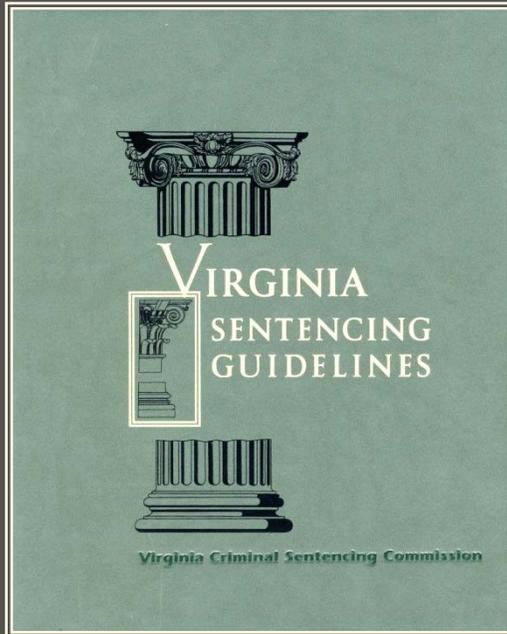




# VIRGINIA CRIMINAL SENTENCING COMMISSION



## Possible Recommendations for Guidelines Revisions & Request for Directions

September 9, 2019

# Modifications to the Sentencing Guidelines

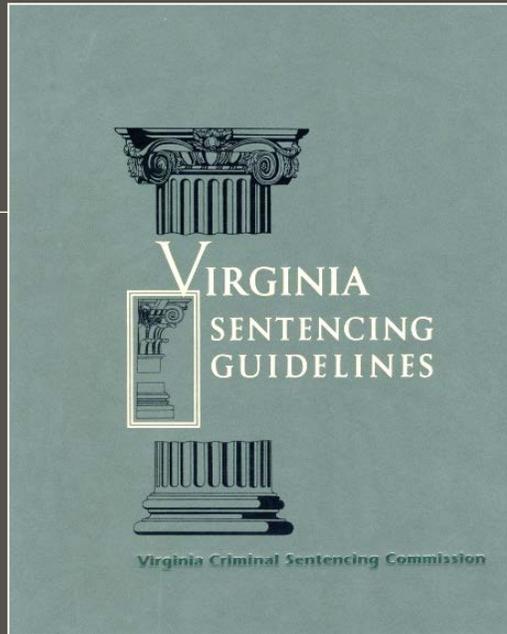
- **The Commission closely monitors the sentencing guidelines system and, each year, deliberates upon possible modifications to the guidelines.**
- **Under § 17.1-806 of the *Code of Virginia*, any modifications adopted by the Commission must be presented in its annual report, due to the General Assembly each December 1.**
- **Unless otherwise provided by law, the changes recommended by the Commission become effective on the following July 1.**



# Modifications to the Sentencing Guidelines

- **Proposals are designed to maximize compliance and balance mitigation and aggravation rates to the extent possible.**
- **Current guidelines worksheets serve as the base for scoring historical cases, but the points assigned to those factors may be adjusted and new factors may be added.**





## Suggestions From Users & Policy Makers

### Review **Kidnapping** Guidelines When

- the Primary is Abduct by Force Without Justification,
- the Additional Offense is a Misdemeanor and
- the Recommendation is 0-6 months

§ 18.2-47 (Class 5 Felony)

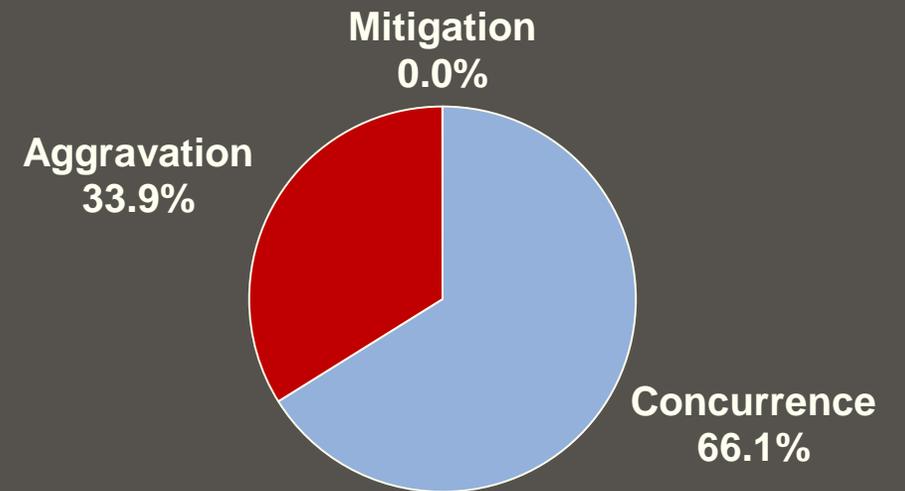
# Abduct by Force Without Justification With Misdemeanor & 0 - 6 Months Recommendation

