

THE GUIDELINE MESSENGER

The official newsletter of the Virginia Criminal Sentencing Commission

IN THIS EDITION

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SENTENCING GUIDELINES CASE DETAILS WORKSHEET - FREQUENTLY MISSING OR INCOMPLETE

The Sentencing Commission implemented the new Case Details Worksheet and incorporated it into the Guidelines beginning July 1, 2021. This one-page worksheet is designed to provide vital and essential information for the court, the Commission, and state policy makers. *Guidelines received by the Commission since implementation reveal that the Case Details Worksheet, in many cases, is either missing or incomplete.* For the Commission, the Case Details Worksheet provides information needed to craft Guidelines that reflect current sentencing patterns and capture legislative requirements. For example, without the information contained in the Case Details Worksheet, the Commission will be unable to develop new Robbery Guidelines (House Bill 1936 passed by the 2021 General Assembly resulted in the suspension of the Robbery Guidelines pending analysis of new sentencing data). Also, certain policy-related questions, such as those posed by the General Assembly when considering legislation, cannot be answered without Case Details information.

Below are examples from FY2022 Case Details Worksheets received to date.

- 45% of all cases are missing the defendant's gender,
- 35% of all cases missing the defendant's race,
- 68% of larceny cases are missing the value of stolen items,
- 49% of drug cases are missing the type of drug, and
- 37% of assault cases are missing victim injury.

The majority of the Case Details Worksheet captures details of the offense(s) that must be known to accurately score the Guidelines, as well as other elements that judges have indicated as relevant in the sentencing decision. The remainder of the worksheet (Question #21) captures other factors that may be known at the time of sentencing, such as a defendant's substance abuse issues, which the judge may wish to consider in the sentencing decision. Responses to Question #21 may be submitted to the preparer by the defendant or his/her attorney. However, if the information is not provided or remains unknown, Question #21 may be left blank.

There is currently no universal source of information on felony cases other than the Commission's Case Details Worksheet. Pre-sentence reports are prepared in only 40%-45% of felony sentencing events in Virginia. *The Commission highly encourages circuit court judges to review the Guidelines worksheets for completeness, including the Case Details Worksheet.* The Case Details Worksheet is an official Guidelines worksheet and § 19.2-298.01 requires judges to be presented with and review applicable Guidelines when sentencing in felony cases.

**NEW PROBATION VIOLATION GUIDELINES & LEGISLATION
IN EFFECT SINCE JULY 1, 2021**

Early FY2022 data suggests revocation sentences are lower than prior to COVID

In 2020, the Commission completed a study that provided the foundation needed to revise the Probation Violation Guidelines. The goal was to improve the utility of these Guidelines for Virginia’s judges. The Commission conducted a comprehensive analysis of sentencing outcomes in revocation cases handled in Virginia’s Circuit Courts. Based on this study, the Commission recommended a thorough overhaul of the Probation Violation Guidelines, including an expansion to cover, for the first time, violations associated with new convictions. The recommendation was accepted by the General Assembly and the new Probation Violation Guidelines took effect on July 1, 2021.

With the passage of House Bill 2038 (2021 Special Session I), the Commission adjusted the new Probation Violation Guidelines to ensure they are compatible with the requirements of the new law. The historically-based Guidelines were modified so that they will not recommend more incarceration time than that permitted under the provisions of § 19.2-306.1. For example, per § 19.2-306.1, a judge may not impose any active incarceration for most first-time technical violations of the conditions of supervised probation.

Analysis of early FY2022 revocation data suggests that sentences for technical violations have been lower under the new Probation Violation Guidelines and new law compared to sentences handed down in the years past (prior to the onset of the COVID-19 pandemic, release of the new Guidelines, and enactment of the new statutory caps). However, analysis also reveals lower sentences for other types of violations, including special condition violations and violations arising out of new convictions (see table below). Given the limited data available since the implementation of the revised Guidelines and new statutory requirements, no conclusions can yet be drawn about potential impacts of these changes.

Type of Violation	Median Sentence for Violation	
	Before (FY2014-FY2018) ¹	After (July-December 2021) ²
1 st Technical	3 mos.	0 days
2 nd Technical	6 mos.	14 days
3 rd /sub. Technical	11.5 mos.	6 mos.
1 st Violation - Firearm or Absconding	4 mos.	14 days
2 nd Violation - Firearm or Absconding	12 mos.	5.5 mos.
Special Condition Violation	6 mos.	3 mos.
New Misdemeanor Conviction	4 mos.	3 mos.
New Felony Conviction	12 mos.	8 mos.

¹ Source: Probation Violation Guidelines Study (2017-2020)

² Source: SRR/PVG Data System, FY2022 (July -December 2021)

Notes: Technical violations relating to possessing, etc., firearms and absconding are treated distinctly in § 19.2-306.1. For comparison purposes, an effort was made to convert the FY2014-FY2018 study data into the categories defined by House Bill 2038. The types of technical violations are difficult to determine in the historical data; every effort was made to categorize violations accurately.



