

# THE GUIDELINE MESSENGER

The official newsletter of the Virginia Criminal Sentencing Commission

## IN THIS EDITION

### SUPPLEMENTAL INFORMATION AND GUIDANCE FROM THE COMMISSION

- **New Guidelines Modification for Substantial Assistance, Acceptance of Responsibility or Expression of Remorse**

**Effective 7/1/2021**

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

### Overview of Modification

Virginia's Sentencing Guidelines were created to provide sentence recommendations based on historical practices, using information regarding the nature of the current offense(s) and a defendant's criminal history. In 2020, the Sentencing Commission carefully 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 for the offense, or the defendant's expression of remorse for the crimes. Based on this study, the Commission recommended changes to the Sentencing Guidelines, which were included in the *2020 Annual Report* and subsequently 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. If the calculated low end of Guidelines range is three years or less, the low end of the Guidelines range will be reduced to zero. If the calculated low end of the Guidelines range is more than three years, the low end of the Guidelines range will be reduced by 50%. The midpoint and the high end of the Sentencing Guidelines range will remain unchanged.

The modification to the Guidelines allows the judge the option to consider the defendant's substantial assistance, acceptance of responsibility or expression of remorse and still be in concurrence with the Guidelines.

### Guidance from the Commission

The Commission has received requests for additional information and further guidance regarding this change in the Guidelines. The decision to modify the Guidelines recommendation based on the defendant's assistance, acceptance of responsibility or remorse must be made by the judge at sentencing. If, absent the Guidelines modification, the judge would depart below the recommended range and cite one of these reasons to explain the departure, the Commission suggests that the judge make use of the modified Guidelines range. To do so, the judge need only check the MODIFICATION OF RECOMMENDATION box in the Disposition section of the Guidelines coversheet. The judge may then utilize the modified Guidelines range shown below the check box.

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

### SUPPLEMENTAL



### 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. Examples include: defendants who paid restitution in full or returned property, entered treatment on their own, made amends with the victim or made the victim whole, prevented the crime from escalating to something more serious, turned themselves in, or were distraught about what was done. In the cases analyzed by the Commission, the defendant took some action beyond pleading guilty.

### Analysis of Sentencing Data

Judicial departure reasons submitted on Virginia's Guidelines forms provide the only reliable data source to identify cases that resulted in reduced sentences because of the defendant's substantial assistance, acceptance of responsibility, or expression of remorse. The Commission identified 1,428 sentencing events during FY2016-FY2020 in which the judge departed from the Guidelines recommendation and cited one of these three reasons. The 1,428 cases represented 1%-2% of cases overall during the five-year period, but they accounted for approximately 13% of all departures below the Guidelines. Thus, in at least one out of every 10 downward departures, judges cited substantial assistance, acceptance of responsibility or expression of remorse as the reason. In these 1,428 sentencing events, 31.3% of the defendants were sentenced to probation for providing assistance.

Another 42.4% percent were sentenced to probation for accepting responsibility and/or expressing remorse. After extensive analysis, the Commission recommended a change to the Guidelines to integrate judicial sentencing in such cases.

Based on the analysis, the best approach to capture defendants sentenced to probation or shorter incarceration because of the assistance provided, acceptance of responsibility or expression of remorse was to reduce the low end of the Guidelines range. With the modification, the Guidelines better reflect actual judicial sentencing practices in these circumstances.

### Application in the Courtroom

To reflect historical sentencing and to be true to the source of the data, the decision to modify the Guidelines recommendation must be made by the judge at sentencing. Attorneys will continue to make arguments to the judge as to why a specific sentence was included in a plea agreement or why the judge should modify the Guidelines recommendation for one of the specified reasons. No change to court procedures is necessary.

If the Guidelines are prepared using the automated application (called SWIFT), the modified Guidelines range will be calculated automatically and inserted on the back side of the Guidelines coversheet. If the judge determines that the modification is appropriate for one of the reasons described above, the judge simply needs to check the MODIFICATION OF RECOMMENDATION box in the Disposition section of the Guidelines coversheet to indicate that determination. The judge may then utilize the modified Guidelines range that appears below the check box. If the judge checks the box and sentences within the modified range, no departure explanation is needed.

To see the new Guidelines coversheet, go to [www.vcsc.virginia.gov/worksheets2021/coversheet2021FINAL.pdf](http://www.vcsc.virginia.gov/worksheets2021/coversheet2021FINAL.pdf)

## How to contact the Virginia Criminal Sentencing Commission



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E-mail [SWIFT@vcsc.virginia.gov](mailto:SWIFT@vcsc.virginia.gov)

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

[www.vcsc.virginia.gov](http://www.vcsc.virginia.gov)

