

# THE GUIDELINE MESSENGER

The official newsletter of the Virginia Criminal Sentencing Commission

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## SIGNIFICANT CHANGES TO VIRGINIA'S SENTENCING GUIDELINES EFFECTIVE JULY 1, 2021

### Substantial Assistance, Acceptance of Responsibility or Expression of Remorse

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. The Sentencing Commission closely monitors the guidelines system and, each year, deliberates upon possible modifications to enhance the usefulness of the guidelines as a tool for judges. Revisions to the guidelines are based on analysis of sentencing data, including judicial explanations of departures.

In 2020, the 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 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 changes to the guidelines allow 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.

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 the guidelines are prepared using the Commission's automated Sentencing Guidelines 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 defendant meets one of the criteria, the judge simply needs to check the box indicating that determination. The judge may then utilize the modified guidelines recommended range shown below the check box.

#### Example:



#### MODIFICATION OF RECOMMENDATION

#### Based on Substantial Assistance, Acceptance of Responsibility or Expression of Remorse

The decision to modify the guidelines recommendation must be made by the judge. If the recommended low end is 3 years or less, the low end is adjusted to No Incarceration. If recommended low end is more than 3 years, low end is reduced by 50%.

If accepted by the court,

Adjusted Range is:

Years 0 Months 0 Days 0 TO Years 2 Months 6 Days 0

## SIGNIFICANT CHANGES TO VIRGINIA'S SENTENCING GUIDELINES EFFECTIVE JULY 1, 2021



### NEW Probation Violation Guidelines

In 2003, the General Assembly directed the Sentencing Commission to develop guidelines for violations of probation supervision for reasons other than a new criminal conviction (i.e., “technical” violations). Per the legislative mandate, the Commission examined historical sanctioning practices in revocation hearings. Statewide use of the Probation Violation Guidelines began July 1, 2004. While a series of amendments to the Probation Violation Guidelines increased judicial concurrence, the concurrence rate remained relatively low. In 2016, the Commission approved a new study to provide the foundation needed to revise the guidelines used in revocation cases and improve the utility of the guidelines for Virginia’s judges. The large-scale multi-year study included surveys of judges and other court stakeholders, data from multiple criminal justice data systems, supplemental data collected by staff, and rigorous statistical analysis of the most comprehensive dataset on probation violations and revocation outcomes ever compiled in Virginia. Based on this study, the Commission recommended a thorough overhaul of the Probation Violation Guidelines, a recommendation that was accepted by the 2021 General Assembly. A detailed discussion of the Commission’s study and findings can be found in the *2020 Annual Report*.

Perhaps most significantly, the Commission concluded that the Probation Violation Guidelines could be expanded to cover violations stemming from new felony and misdemeanor convictions (rather than just technical violations). Moreover, the Probation Violation Guidelines were improved by replacing the current instrument with multiple instruments based on the type of violation (predictive accuracy was improved using distinct instruments). In an extensive survey, circuit judges identified the original offense type, sex offender violations, prior revocations, felony convictions, and patterns of similar behavior as factors that weighed most heavily in their revocation sentencing decisions. Data analysis revealed these factors to be significantly correlated with sentencing outcomes for probation violations.

The Commission conducted a second analysis to examine the reasons cited by judges for departing from the current Probation Violation Guidelines. This analysis revealed that the judge’s assessment of the probationer’s rehabilitation potential (good or poor) was often important in the sentencing decision. Based on these empirical findings, the Commission concluded that a new factor could be added to the Probation Violation Guidelines to account for a probationer’s rehabilitation potential. This factor is not scored by the guidelines preparer. Rather, this factor is based on judicial determination at the revocation hearing.

When the judge determines a probationer has good rehabilitation potential, despite the current violation, analysis of the data support an adjustment to the Probation Violation Guidelines to reduce the low end of the range to zero or “time served.”

