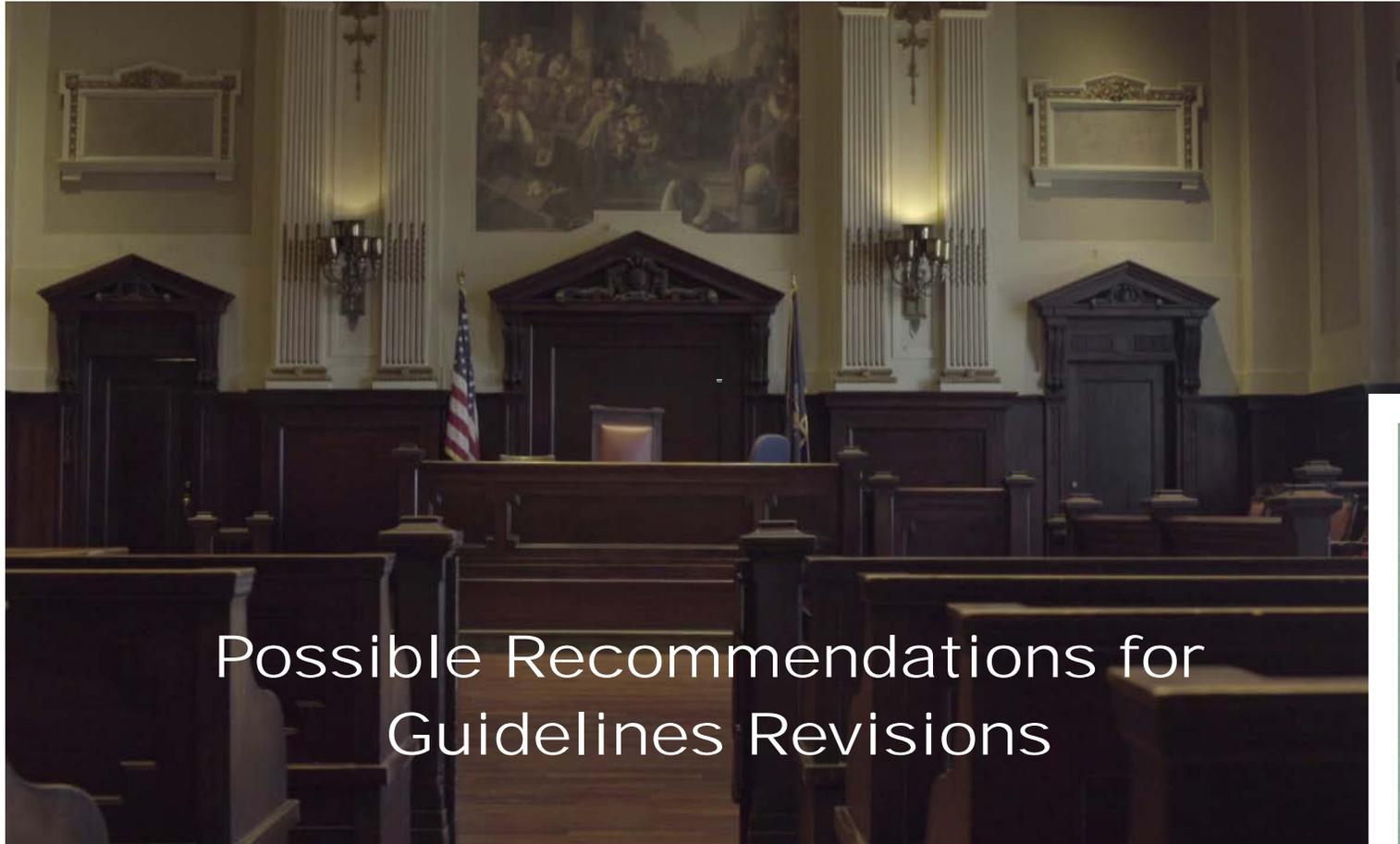
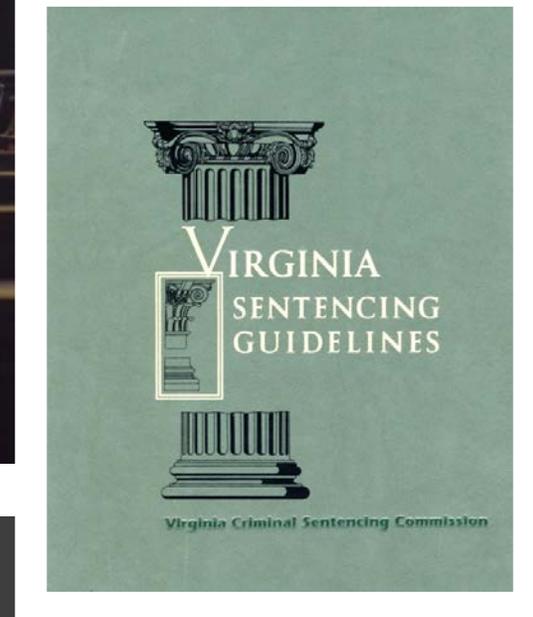