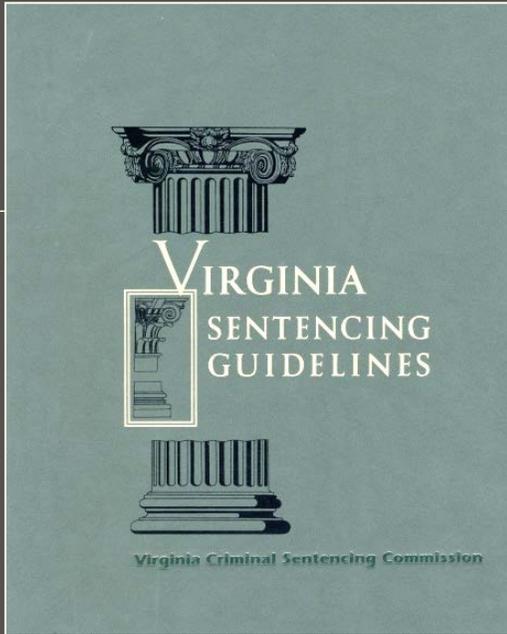
FY2014 – FY2018  
Number of Sentencing Events = 116

| Type of Additional Offense | Number* |
|----------------------------|---------|
| Assault                    | 91      |
| Protective Order Violation | 16      |
| Sex Offense                | 9       |
| Family                     | 4       |

\* Will not add up to 116: There may be more than one type of misdemeanor in the sentencing event

Class 5 Felony Kidnapping &  
One or More Misdemeanor Additional Offense





# Suggestions From Users & Policy Makers

## Eliminate the Drug Exception Rule

The VCCs have to be exactly the same to be scored under “Primary Offense” or “Primary Offense Remaining Counts.” The exception is when there are multiple counts of selling or distributing a Schedule I or II drug. The offenses included under the **Drug Exception Rule** are:

NAR-3042-F9 – Distribution of Schedule I or II drugs

NAR-3043-F9 – Possession with intent to sell Schedule I or II drugs

NAR-3044-F9 – Manufacture Schedule I or II drugs

NAR-3045-F9 – Sell for profit Schedule I or II drugs

All of these offenses are listed under § 18.2-248(C). If more than one of these VCCs appears in a sentencing event, they are treated as multiple counts of the primary offense.

# Eliminate the Drug Exception Rule

## Reasons to Eliminate the Rule:

1. Confusing and often not followed
2. There are subtle differences between possession with intent vs. distribution for profit
3. There are significant differences between manufacture Schedule I/II drug under § 18.2-248(C) vs. manufacture methamphetamine under § 18.2-248(C1)

# Eliminate the Drug Exception Rule

## §§ 18.2-248(C) vs. § 18.2-248(C1)

§ 18.2-248. Manufacturing, selling, giving, distributing, or possessing with intent to manufacture, sell, give, or distribute a controlled substance or an imitation controlled substance prohibited; penalties. —

A. Except as authorized in the Drug Control Act (§ 54.1-3400 et seq.), it shall be unlawful for any person to manufacture, sell, give, distribute, or possess with intent to manufacture, sell, give or distribute a controlled substance or an imitation controlled substance.

B. In determining whether any person intends to manufacture, sell, give or distribute an imitation controlled substance, the court may consider, in addition to all other relevant evidence, whether any distribution or attempted distribution of such pill, capsule, tablet or substance in any other form whatsoever included an exchange of or a demand for money or other property as consideration, and, if so, whether the amount of such consideration was substantially greater than the reasonable value of such pill, capsule, tablet or substance in any other form whatsoever, considering the actual chemical composition of such pill, capsule, tablet or substance in any other form whatsoever and, where applicable, the price at which over-the-counter substances of like chemical composition sell.