#### Example:

##### ◆ SENTENCE FOR REVOCATION

###### Rehabilitation Potential

- Court finds that the defendant is a good candidate for rehabilitation  
The low end of the guidelines is set to time served or zero

Amount of Time Imposed .....  Life + 

|        |   |
|--------|---|
| Years  | 0 |
| Months | 6 |
| Days   | 0 |

Amount of Time to Serve for Violation (Effective) ...  Life + 

|        |   |
|--------|---|
| Years  | 0 |
| Months | 0 |
| Days   | 0 |

 Sentenced to Time Served

Through the course of the study, the Commission noted that the information and level of detail provided to circuit court judges regarding violations varies considerably across, and even within, probation districts. For example, information related to the length of time absconded, treatment programs attempted or completed by the probationer, and specific sex offender conditions violated have been identified by judges as important in sentencing but are not consistently available in the Major Violation Reports submitted to the court. To address this, the Commission has added new documentation fields to the Sentencing Revocation Report and the Probation Violation Guidelines to ensure judicial access to important case information is standardized statewide. Further, beginning July 1, 2021, only probation officers will be authorized to complete the Probation Violation Guidelines, which must be submitted with an updated criminal history check.

Further modifications to the Probation Violation Guidelines were necessary in order to make them compatible with the requirements of House Bill 2038, adopted by the 2021 General Assembly. The provisions of House Bill 2038 are discussed in the next section.

The revised Probation Violation Guidelines will take effect on July 1, 2021. Prior to implementation, the Commission will provide training to individuals who prepare the Probation Violation Guidelines for the court. As always, judicial concurrence with the guidelines remains discretionary. The Commission will closely monitor judicial response to the new guidelines and will recommend further adjustments, if necessary, based on judicial practice after the changes take effect.

To view the new Sentencing Revocation Report  
and the Probation Violation Guidelines, see  
<http://www.vcsc.virginia.gov/training/SRR.pdf>

## IMPACT OF RECENT LEGISLATION ON SENTENCING GUIDELINES



### Limits on Probation and Sentences for Technical Violations (House Bill 2038)

House Bill 2038, passed by the General Assembly in 2021, specifies limits for periods of probation and supervised probation, as well as sentences for technical violations. Under the legislation:

- The court, at sentencing, may fix the period of probation only up to the statutory maximum of the offense; the limitation does not apply to the extent that an additional period of probation is necessary for the defendant to participate in a court-ordered program or when the defendant still owes restitution and is subject to § 19.2-305.1;
- The period of **supervised** probation may not exceed 5 years from the release of the defendant from active incarceration;
- These limits do not apply to defendants convicted of certain sex offenses (current requirements for sex offenders remain);
- In any case where a court suspends the imposition or execution of a sentence, it may fix the period of suspension only up to the statutory maximum of the offense; this does not apply if an additional period of suspension is necessary for the defendant to participate in a court-ordered program;
- The court may not conduct a revocation hearing unless the court issues process to notify the accused or to compel his appearance *within 90 days of receiving notice of the alleged violation* or within 1 year after the expiration of the period of probation or period of suspension, *whichever is sooner*, or, for failure to pay restitution, within 3 years after such expiration;
- If neither a probation period nor a period of suspension was fixed by the court, the court must issue process within *6 months* (rather than 1 year) after the expiration of the maximum period for which the defendant might originally have been sentenced.

House Bill 2038 defines “technical violation.” For the purposes of the legislation, a technical violation means 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).

The definition of technical violation in House Bill 2038 does not include violations of special conditions set by the court, such as gang or sex offender restrictions.

House Bill 2038 specifies that multiple technical violations arising from a single course of conduct or considered at the same revocation hearing shall not be considered separate technical violations for the purposes of sentencing.