VIRGINIA CRIMINAL SENTENCING COMMISSION



Possible Recommendations for
Guidelines Revisions



November 3, 2021

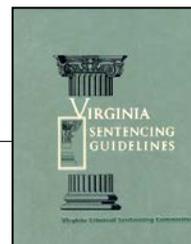
Modifications to the Sentencing Guidelines

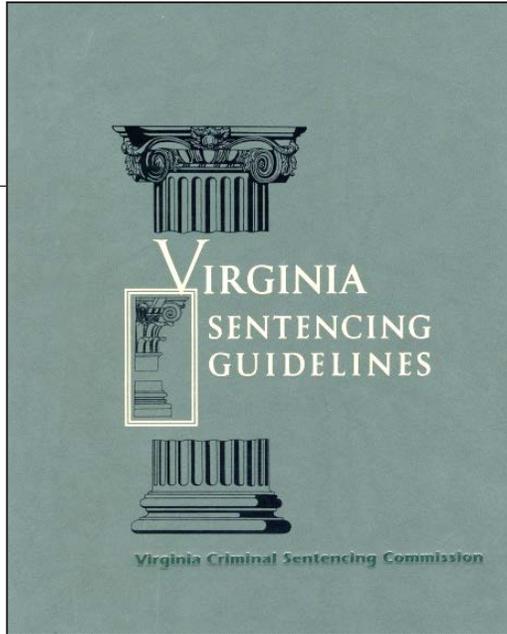


- **The Commission closely monitors the sentencing guidelines system and, each year, deliberates upon possible modifications to the guidelines.**
- **Under § 17.1-806 of the *Code of Virginia*, any modifications adopted by the Commission must be presented in its annual report, due to the General Assembly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

Proposals for New Guidelines Offenses

- **Proposals reflect the best fit for the historical data.**
- **Proposals are designed to closely match the historical rate of incarceration in prison and jail.**
- **Current guidelines worksheets serve as the base for scoring historical cases, but the points assigned to those factors may be different for the new offense and new factors may be added.**





Proposed Recommendation 1:

Revise the Murder/Homicide Guidelines to cover the crime of Aggravated Murder

Proposed Recommendation 1



The 2021 General Assembly passed legislation to abolish the death penalty, including for persons currently on death row (HB2263/SB1165).

— **Effective July 1, 2021**

Capital murder was redefined as “aggravated murder” and remains a Class 1 felony.

Effective July 1, 2021

§ 18.2-10. Punishment for conviction of felony; penalty.

The authorized punishments for conviction of a felony are:

(a) For Class 1 felonies, imprisonment for life and, subject to subdivision (g), a fine of not more than \$100,000.

Any person who was 18 years of age or older at the time of the offense and who is sentenced to imprisonment for life upon conviction of a Class 1 felony shall not be eligible for (i) parole, (ii) any good conduct allowance or any earned sentence credits under Chapter 6 (§ 53.1-186 et seq.) of Title 53.1, or (iii) conditional release pursuant to § 53.1-40.01 or 53.1-40.02.

Proposed Recommendation 1



Under Guidelines rules, the primary offense is the offense with the highest statutory maximum penalty.

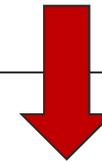
If there is a tie in statutory maximums, and one offense is covered by the Guidelines while the other one is not:

- Guidelines should be completed using the Guidelines-covered offense as the primary and the non-Guidelines offense as the additional offense.