C. **Except as provided in subsection C1**, any person who violates this section with respect to a controlled substance classified in Schedule I or II shall upon conviction be imprisoned for not less than five nor more than 40 years and fined not more than \$500,000. Upon a second conviction of such a violation, and it is alleged in the warrant, indictment, or information that the person has been before convicted of such an offense or of a substantially similar offense in any other jurisdiction, which offense would be a felony if committed in the Commonwealth, and such prior conviction occurred before the date of the offense alleged in the warrant, indictment, or information, any such person may, in the discretion of the court or jury imposing the sentence, be sentenced to imprisonment for life or for any period not less than five years, three years of which shall be a mandatory minimum term of imprisonment to be served consecutively with any other sentence, and he shall be fined not more than \$500,000.

# Eliminate the Drug Exception Rule

## §§ 18.2-248(C) vs. § 18.2-248(C1)

C1. Any person who violates this section with respect to the manufacturing of methamphetamine, its salts, isomers, or salts of its isomers or less than 200 grams of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers shall, upon conviction, be imprisoned for not less than 10 nor more than 40 years and fined not more than \$500,000. Upon a second conviction of such a violation, any such person may, in the discretion of the court or jury imposing the sentence, be sentenced to imprisonment for life or for any period not less than 10 years, and be fined not more than \$500,000. When a person is convicted of a third or subsequent offense under this subsection and it is alleged in the warrant, indictment, or information that he has been previously convicted of two or more such offenses or of substantially similar offenses in any other jurisdiction, which offenses would be felonies if committed in the Commonwealth and such prior convictions occurred before the date of the offense alleged in the warrant, indictment, or information, he shall be sentenced to imprisonment for life or for a period not less than 10 years, three years of which shall be a mandatory minimum term of imprisonment to be served consecutively with any other sentence and he shall be fined not more than \$500,000.

Upon conviction, in addition to any other punishment, a person found guilty of this offense shall be ordered by the court to make restitution, as the court deems appropriate, to any innocent property owner whose property is damaged, destroyed, or otherwise rendered unusable as a result of such methamphetamine production. This restitution shall include the person's or his estate's estimated or actual expenses associated with cleanup, removal, or repair of the affected property. If the property that is damaged, destroyed, or otherwise rendered unusable as a result of such methamphetamine production is property owned in whole or in part by the person convicted, the court shall order the person to pay to the Methamphetamine Cleanup Fund authorized in § 18.2-248.04 the reasonable estimated or actual expenses associated with cleanup, removal, or repair of the affected property or, if actual or estimated expenses cannot be determined, the sum of \$10,000. The convicted person shall also pay the cost of certifying that any building that is cleaned up or repaired pursuant to this section is safe for human occupancy according to the guidelines established pursuant to § 32.1-11.7.

# Eliminate the Drug Exception Rule

## §§ 18.2-248(C) vs. § 18.2-248(C1)

C. Except as provided in subsection C1, any person who violates this section with respect to a controlled substance classified in Schedule I or II shall upon conviction be imprisoned for not less than five nor more than 40 years and fined not more than \$500,000. Upon a second conviction of such a violation, and it is alleged in the warrant, indictment, or information that the person has been before convicted of such an offense or of a substantially similar offense in any other jurisdiction, which offense would be a felony if committed in the Commonwealth, and such prior conviction occurred before the date of the offense alleged in the warrant, indictment, or information, any such person may, in the discretion of the court or jury imposing the sentence, be sentenced to imprisonment for life or for any period not less than five years, three years of which shall be a mandatory minimum term of imprisonment to be served consecutively with any other sentence, and he shall be fined not more than \$500,000.

Should all convictions for manufacture methamphetamine be under § 18.2-248(C1)?  
Should guidelines reflect two different sentencing patterns based on the statute cited?