When finding the defendant in violation, the court may revoke the suspension and impose a sentence in accordance with the provisions of the bill (see below). The court may again suspend all or part of the sentence for a period up to the statutory maximum period for which the defendant might originally have been sentenced, less any time already served. However, if a court finds that the defendant absconded, the court may extend the period of probation or suspended sentence by the length of time the defendant had absconded. Under the bill, the period of any suspension of sentence must be measured from the date of the entry of the original sentencing order.

HB2038 limits the amount of active incarceration a court can impose for a technical violation of probation supervision as follows:

| Violation   | Sentence specified in HB2038  |
|---|---|
| 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, up to 14 days of active incarceration |
| 3rd or subsequent technical violation OR 2nd or subsequent technical violation related to firearm or absconding | Whatever sentence may have been originally imposed  |

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.

It is important to note that sentences for violations arising because of new offense convictions and sentences for violations of special conditions are not affected by the legislation.

With the passage of House Bill 2038, the Sentencing Commission adjusted the new Probation Violation Guidelines, which take effect on July 1, 2021, to ensure they are compatible with the requirements of the new law. Specifically, the Probation Violation Guidelines have been adjusted to reflect the caps on sentences for technical violations specified in the legislation.

## IMPACT OF RECENT LEGISLATION ON SENTENCING GUIDELINES



### Restructuring of Penalties for Robbery (House Bill 1936)

The General Assembly recently adopted House Bill 1936 to create degrees of punishment for robbery based on the elements of the robbery offense, as shown below.

| House Bill 1936<br>Elements of Robbery (§ 18.2-58)  | Penalty<br>(Effective July 1, 2021) |
|---|-------------------------------------|
| Results in serious bodily injury or death   | Class 2 felony (20 years - Life)    |
| Use or display of firearm in threatening manner   | Class 3 felony (5 - 20 years)       |
| Use of physical force not resulting in serious bodily injury; use of a deadly weapon other than firearm in a threatening manner | Class 5 felony (1 - 10 years)       |
| Use of threat/intimidation not involving a deadly weapon  | Class 6 felony (1 - 5 years)        |

The crime of robbery (§ 18.2-58) is currently punishable by imprisonment of five years to life. The effect of the legislation is to reduce the maximum penalty for completed robbery offenses except in cases involving serious bodily injury or death. In addition, § 16.1-269.1(C) was amended to limit the required transfer of juveniles to circuit court (upon finding of probable cause) to the two most serious classes of robbery.

The legislation creates classes of robbery that are very different than the way robbery is delineated in the guidelines currently (which is by location – street, business, residence, bank - and whether or not a firearm/simulated firearm was used). Current data are insufficient to perform the analysis necessary to develop guidelines based on the proposed classes. Further, it is not known how charging practices or sentencing patterns for robbery will evolve under the new schema (or what impact the new schema may have on sentences for robberies committed prior to, but sentenced after, July 1, 2021). Most likely, the current guidelines will not accurately reflect the typical or average robbery outcomes based on the new classifications. The *Code* specifies how revisions to the Sentencing Guidelines are to be handled. Revisions to the robbery guidelines cannot be implemented until July 1, 2022, at the earliest.

**For these reasons, the Commission has determined that robbery will not be covered as a primary offense under the guidelines until a full analysis of sentencing under the new penalty structure can be completed.** The Commission will submit proposed revisions to the robbery guidelines in a future Annual Report.

Guidelines users should be aware that House Bill 1936 did not modify § 18.2-58.1, which defines the punishment for carjacking. Therefore, the current guidelines for carjacking offenses prosecuted under § 18.2-58.1 will continue to apply.

Also, House Bill 1936 may affect the scoring of the guidelines when the defendant has a robbery conviction in his/her criminal history. As noted in the Sentencing Guidelines Manual, the scoring of prior record, and therefore the classification of prior record into Category 1 or Category 2, is based on the current statutory maximum penalty of the offense. With the penalty changes enacted as a result of HB1936, some individuals with a prior robbery conviction will shift from having a Category 1 record to a Category 2 record due to the change in the maximum penalty for certain robberies. Moreover, Guidelines preparers are instructed that, if there is not sufficient information to determine the seriousness of a prior record offense, it should be scored at the lowest possible penalty level.