**REQUIREMENTS
SPECIFIED IN STATUTE**

With passage of House Bill 1318 and Senate Bill 424 by the 2022 General Assembly, completion and judicial review of the Sentencing Revocation Report and any applicable Probation Violation Guidelines will be required by statute (see § 19.2-306.2, effective July 1, 2022)

Previously, these requirements were contained only in the Appropriation Act.

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**NEW PROBATION VIOLATION GUIDELINES & LEGISLATION
IN EFFECT SINCE JULY 1, 2021**



Concurrence with Probation Violation Guidelines increased in first half of FY2022

Although amendments prior to FY2022 had increased judicial concurrence with the Probation Violation Guidelines, the concurrence rate remained relatively low (55% during FY2014-FY2018). This suggested that many judges were dissatisfied with the Probation Violation Guidelines that were in place at that time.

With the implementation of the new Probation Violation Guidelines, judicial concurrence has improved considerably (see table below). Some of the increase in concurrence is due to the Commission’s adjustment of the new Probation Violation Guidelines to integrate the new statutory sentencing caps for certain technical violations. If cases with statutory caps are excluded, concurrence with the Probation Violation Guidelines among early FY2022 cases has been 79.8%.

The Commission will continue to analyze revocation data as it becomes available and will recommend adjustments to the Probation Violation Guidelines, if necessary, based on judicial practice.

Type of Violation	BEFORE (FY2014-FY2018) ¹			AFTER (Jul-December 2021) ²		
	With Guidelines	Below Guidelines	Above Guidelines	Within Guidelines	Below Guidelines	Above Guidelines
1 st Technical	55.0%	22.6%	22.4%	98.8%	0.0%	1.2%
2 nd Technical	56.8%	24.9%	18.3%	97.2%	0.0%	2.8%
3 rd /sub. Technical	35.4%	41.5%	23.2%	69.3%	26.1%	4.5%
1 st Violation - Firearm or Absconding	57.7%	26.5%	15.8%	97.5%	0.0%	2.5%
2 nd Violation - Firearm or Absconding	55.1%	29.7%	15.3%	70.1%	24.4%	5.5%
Special Condition	56.5%	16.9%	26.6%	79.4%	16.6%	4.1%
New Misdemeanor	<i>na</i>	<i>na</i>	<i>na</i>	84.5%	11.2%	4.3%
New Felony	<i>na</i>	<i>na</i>	<i>na</i>	78.6%	14.5%	7.0%
OVERALL	55.2%	23.2%	21.6%	85.5%	10.2%	4.3%

¹ Source: Probation Violation Guidelines Study (2017-2020)

² Source: SRR/PVG Data System, FY2022 (July -December 2021)

Notes: Technical violations relating to possessing, etc., firearms and absconding are treated distinctly in § 19.2-306.1. For comparison purposes, an effort was made to convert the FY2014-FY2018 study data into the categories defined by House Bill 2038. The types of technical violations are difficult to determine in the historical data; every effort was made to categorize violations accurately.



RECENT LEGISLATION CONSIDERED BY THE GENERAL ASSEMBLY

Senate Bill 137 focused on Guidelines departure reasons

Introduced in the 2022 legislative session, Senate Bill 137 specified that the written explanation filed by the court when departing from Guidelines must adequately explain the sentence imposed to promote fair sentencing.

Under this proposal, failure to follow any provisions, including the failure to provide an explanation that adequately explains the sentence imposed, would be reviewable on appeal or could be the basis of other post-conviction relief. Furthermore, failure to provide a written explanation that adequately explains the sentence imposed would be error that may constitute a basis for resentencing by the trial judge.

Under current law, the failure to follow any or all of the provisions of the Sentencing Guidelines or the failure to follow

any or all of such provisions in the prescribed manner is not reviewable on appeal and cannot be the basis of any other post-conviction relief. The provisions of Senate Bill 137 would represent a substantial change from current law.

While the legislation failed to pass both houses of the General Assembly, it does reflect the interest among some legislators in judicial departure reasons.

The Commission encourages Circuit Court judges to provide Guidelines departure explanations that are as detailed as possible.

SWIFT – THE AUTOMATED SENTENCING GUIDELINES APPLICATION – INTEGRATION INTO THE JUDICIAL INFORMATION SYSTEM (JIS)

Rollout of SWIFT-JIS integration is nearing completion

A number of years ago, the Commission launched a project to automate the Sentencing Guidelines completion and submission process. The Commission has been collaborating with the Supreme Court’s Judicial Services Department and the Department of Judicial Information Technology to develop SWIFT, a secure web-based application to automate the Guidelines from preparation to submission to the court and then to the Commission after sentencing.

