



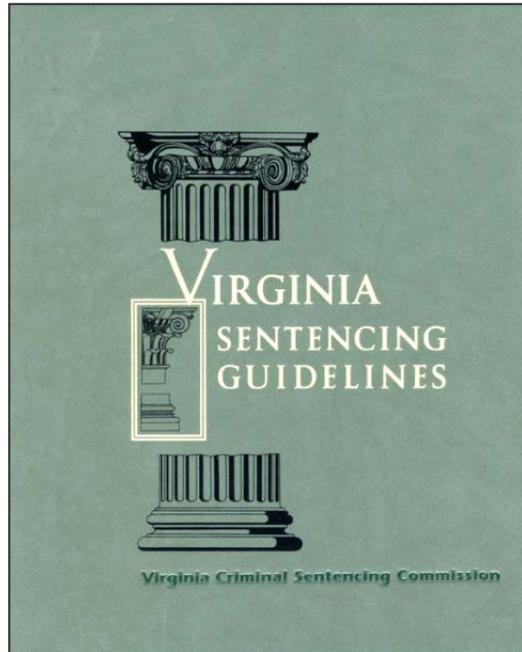
**VIRGINIA CRIMINAL
SENTENCING COMMISSION**

Sentencing Guidelines Judicial Survey Results

November 2, 2022



Full Reanalysis of Sentencing Guidelines



IN 2021, THE COMMISSION APPROVED A FULL REANALYSIS OF ALL FELONY OFFENSE GUIDELINES

The study will be a large-scale, multi-year project.

The approach will be holistic and comprehensive.

OBJECTIVE

Re-benchmark the Guidelines so that they reflect current sentencing practices as accurately as possible.

RATIONALE FOR FULL REANALYSIS

While Virginia's judges concur with Guidelines at a high rate overall, they depart more often in certain types of cases (e.g., midpoint enhancement cases). Such cases would be examined in detail.

Recent changes in felony larceny threshold (2018, 2020)

Recent legislation to create classes of robbery (2021)



Judicial Survey

As an important first step, the Commission approved a survey to seek input and guidance from circuit court judges.

Survey results will be useful in pointing staff to areas of the Guidelines that are in need of revision and to factors most important to judges.

Survey content was approved in September 2022.

The survey was administered in October 2022 through Survey Monkey.



Felony Sentencing Guidelines Judicial Survey

The Virginia Criminal Sentencing Commission recently approved a full-scale re-analysis of all Guidelines offense groups. The approach will be holistic and comprehensive and require two to three years to complete. The goal of the study is to re-benchmark the Guidelines so that they reflect current sentencing practices as accurately as possible.

Unlike most states, Virginia's Sentencing Guidelines are based on analysis of historical sentencing data. In fact, the *Code of Virginia*, in § 17.1-803, requires the Commission to develop guidelines that take into account historical sentencing practices. In essence, the Guidelines are designed to provide judges with a benchmark of the typical case outcome given the defendant's current offenses and prior record. There is one exception to the historical basis of Virginia's Guidelines. Per § 17.1-805, the Guidelines must include enhancements to increase sentence recommendations for defendants with convictions for violent felonies. The percent enhancements specified in § 17.1-805 have been in the *Code* since 1995 and have been unchanged since that time. The 2022 General Assembly passed legislation that clarifies the Commission's authority to recommend revisions to the Guidelines based on historical sentencing data, specifically in regards to the size of midpoint enhancements.

The Commission is seeking input and guidance from circuit court judges through the survey that follows. Responding to the survey will provide the Commission with valuable information for the re-analysis project and direct the Commission's attention to areas of the Guidelines that may need revision.

The survey questions pertain only to felony sentencing events. The questions do not pertain to probation or suspended sentence revocations.

The survey does not include any identifying information and responses to the survey will be completely anonymous.

Completion of the survey should take about 20 minutes.

The Commission looks forward to receiving your input by TBD. Your assistance is greatly appreciated.

ANONYMOUS

Judicial Survey Responses



The survey was sent to all active circuit court judges (175) and all retired circuit judges who still sit (109).



Overall, 148 judges responded to the survey.