*As a result of House Bill 1936, the Commission has determined that robbery will not be covered as a primary offense under the guidelines until a full analysis of sentencing under the new penalty structure can be completed. The Commission will submit proposed revisions to the robbery guidelines in a future Annual Report.*

*Because House Bill 1936 did not modify § 18.2-58.1, related to carjacking, the guidelines for carjacking will continue to apply.*



## RECENT LEGISLATION IMPACTING TIME SERVED BY FELONS

### Higher Rates of Earned Sentence Credits for Nonviolent Felons (House Bill 5148) - Effective July 1, 2022

The General Assembly passed House Bill 5148 during a Special Session in the fall of 2020. The legislation, which will take effect **on July 1, 2022**, will increase the rate at which individuals serving time for nonviolent felony offenses earn sentence credits. Currently, pursuant to § 53.1-202.3, all felons must serve a minimum of 85% of the active sentence ordered by the court (felons may earn a maximum of 4 ½ days off for every 30 days served). Under the provisions of House Bill 5148, persons serving time for certain nonviolent felonies will be eligible to earn as much as 15 days for every 30 days served, based on their participation in programs and record of institutional infractions during confinement. If a nonviolent felon earns at the highest rate throughout his sentence, he will serve no less than 65% of the court-ordered sentence. The provisions of this legislation will apply retroactively to the entire sentence of any person who is confined in a state correctional facility and participating in the earned sentence credit system on July 1, 2022.

Offenses excluded from the expanded sentence credits are listed below. State inmates convicted of these offenses will continue to serve at the lower rates of earned sentence credits (maximum of 4 ½ days off for every 30 days served).

- Class 1 felonies;
- 1<sup>st</sup> or 2<sup>nd</sup> degree murder, felony murder, solicitation to commit murder, lynching;
- Acts of terrorism punishable as Class 2 felonies or treason;
- Felony kidnapping or abduction (Article 3 of Chapter 4 of Title 18.2);
- Malicious wounding (§ 18.2-51 et seq.), strangulation (§ 18.2-51.6) or female genital mutilation (§ 18.2-51.7);
- Felony assault of family/household member (§ 18.2-57.2);
- Robbery (§ 18.2-58) or carjacking (§ 18.2-58.1);
- Rape or other felony sexual assault (Article 7 of Chapter 4 of Title 18.2);
- Burglary with intent to murder, rape, rob or commit arson (§ 18.2-90);
- Felony stalking (§ 18.2-60.3);
- Felony violation of protective order (§§ 16.1-253.2, 18.2-60.4);
- Felony prostitution or sex trafficking (Article 3 of Chapter 8 of Title 18.2);
- Use of machine gun or sawed-off shotgun in crime (§ 18.2-289, § 18.2-300(A));
- Indecent liberties, certain felony crimes against children or incapacitated adults (Article 4 of Chapter 8 of Title 18.2 - except bigamy and Class 6 felony child abuse);
- Child pornography offenses (except 1<sup>st</sup> offense possession) or online solicitation of minors (Article 5 of Chapter 8 of Title 18.2);
- Permit minor to perform in sexually explicit material (§ 40.1-100.2);
- Cruelty or injuries to children (§ 40.1-103);
- Torture or mutilation of animals resulting in serious injury or death (§ 3.2-6570(F));
- Trespass on school property with intent to abduct child (§ 18.2-128(B));
- Sexually violent predator escape, leave state, fail to return (§ 37.2-917, § 37.2-918);
- Second or subsequent convictions (in any combination, with liberty in between) for: Voluntary manslaughter, mob-related felonies, unlawful wounding, certain acts of terrorism, burglary (§ 18.2-89, § 18.2-92), arson of an occupied dwelling, church, or public building, poison/adulterate food with intent to injure or kill, animal fighting, 1<sup>st</sup> offense possession of child pornography, felony failure to pay wages, paramilitary activities, burn cross/other object to intimidate, display noose/swastika to intimidate.