Example:

**Primary Offense =
Forcible Sodomy § 18.2-67.1
(Unclassed felony / 5 years - Life)**

**Additional Offense =
Aggravated murder (Class 1 felony / Life)**



Because the guidelines analysis never included capital (now aggravated) murder, the guidelines may produce recommendations that seem counterintuitive.

Proposed Recommendation 1



According to the Department of Corrections (DOC), there were 2 Virginia inmates serving under a death sentence as of December 1, 2020.

- The last individual to enter death row was received in September 2011.

According to the Circuit Court Case Management System (CMS) for FY2015 through FY2020, 34 offenders were convicted of a completed act of capital murder under § 18.2-31.

- 32 of the 34 defendants were given a sentence of life in prison.
- For the remaining two offenders, the court suspended the life sentence and ordered prison terms of 36 and 38 years, respectively.

 Fiscal Impact Statement for Proposed Legislation
Virginia Criminal Sentencing Commission

House Bill No. 2263
Floor Amendment in the Nature of a Substitute
(Patrons Prior to Substitute – Mullin and Carter)

LD #: 21200391 Date: 02/18/2021

Topic: Punishment for Class 1 felony offenses

Fiscal Impact Summary:

• State Adult Correctional Facilities: \$77,376 (2 beds)*	• Juvenile Direct Care: None (\$0)**
• Local Adult Correctional Facilities: None (\$0)	• Juvenile Detention Facilities: None (\$0)**
• Adult Community Corrections Programs: None (\$0)	

* Pursuant to § 30-19.1-4, fiscal impact statements prepared by the Virginia Criminal Sentencing Commission only include the estimated increase in operating costs associated with additional state-responsible prison beds and do not reflect any other costs or savings that may be associated with the proposed legislation.

** Provided by the Department of Juvenile Justice

Summary of Proposed Legislation:

The proposal amends numerous statutes in the Code of Virginia to eliminate the punishment of death for Class 1 felonies and to remove references to the punishment of death from related statutes. Under the proposed changes, an offender convicted of a Class 1 felony must be sentenced to imprisonment for life, and such offender who was 18 years of age or older at the time of the offense would serve a mandatory minimum term of imprisonment for life and be ineligible for parole, good conduct allowance, earned sentence credits, or conditional release under § 53.1-40.01 or 53.1-40.02. The provisions of the proposal would apply to Class 1 felonies sentenced on or after July 1, 2021. In addition, any person under a sentence of death imposed prior to July 1, 2021, who has not been executed by that date would have his sentence changed to life imprisonment, and such person who was 18 years of age or older at the time of the offense would be ineligible for parole, good conduct allowance, sentence credits, or conditional release under § 53.1-40.01 or 53.1-40.02.

Currently, under § 18.2-10, an offender convicted of a Class 1 felony who was at least 18 years of age at the time of the offense and is determined not to have an intellectual disability may be sentenced to either death or life imprisonment. Conspiracy to commit an offense punishable by death is a Class 3 felony (§ 18.2-22), while an attempt to commit such an offense is a Class 2 felony (§ 18.2-25).

Proposed Recommendation 1



Felony Sentencing Events with Attempted/Conspired Capital Murder as the Most Serious Offense FY2015 - FY2021 (preliminary)

Statutory Penalty Range		Type of Sentence	Number of Defendants
Attempted Capital Murder	20 Years - Life	Probation/Jail	0
Conspired Capital Murder	5 - 20 Years	Prison	
		Life Sentence	3
		Sentence in Years	48
		Mean	26.1 yrs.
		Median	20.0 yrs.

Proposed Recommendation 1

Murder/Homicide — ❖ — Section A

Offender Name: _____

◆ **Primary Offense** _____ *(scores for attempted/conspired offenses are in parentheses)*

- A.** Aggravated murder
 - Completed: 1 count 10
 - Attempted or conspired: 1 count 8
- B.A.** First degree murder Completed: 1 count 9
- C.B.** First degree murder Attempted or conspired: 1 count (8)
- D.C.** Second degree murder or felony homicide
 - Completed: 1 count 8
 - Attempted or conspired: 1 count (4)
- E.D.** Voluntary manslaughter
 - Attempted, conspired or completed: 1 count 5
- F.E.** Involuntary manslaughter
 - Completed: 1 count 1
 - 2 counts 3
 - Attempted or conspired: 1 count (1)
- G.F.** Involuntary manslaughter-vehicular 1 count 8
- H.G.** Aggravated vehicular manslaughter 1 count 8

Score

0	
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Total Score _____ →

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If total is 7 or less, the guidelines sentence is ~~Probation~~ **No Incarceration or Incarceration to 6 Months** If total is 8 or more, go to Section C.