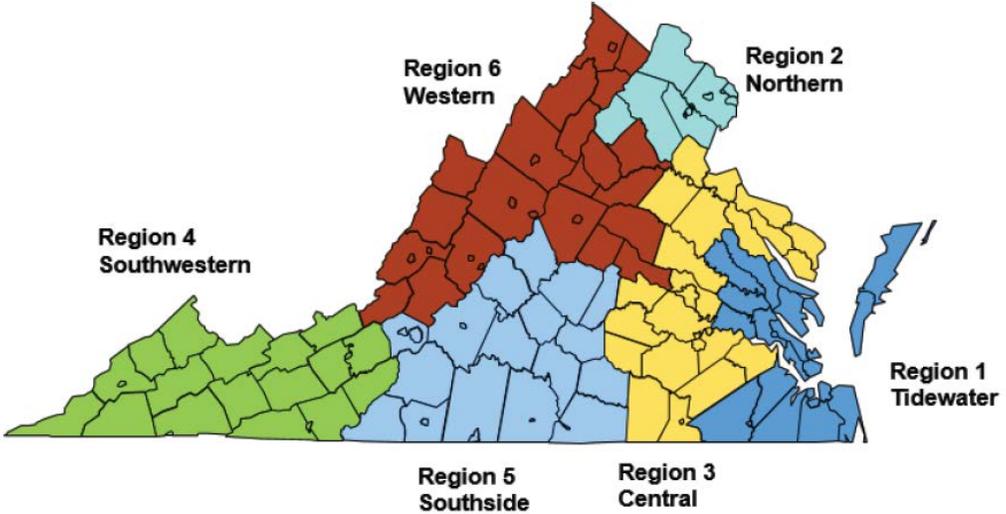
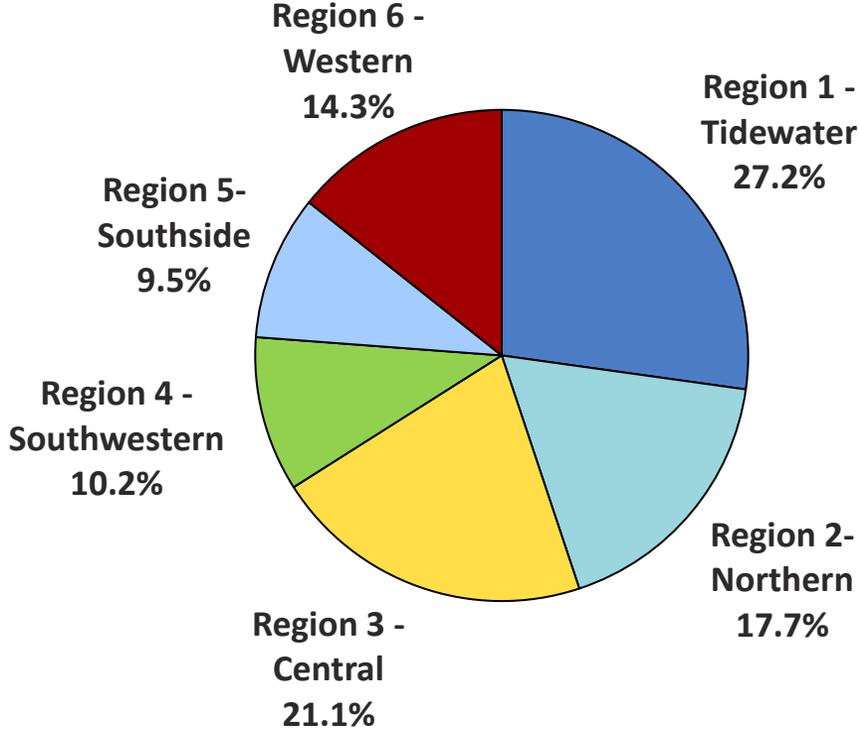
Response rate was 52.1%.

Average completion time for the online survey was 16 minutes.

Average completion rate (answering all of the survey questions) was 95%.



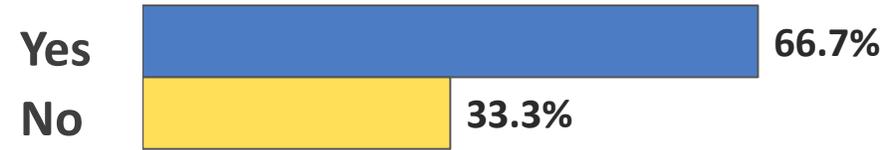
Q1: In which region do you sit most often?



Answered: 147 Skipped: 1

Does the jurisdiction in which you sit most often have...

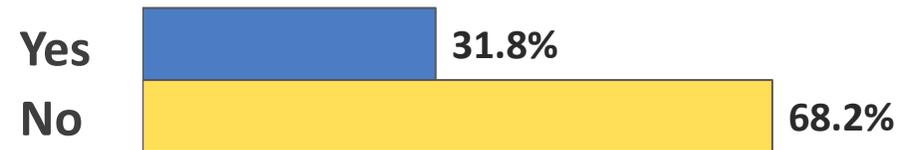
Q2: a Public Defender Office?