#### House Bill 5148 2020 General Assembly (Special Session I)

Rate of earned sentence credits  
for nonviolent felons  
*effective July 1, 2022:*

- Level 1 = 15 days per 30 days served
- Level 2 = 7.5 per 30 days served
- Level 3 = 3.5 per 30 days served
- Level 4 = 0 days for 30 days served

To see a list of Virginia Crime Codes (VCCs) identifying the specific offenses eligible for the 65% earned sentence credit rate versus the 85% earned sentence credit rate, see <http://www.vcsc.virginia.gov/training/credit.pdf>



## SENTENCING GUIDELINES CASE DETAILS WORKSHEET EFFECTIVE JULY 1, 2021

### NEW Worksheet Will Be Incorporated into the Sentencing Guidelines

The Sentencing Commission has a number of legislative mandates that it must fulfill. Among these, the Commission must develop, maintain and modify a system of discretionary Sentencing Guidelines for use in all felony cases that take into account historical data (§ 17.1-803(1)). The Commission has also been charged with monitoring sentencing practices in felony cases throughout the Commonwealth, including the use of the Sentencing Guidelines, and maintaining a database of the information obtained (§ 17.1-803(7)). The Commission must also perform such other functions as may be required by law or may be necessary to carry out its mandates (§ 17.1-803(11)). Other functions include special studies or detailed analyses as directed by the General Assembly. To fulfill its legislative mandates, the Commission requires criminal case information of the highest quality. Pre-sentence reports are not completed for all felony cases and, in fact, are prepared in only 40%-45% of felony sentencing events in Virginia. There is currently no universal source of information for felony cases in the Commonwealth.

Also of critical importance, the Commission has observed that the information and level of detail provided to circuit court judges in felony cases varies markedly, particularly when the court does not receive a pre-sentence report. Since the 1980s, a primary objective of the sentencing guidelines has been to decrease unwarranted sentencing disparity and promote consistency and predictability in sentencing. In order to achieve this goal, it is vital that judges receive accurate sentencing guidelines but also standardized information regarding details of the offense. Furthermore, providing the judge with consistent information pertaining to the circumstances of the defendant (including substance abuse and mental health issues and treatment history) allows the judge to fully consider the unique aspects of each case before the court.

To address the critical need for information, the Commission recently approved a Case Details Worksheet that will be incorporated into the Sentencing Guidelines beginning July 1, 2021. 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.

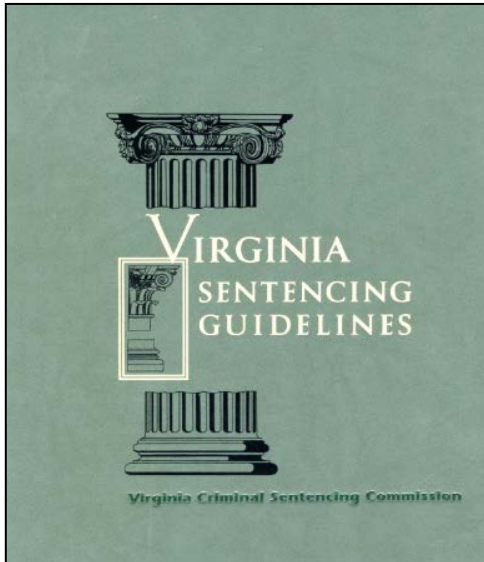
The majority of the worksheet captures details of the offense(s) that must be known to accurately score the sentencing guidelines, as well as other elements that judges have indicated as relevant in the sentencing decision. The remainder of the worksheet (the lower section) is designed to capture other 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. There is no requirement that the guidelines preparer conduct an interview with the defendant that would not otherwise be scheduled (for example, to complete a pre-sentence report ordered by the court). Information in the lower section of the worksheet 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. If the guidelines are prepared using the Commission's automated Sentencing Guidelines application (called SWIFT), the Case Details Worksheet can be completed within the automated system.