Proposed Recommendation 1

Murder/Homicide Section C

Offender Name: _____

◆ Primary Offense _____ Category I Category II Other

A. Aggravated murder

Completed: All counts	Life	Life	Life
Attempted or conspired: 1 count	420	210	105
Attempted or conspired: 2 counts	1020	510	255

B. A. First degree murder

(scores for attempted/conspired offenses are in parentheses)

Completed: 1 count	Life	596	335
2 counts.....	Life	652	367

C. B. First degree murder

Attempted or conspired: 1 count	(120)	(118)	(59)
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D. C. Second degree murder or felony homicide

Completed: 1 count.....	354	236	205
Attempted or conspired: 1 count	(120)	(118)	(59)

E. D. Voluntary Manslaughter

Completed: 1 count.....	120	96	48
2 counts	180	120	60
Attempted or conspired: 1 count	(60)	(48)	(24)
2 counts	(96)	(48)	(24)

F. E. Involuntary manslaughter

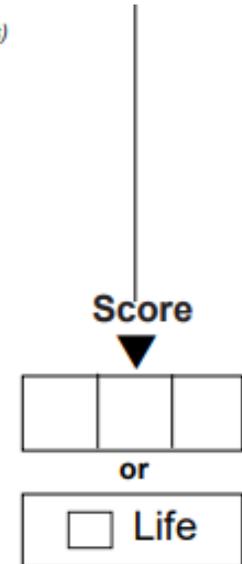
Completed: 1 count	76	38	19
Attempted or conspired: 1 count.....	(60)	(38)	(19)

G. F. Vehicular Involuntary manslaughter

Completed: 1 count.....	80	40	20
2 counts	232	116	58
3 counts	320	160	80

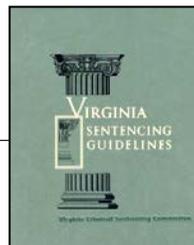
H. G. Aggravated vehicular manslaughter 1 count.....

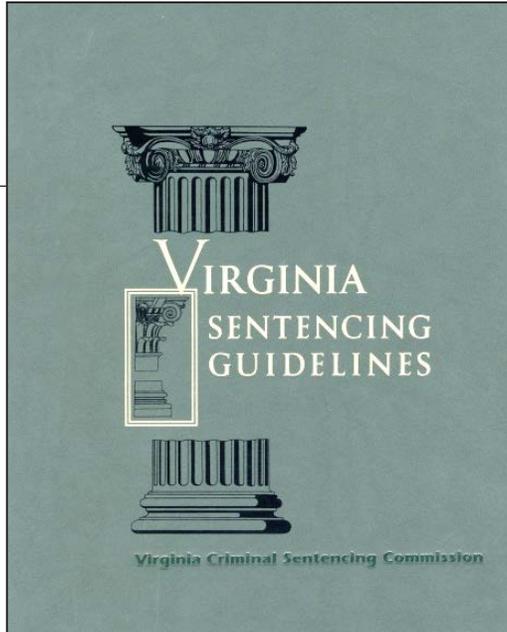
Attempted or conspired: 1 count	(60)	(38)	(19)
.....	213	142	71



Proposed Recommendation 1

Revise the Murder/Homicide Guidelines to
cover the crime of Aggravated Murder
as proposed





Proposed Recommendation 2:

Request legislation to codify the Probation Violation Guidelines in the same manner as the Sentencing Guidelines for felony offenses

Proposed Recommendation 2



While the requirements for the Sentencing Guidelines for felony offenses are spelled out in statute (see § 17.1-803 and § 19.2-298.01), requirements related to the **Probation Violation Guidelines are NOT codified.**



Since July 1, 2010, the **APPROPRIATION ACT** has included language to specify that a Sentencing Revocation Report and, for technical violations, the Probation Violation Guidelines, must be presented to the court and reviewed by the judge for any violation hearing conducted pursuant to § 19.2-306.

