. The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.

6. Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps set forth in subsection (b). The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b) will occur particularly early in the case. For example, to qualify under subsection (b), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.

Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. See section 401(g)(2)(B) of [Public Law 108–21](#). The government should not withhold such a motion based on interests not identified in [§3E1.1](#), such as whether the defendant agrees to waive his or her right to appeal.

If the government files such a motion, and the court in deciding whether to grant the motion also determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, the court should grant the motion.

**Background:** The reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for his offense by taking, in a timely fashion, the actions listed above (or some equivalent action) is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility.

Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease for a defendant at offense level 16 or greater prior to operation of subsection (a) who both qualifies for a decrease under subsection (a) and has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps specified in subsection (b). Such a defendant has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction. Subsection (b) does not apply, however, to a defendant whose offense level is level 15 or lower prior to application of subsection (a). At offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in subsection (b) within the applicable guideline range.

Section 401(g) of [Public Law 108–21](#) directly amended subsection (b), Application Note 6 (including adding the first sentence of the second paragraph of that application note), and the Background Commentary, effective April 30, 2003.

# VIRGINIA GUIDELINES BASED ON DEPARTURE REASONS PROVIDED BY JUDGES

1. The Commission has never provided guidance on appropriate departure reasons

2. Examples of types of departure reasons given\*:

- Absent of criminal record and positive response to treatment
- Defendant highly cooperative and remorseful, sentence requested by the victim
- Defendant did not escalate the crime
- Defendant has mental health issues and appreciated the seriousness of his acts
- Defendant made strides to improve her situation
- Defendant promptly admitted guilt
- **Demonstrated true remorse in his lifestyle changes**
- Elderly defendant led exemplary life prior to the offenses, was fully cooperative and testing indicates no risk
- Extremely low possibility of recidivism
- First time convicted and cooperative
- Limited involvement in the crime and cooperation
- **On his own initiative began counseling and genuinely desires to reform his behavior**
- Participated with social services to resolve problems
- Recent discover of a crime committed when the defendant was a juvenile
- **Self-enrolled in sex offender treatment**
- Substantial Assistance (As confirmed by the Commonwealth)
- **Stopped offense from escalating; prevented a death**
- Testified against parent
- The least culpable of the three involved and cooperated
- Took full responsibility at trial and hearing for an isolated event
- **Tragic case, child was killed, defendant cooperated and testified in two trials**
- Voluntarily testified in other trials

- No or Limited Criminal Record
- Expressed Remorse & Actively Remedied the Situation
- Accepted Responsibility & Took Steps to Reduce the Likelihood of being a Recidivist

\* Examples are when written departure reasons were available in the database. Written reasons will not be available in all cases until SWIFT is utilized throughout the Commonwealth.

# Implementation Examples Based on Emails

## EXAMPLE 1

- “ The arguments regarding “acceptance of responsibility” varied from statements made by defendants in presentencing reports basically saying things like “I take 110% responsibility for my actions” to defendants “apologizing” to the court immediately before a sentence was imposed.
- One of the things I found to be strange was defendants essentially denying responsibility, even in the presentence report, but then saying “sorry” while in front of the judge and the court accepting their in-court statements, at the actual sentencing hearing, as “acceptance of responsibility.”
- Another thing I found to be strange, and I am not sure if other judges are doing this, but the judge specifically **asked me if the Commonwealth agreed** the defendant had accepted responsibility prior to making the change to the sentencing guidelines. I was under the belief that the determination of the acceptance of responsibility was a decision to be made by the judge alone. As a result, I was caught off guard when this judge asked the Commonwealth’s position especially because even if I did not agree that the defendant had accepted responsibility, he still changed the guidelines.
- **Essentially, the main point I took away from my experience with this sentencing docket is that defendant can deny any responsibility, even after pleading guilty, but then simply “apologize” to the court immediately before their sentence is imposed and get the benefit of the change to the guidelines.**”

## EXAMPLE 2

- “ I've heard that at least one judge is **treating every guilty plea as "acceptance of responsibility."** I cannot confirm this firsthand.
- Arguments made: Classes taken to change behavior, pre-enroll in certain things (ASAP), in-patient or intensive out-patient treatment programs, letters written, testimony from the defendant during sentencing, etc.
- **One Judge is requiring affirmative evidence**, even when the Commonwealth agrees, at least in certain circumstances. Normally, he considers a person entering into treatment/programs to rehabilitate behavior as nearly sufficient evidence.
- A DWI for which I handled sentencing had an agreement to lower the low end. Judge, after receiving evidence of inpatient treatment, the guilty plea, and the Commonwealth's agreement, still almost did not treat the Defendant as accepting responsibility. **Judge even asked the Probation officer what they thought because he was unsure.**”

## MODIFICATION OF RECOMMENDATION

### FOR SUBSTANTIAL ASSISTANCE, ACCEPTS RESPONSIBILITY OR EXPRESSES REMORSE:

- If Recommended Low-end is # Years or Less, Adjust Low-end to NO incarceration ([SWIFT Would Insert New Range](#))
- If Recommended Low-end is Over # Years, Adjust Low-end to 50% of the Low-end Recommendation ([SWIFT Would Insert New Range](#))

## ◆ SENTENCE

Total Time Imposed Before Suspension .....  Life Sentence +

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Total Effective Time to Serve .....  Life Sentence +

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Sentenced to  
Time Served

### Post Release

Post Release Incarceration Term § 18.2-10 (suspended) .....

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Post Release Supervision Period § 19.2-295.2(A) .....