# Eliminate the Drug Exception Rule

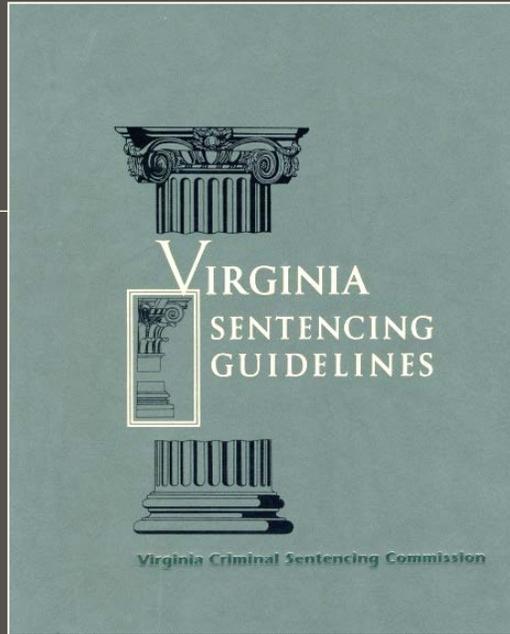
Should these two VCCs be combined? OR  
Should the descriptions be modified to identify unique offenses?

**NAR-3042-F9** — Distribution of Schedule I or II drugs  
(provide drugs to be resold by others)

NAR-3043-F9 — Possession with intent to sell Schedule I or II drugs

NAR-3044-F9 — Manufacture Schedule I or II drugs

**NAR-3045-F9** — Sell for profit Schedule I or II drugs



## Suggestions From Users & Policy Makers

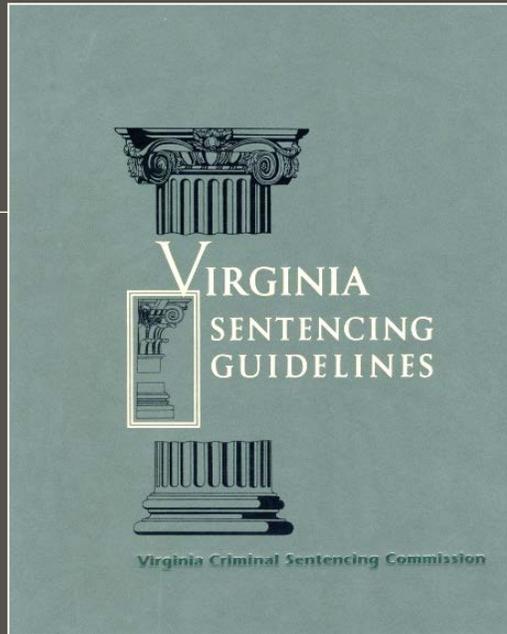
Stop Preparing Guidelines for Offenses that Occurred Prior to  
**July 1, 1995**

# No Guidelines for Offenses Prior to 1995

## Reasons to Stop Preparing Guidelines:

1. Circuit court judge ruled that by statute the guidelines do not apply to these cases. In this judge's opinion, the Commission's vote to continue to have guidelines reviewed by the court for pre-1995 cases was not relevant.
2. Policies and release patterns of the Parole Board policies are not the same as they were when the pre-1995 guidelines were created.
3. Between FY2014 - FY2018 VCSC received 20 worksheets for crimes that occurred prior to January 1, 1995.  
(18 Rape/Sexual Assault, 1 Murder, 1 Robbery)

Using Pre 1995 Guidelines narrows the ranges based on historical sentencing practices



## Suggestions From Users & Policy Makers

Conduct a special study on child abuse and neglect  
§ 18.2-371.1(A)

# Section C - Changes In Effect as of July 1, 2019

## Primary Offense

|   | Prior Record Classification         |                                      |                                |
|---|-------------------------------------|--------------------------------------|--------------------------------|
|   | <input type="checkbox"/> Category I | <input type="checkbox"/> Category II | <input type="checkbox"/> Other |
| A. Burn unoccupied dwelling/church (1 count).....   | 68                                  | 34                                   | 17                             |
| B. Burn occupied dwelling/church  |                                     |                                      |                                |
| Completed: 1 count.....   | 108                                 | 54                                   | 27                             |
| 2 counts.....   | 200                                 | 100                                  | 50                             |
| Attempted or conspired: 1 count.....  | (68)                                | (34)                                 | (17)                           |
| 2 counts.....   | (72)                                | (36)                                 | (18)                           |
| C. Burning of personal property, standing grain, etc., value \$500 or more (1 count)..... | 32                                  | 16                                   | 8                              |
| D. Threatening to burn, bomb or explode (1 count).....                                    | 32                                  | 16                                   | 8                              |
| E. Threat by letter, communication or electronic message (1 count).....                   | 40                                  | 20                                   | 10                             |
| <b>F. Child neglect/abuse, serious injury (1 count).....</b>                              | <b>32</b>                           | <b>16</b>                            | <b>9</b>                       |
| G. Gross, reckless care of child (1 count).....   | 28                                  | 14                                   | 7                              |
| H. Cruelty and injury to child (1 count).....   | 28                                  | 14                                   | 7                              |
| I. Maliciously shoot, throw missile at train, car, etc. (1 count).....                    | 32                                  | 16                                   | 8                              |
| J. Damage/destroy any property or monument \$1,000 or more (1 count).....                 | 32                                  | 16                                   | 8                              |