Proposed Recommendation 2

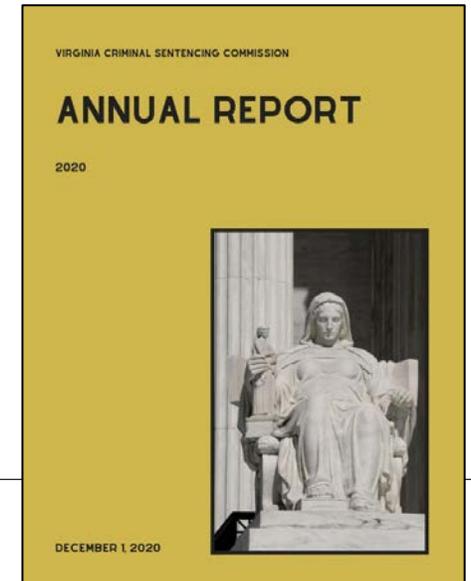


In 2016, the Commission approved a study to revise the Probation Violation Guidelines in use since 2004.

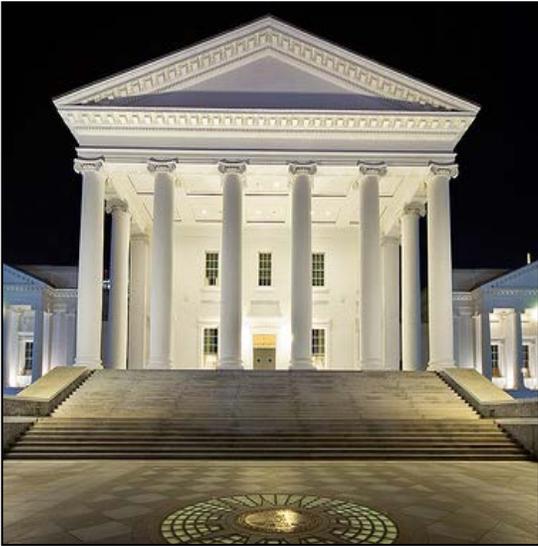
Based on the results of this large-scale multi-year project, the Commission recommended revisions to the Probation Violation Guidelines.

- **Changes included an expansion to cover, for the first time, violations associated with new convictions.**

The 2021 General Assembly accepted the Commission's recommendations.



Proposed Recommendation 2



At its June 2021 meeting, the Commission directed staff to pursue draft legislation that would:

- **Codify the Probation Violation Guidelines** in the same manner as the **Sentencing Guidelines** for felony offenses, and
- **Ensure that the statutory language accurately reflects the current Probation Violation Guidelines, as approved by the Commission in 2020 and accepted by the General Assembly in 2021.**

Proposed Recommendation 2

§ 17.1-803. Powers and duties

Suggested Language for Legislation

7. Prepare, periodically update, and distribute a form for recording the reasons for, and outcomes of, revocation hearings conducted in circuit courts pursuant to § 19.2-306.

8. Develop, maintain and modify as may be deemed necessary, a system of statewide discretionary sentencing guidelines for use in hearings conducted in circuit courts pursuant to § 19.2-306 in which the defendant is cited for violation of a condition or conditions of supervised probation imposed as a result of a felony conviction. Such guidelines shall take into account historical data for sentences imposed in such cases and such other factors as may be deemed relevant to sentencing.

Proposed Recommendation 2

Suggested Language for Legislation

§ 19.2-306.2. Use of sentencing revocation report and discretionary sentencing guidelines in cases of revocation of suspension of sentence and probation.

A. For every hearing conducted pursuant to § 19.2-306 for revocation of suspension of sentence or probation imposed as a result of a felony conviction, the circuit court shall have presented to it a sentencing revocation report prepared on a form designated by the Virginia Criminal Sentencing Commission indicating the nature of the alleged violation or violations and, if the defendant is subject to supervised probation, the condition or conditions of probation that the defendant has allegedly violated. The sentencing revocation report shall be prepared by the supervising probation agency that initiated the request for the revocation hearing. If the defendant is not under active probation supervision or the supervising probation agency did not initiate the request for the revocation hearing, the sentencing revocation report shall be completed by the attorney for the Commonwealth.