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Probation Period (Supervised) § 19.2-303 .....  Indefinite

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Good Behavior Period (§ 19.2-306)

\_\_\_\_\_  
Years                      Months                      Days

*Check all that apply*

Incarceration Sentence to Run Concurrently With Another Sentencing Event

Written Plea Agreement Accepted = Rule 3A:8(c)(1) (A) or (C)

[Illegible]

◆ **REASON FOR DEPARTURE AND/OR MODIFICATION OF JURY SENTENCE**

**MODIFICATION OF RECOMMENDATION**

FOR SUBSTANTIAL ASSISTANCE, ACCEPTS RESPONSIBILITY OR EXPRESSES REMORSE:

- If Recommended Low-end is # Years or Less, Adjust Low-end to NO incarceration ([SWIFT Would Insert New Range](#))
- If Recommended Low-end is Over # Years, Adjust Low-end to 50% of the Low-end Recommendation ([SWIFT Would Insert New Range](#))

**Proposed Solution:** Move the factor under reason for departure. The case will not be in strict concurrence and the judge will need to give a departure reason (Reasons for departure will be used to develop criteria to apply the modified recommendation). However, if the judge checks the box and the effective sentence is within the modified range, the case will be classified as in general concurrence for reporting purposes (as proposed in the 2020 Annual Report).

◆ **ATTACH COURT ORDER AND MAIL** Pursuant to § 19.2-298.01(E) \_\_\_\_\_

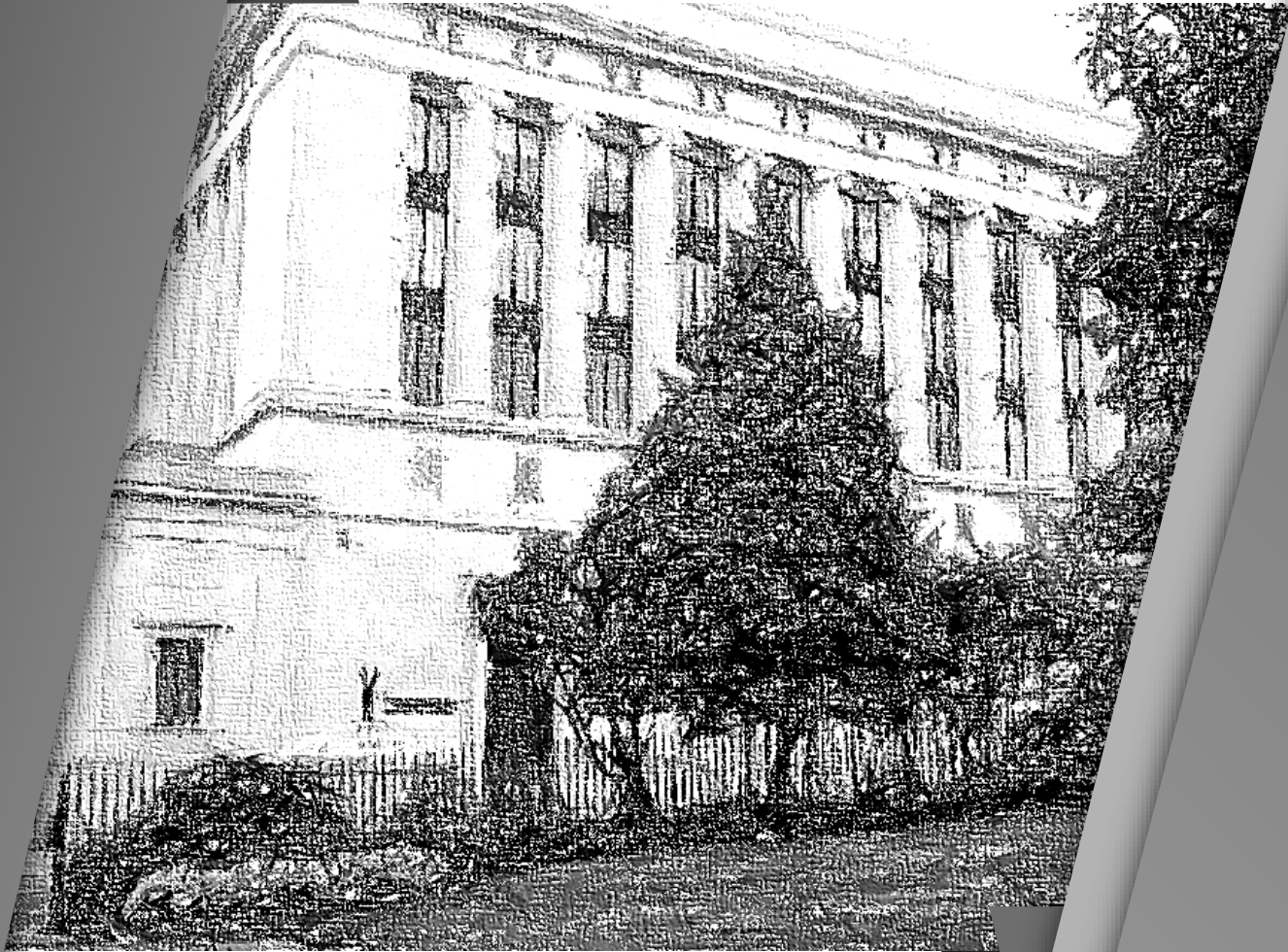
After sentencing, send to:

Virginia Criminal Sentencing Commission • 100 North Ninth Street • Fifth Floor • Richmond, Virginia 23219



# Implementation Issue

Substantial Assistance, Acceptance of  
Responsibility & Remorse  
Factor



# Feedback from the Field

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Comments, suggestions, and concerns  
from judges, attorneys, clerks and  
probation officers .