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 House Bill 1936 resulted in the suspension of the robbery guidelines pending analysis of new sentencing data (see page 4 of this newsletter).

Each spring, Commission staff conduct an extensive round of training on "What's New" in the Sentencing Guidelines. The Case Details Worksheet will be included in this year's "What's New" seminars, which will be offered in virtual and in-person formats.

Based upon the information gathered through this worksheet, the Commission will be able to recommend revisions to the guidelines to ensure that they continue to reflect an accurate benchmark of the typical sentencing outcome in similar cases.

To view the new Case Details Worksheet, see  
<http://www.vcsc.virginia.gov/training/casedetails.pdf>



## CALCULATION OF GUIDELINES CONCURRENCE

While compliance with the guidelines is discretionary, a judge is required to review the guidelines before sentencing and provide a written explanation for departure when giving a sentence outside the guidelines range (§ 19.2-298.01).

### TYPES OF CONCURRENCE:

#### **STRICT CONCURRENCE**

The effective sentence is exactly within the recommended range.

#### **NONVIOLENT OFFENDER RISK ASSESSMENT**

When an alternative sanction is recommended, the judge gives a less restrictive sentence than is recommended by the traditional guidelines. Examples:

- Jail or probation instead of prison
- HEM or time served instead of jail
- No effective time instead of prison/jail

#### **SPECIAL NOTE:**

If the judge sentences a defendant to an alternative when it is recommended by risk assessment, the judge does not need to submit a departure explanation.

#### **SEX OFFENDER RISK ASSESSMENT**

In rape and sexual assault cases, the effective sentence is within the low end of the recommendation and the adjusted high end of the recommendation.

#### **TIME SERVED**

The “Time Served” box is checked and:

- the Section B recommendation is 1 day - 6 months OR
- the Section B recommendation is probation/no incarceration (*The effective sentence must be less than 3 months and specified in days*) OR
- the low end of the Section C recommendation is 7 months.

#### **ROUNDING**

The effective sentence is at least six months and it is within 5% of the recommendation (or, if 5% equates to less than one month, the effective sentence is within one month above or below the recommendation).

#### **FIRST OFFENDER (Effective 7/1/2018)**

The defendant is eligible for disposition under the first-offender statute (§ 18.2-251), the judge defers the finding of guilt and places the defendant on probation with terms and conditions as specified in § 18.2-251.

#### **SUBSTANTIAL ASSISTANCE, ACCEPTANCE OF RESPONSIBILITY OR EXPRESSION OF REMORSE (Effective 7/1/2021)**

In cases in which the judge determines the defendant has provided substantial assistance, accepted responsibility or expressed remorse, the effective sentence is within the adjusted low end and the high end of the recommended range.

#### **PROBATION VIOLATION GUIDELINES & GOOD REHABILITATION POTENTIAL (Effective 7/1/2021)**

In cases in which the judge determines the probationer has good rehabilitation potential, the effective sentence is between zero (or “time served”) and the high end of the recommended range.

### EXPLANATIONS OF DEPARTURE

#### **SPECIAL NOTE:**

To assist judges, the Commission interprets certain check boxes on the guidelines form as departure explanations. The Commission interprets the following as a departure reason:

- The jury trial box is checked, **OR**
- The judge checks one of the boxes indicating the acceptance of a plea agreement, **OR**
- The judge checks the box for DOC’s CCAP program.

*However, for public consumption, the Commission recommends that a judge write a reason for departure whenever the active sentence is outside the guidelines recommended range.*



## Members of the Virginia Criminal Sentencing Commission

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