Proposed Recommendation 2

Suggested Language for Legislation

- B. For every hearing conducted pursuant to § 19.2-306 in which the defendant is cited for violation of a condition or conditions of supervised probation imposed as a result of a felony conviction and such person is under the supervision of a state probation and parole officer as defined in § 53.1-143, the court shall have presented to it the applicable discretionary probation violation guidelines.*
- 1. The applicable discretionary probation violation guidelines shall be prepared by a state probation and parole officer on a form designated by the Virginia Criminal Sentencing Commission. If a party other than a state probation and parole officer initiated the request for the revocation hearing, no probation violation guidelines are prepared and only the sentencing revocation report required by subsection A will be submitted to the court.*

Proposed Recommendation 2

Suggested Language for Legislation

- 2. The court shall review and consider the suitability of the applicable discretionary probation violation guidelines. Before imposing sentence, the court shall state for the record that such review and consideration have been accomplished and shall make the completed worksheets a part of the record of the case.*

- 3. In hearings in which the court imposes a sentence that is either greater or less than that indicated by the discretionary probation violation guidelines, the court shall file with the record of the case a written explanation of such departure.*

The suggested language parallels the language in § 19.2-298.01, which applies to the Sentencing Guidelines for felony offenses.

Proposed Recommendation 2

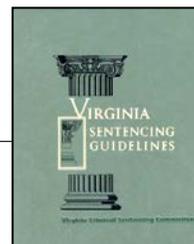
Suggested Language for Legislation

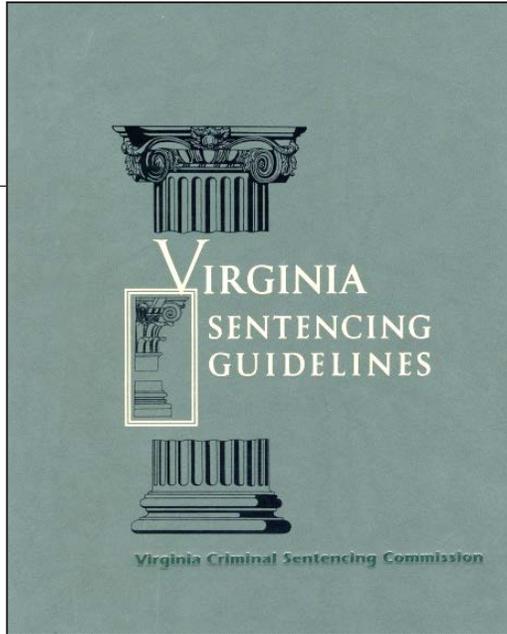
- C. Following the entry of a final order in a revocation case, the clerk of the circuit court in which the hearing was held shall cause a copy of such order or orders, the original sentencing revocation report, any applicable probation violation guideline worksheets prepared in the case, and a copy of any departure explanation prepared pursuant to subsection B3 to be forwarded to the Virginia Criminal Sentencing Commission within 30 days.*
- D. The failure to follow any or all of the provisions specified in this section or the failure to follow any or all of these provisions in the prescribed manner shall not be reviewable on appeal or the basis of any other post-hearing relief.*

The suggested language parallels the language in § 19.2-298.01, which applies to the Sentencing Guidelines for felony offenses.

Proposed Recommendation 2

Request legislation to codify the
Probation Violation Guidelines in the same
manner as the Sentencing Guidelines for
felony offenses

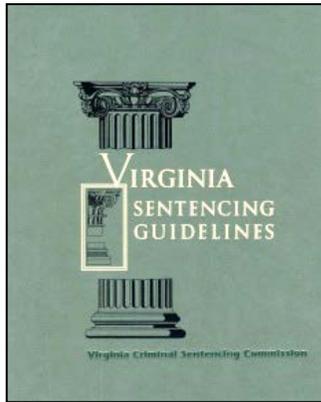




Proposed Recommendation 3:

Request legislation to clarify the Sentencing Commission's authority to recommend revisions to the Guidelines based on historical sentencing data, specifically in regards to the size of midpoint enhancements for prior violent offenses

Proposed Recommendation 3



Unlike most states, Virginia's Sentencing Guidelines are based on analysis of historical sentencing data.

There is one exception to the historical basis of Virginia's Sentencing Guidelines.