Score

|  |  |  |
|--|--|--|
|  |  |  |
|--|--|--|

Old factor

## Victim Injury

Primary offense:  
F,G, or H: Offenses with VCC prefix "FAM"

|                                    | Points |
|------------------------------------|--------|
| Threatened or emotional .....      | 6      |
| Physical or serious physical ..... | 7      |
| Life threatening .....             | 10     |

Primary offense:  
All other offenses

|                                    | Points |
|------------------------------------|--------|
| Threatened or emotional .....      | 2      |
| Physical or serious physical ..... | 4      |
| Life threatening .....             | 5      |

|   |  |  |
|---|--|--|
| 0 |  |  |
|---|--|--|

New factor

## Victim Injury

Primary offense:  
G or H: Reckless Care/Cruelty Child

|                               | Points |
|-------------------------------|--------|
| Threatened or emotional ..... | 6      |
| Physical .....                | 7      |
| Life threatening .....        | 10     |

Primary offense:  
F: Child Neglect/Abuse

|                                   | Points |
|-----------------------------------|--------|
| Threatened or emotional .....     | 6      |
| Physical or Serious Physical..... | 12     |
| Life threatening .....            | 13     |

Primary offense: All other offenses  
A, B, C, D, E, I and J

|                               | Points |
|-------------------------------|--------|
| Threatened or emotional ..... | 2      |
| Physical .....                | 4      |
| Life threatening .....        | 5      |

|   |  |  |
|---|--|--|
| 0 |  |  |
|---|--|--|

Old factor

## Legally Restrained at Time of Offense

If YES, add 2 →

|   |   |  |
|---|---|--|
| 0 | 0 |  |
|---|---|--|

New factor

## Legally Restrained at Time of Offense

Primary offense:  
F: Child neglect/abuse

|  | Points |
|--|--------|
| None.....                                      | 0      |
| Other than post-incarceration supervision..... | 6      |
| Post-incarceration supervision .....           | 8      |

Primary offense:  
All other offenses

|                          | Points |
|--------------------------|--------|
| Any legal restraint..... | 2      |

|   |   |  |
|---|---|--|
| 0 | 0 |  |
|---|---|--|

# Child Neglect Study

FY2013 – FY2019

| Overall Concurrence/Departure Rates |       |             |           |        |
|-------------------------------------|-------|-------------|-----------|--------|
|                                     | Past* | FY18-FY19** | Projected | FY2020 |
| Concurrence                         | 56.5% | 64.0%       | 59.3%     | TBD    |
| Mitigation                          | 14.0% | 2.7%        | 15.9%     | TBD    |
| Aggravation                         | 29.5% | 33.3%       | 24.8%     | TBD    |

**Note:** Guidelines worksheets with scoring errors were excluded from the analysis.  
One offender was excluded because a criminal history report could not be located.

**Source:** Sentencing Guidelines Data System \*2013-2017 214 cases (download May 18, 2018)  
\*\*2018-2019 75 cases (download August 10, 2019)

# Child Neglect Study

What is the Best Source for Detailed Information & How Does VCSC Get Access to the Information?

1. Presentence Reports – **IF** Completed
2. Complete Access to Court Records (Sealed)
  - Stipulation of Facts
  - Criminal Complaint
  - Victim Impact Statements
3. Commonwealth's Attorney's Files



VIRGINIA  
SENTENCING  
GUIDELINES



Virginia Criminal Sentencing Commission