Using SWIFT, users with log-in credentials prepare Guidelines forms within the online application and electronically submit them to the court. Most Circuit Court Clerks have signed agreements such that SWIFT interfaces with the publicly-available Case Management System (CMS) information maintained by the Clerk. With the interface, CMS data can be used to populate information on the Guidelines form, such as the defendant’s name and birthdate and the specific charges that will be scored on the Guidelines. The interface saves time for preparers and reduces Guidelines errors.



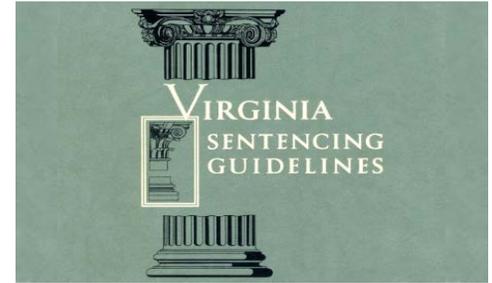
Since February 2021, the Commission and Judicial Services, have been integrating SWIFT into the Judicial Information System, or JIS, circuit by circuit. Integration with JIS will be available in all circuits by July 1, 2022. The 6th, 7th and 8th Circuits go live in late May. The 2nd, 3rd and 5th Circuits join in June.

The Commission sincerely thanks Circuit Court judges who have begun using SWIFT’s interface with JIS to review Guidelines and sign the forms electronically.



When working in the SWIFT application (outside of JIS), the system will automatically log out after one hour of inactivity by the user.

SWIFT, MANDATORY MINIMUMS, AND OTHER GUIDELINES ADJUSTMENTS



SWIFT will identify and calculate mandatory minimums for preparers and the court

Rather than adjust the Sentencing Guidelines recommended range for mandatory minimum sentences, Guidelines users have requested that the original Guidelines range be preserved and that a separate field be added to the cover sheet to address offenses requiring mandatory terms of incarceration. Beginning July 1, 2022, the SWIFT application will identify all completed offenses that carry mandatory minimum sentences and a list of such offenses will be available for view. A sum of the mandatory minimums in the sentencing event will be printed on the cover sheet. As under current rules, the sum of mandatory minimum sentences takes precedence over any part of the Guidelines range that falls below the total of mandatory sentences.

SWIFT will include a manual override to be used when the statute does not require the mandatory term to be imposed. For example, under § 18.2-248(C), the mandatory minimum term for a violation of the subsection is not applicable when the defendant has no prior convictions under § 17.1-805, he did not use violence or did not cause death or serious bodily injury to any person, etc. The manual override should not be used when the judge decides to run the mandatory minimum sentences concurrently to each other or to another offense.



SENTENCING GUIDELINES AND JUVENILES TRIED IN CIRCUIT COURT

Sentencing Guidelines apply to juveniles tried as adults in Virginia

The *Code of Virginia* sets certain requirements related to the Sentencing Guidelines. Pursuant to § 19.2-298.01, the court must be presented with, review and consider applicable Guidelines worksheets, state for the record that the review has been accomplished, and file a written explanation of departure when sentencing outside of the Guidelines range.

The Code does not provide any exceptions for juveniles tried as adults in circuit court. The Guidelines apply even if a judge has decided to impose a juvenile disposition, such as commitment to the Virginia Department of Juvenile Justice.

SWIFT will adjust the Modification of Recommendation to reflect mandatory minimums and adjusted ranges

Beginning July 1, 2022, the Modification of Recommendation factor on the Guidelines disposition page, which addresses the judge's determination of the defendant's substantial assistance, acceptance of responsibility or expression of remorse, will be adjusted within SWIFT to reflect mandatory minimum terms of incarceration required by law. Similarly, when the Commission's sex offender risk assessment recommends an adjustment to the high end of the Guidelines range, the Modification of Recommendation factor will reflect the adjusted high on the disposition page.

Thus, the Modification of Recommendation factor on the disposition page will continue to reflect the adjusted Guidelines range for cases in which the judge determines that the defendant provided substantial assistance, accepted responsibility or expressed remorse. As of July 1, 2022, Modification of Recommendation factor will be further adjusted to account any mandatory minimum sentences that must be imposed and any sex offender risk assessment recommendation, when applicable.



Esther J. Windmueller Fee Waiver Program

On a limited basis and subject to the availability of funds, the Sentencing Commission offers fee waivers for private attorneys. Waivers apply to Guidelines training and/or manuals. Applications for fee waivers are evaluated based on the percentage of the attorney's practice focusing on indigent defense cases and financial need (especially for new or solo practitioners). To submit an application, go to <http://www.vcsc.virginia.gov/training.html>.

Fees are always waived for Commonwealth's Attorneys, Public Defenders, and Probation and Parole Staff

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Guidelines Mobile Manual

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