Per § 17.1-805, the Sentencing Guidelines must include midpoint enhancements to increase recommendations for defendants with convictions for violent felony offenses (as defined in § 17.1-805(C)).

This section of the Code specifies enhancements of 100%, 125%, 300% or 500% depending on the nature of the defendant's current and prior convictions for violent felonies.



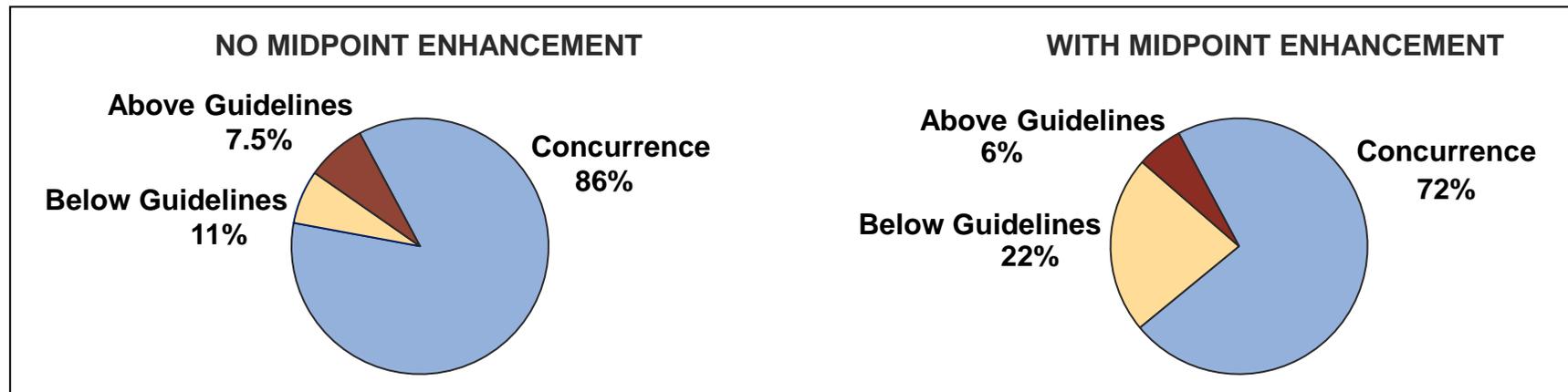
The percent enhancements specified in § 17.1-805 are not based on empirical analysis of sentencing data.

Proposed Recommendation 3

The Commission has approved a full-scale re-analysis of all Guidelines offense groups over the next 3 years.

The goal is to re-benchmark the Guidelines so that they reflect current sentencing practices as accurately as possible.

While judges concur with the Guidelines at a high rate overall, data show that judges often depart from the Guidelines in cases involving midpoint enhancements required by § 17.1-805.



Proposed Recommendation 3



At its June 2021 meeting, the Commission directed staff to pursue draft legislation that would:

- **Clarify the Commission's authority** to recommend revisions to the Guidelines based on historical sentencing data, specifically in regards to the size of midpoint enhancements.

Under the proposal, the Commission would not be required to set the enhancements at 100%, 125%, 300% or 500%, as currently designated in § 17.1-805.

- Rather, the Commission would be authorized to set the **magnitude of midpoint enhancements based on analysis of actual sentencing data for felony offenses.**

Proposed Recommendation 3

Suggested Language for Legislation

§ 17.1-805.1. Discretionary sentencing guideline midpoints for certain defendants.

The Commission shall adopt discretionary felony sentencing guidelines that increase the midpoint of the recommended sentencing range based on the defendant's record of convictions for violent felony offenses, as defined in subsection C of § 17.1-805.

For guidelines that become effective on or after July 1, 2022, the Commission may increase the midpoint of the recommended sentencing range for such defendants as set forth in subsection A of § 17.1-805 or the Commission may recommend increases in the midpoint to the degree indicated by historical data for felony offenses sentenced in the Commonwealth. Any recommendations adopted by the Commission to modify the sentencing guidelines midpoints shall be contained in the annual report required under § 17.1-803 and shall become effective only as specified in § 17.1-806.

Proposed Recommendation 3

Request legislation to clarify the Commission's authority to recommend revisions to the Guidelines based on historical sentencing data, specifically in regards to the size of midpoint enhancements for prior violent offenses