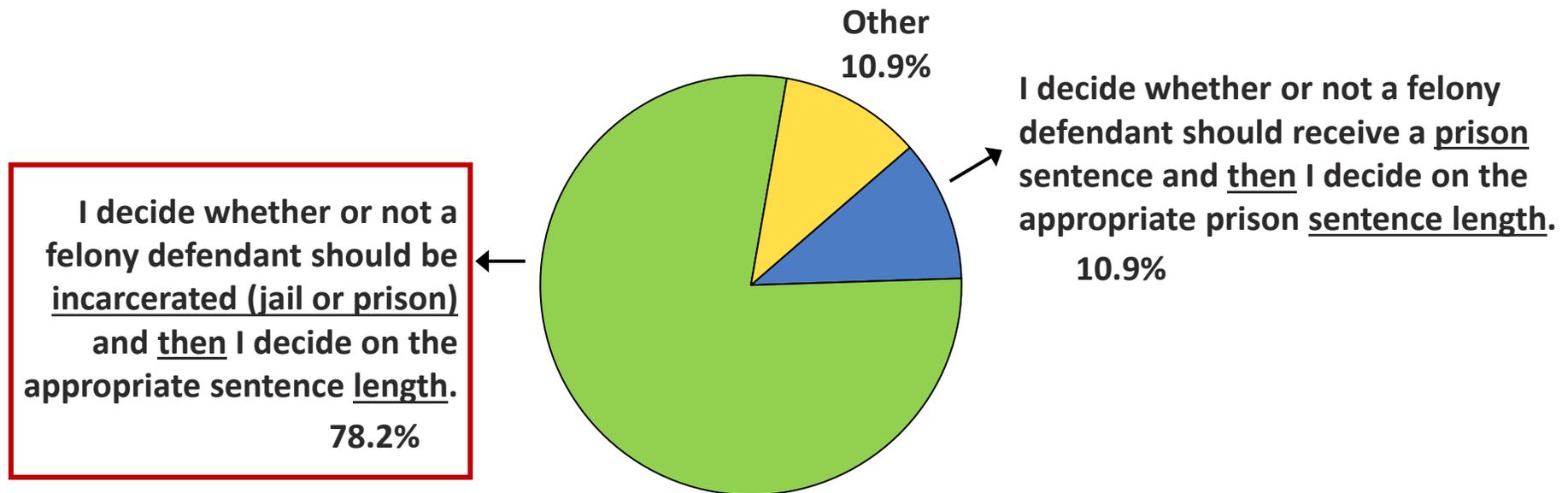
Q3: a Drug Court program?



Q4: any specialty dockets other than Drug Court?



Q5: Please identify the statement that most closely approximates the way in which you approach a sentencing decision.



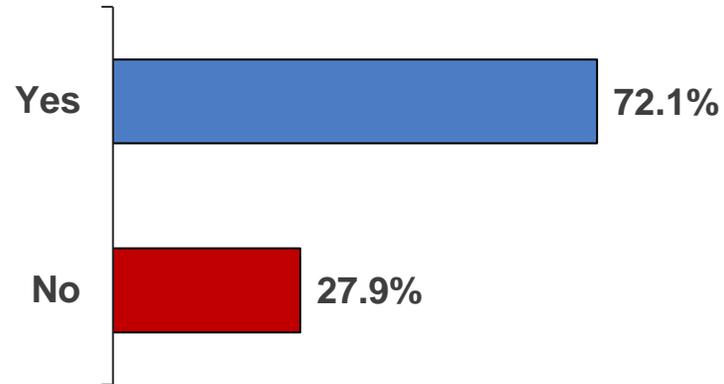
Q5: Please identify the statement that most closely approximates the way in which you approach a sentencing decision.

Other (please describe)

16 RESPONSES

- 
- 
- I look at the Guideline recommendation and after hearing evidence decide if the sentence should be within the guidelines and if so the amount or outside the guidelines based upon aggravating and mitigating circumstances and if so the punishment. **(6)**
 - I review the Guidelines then decide if incarceration is necessary and then consider how much. **(3)**
 - Complete review of all relevant information provided on the individual; listen to arguments of counsel; make decision.
 - It's not a two-step process. The decision is what is a just and fair punishment under the circumstances of a case (multi-faceted process). **(3)**
 - I decide whether or not a felony defendant should receive a prison sentence. If not, then I decide whether the felony defendant should be incarcerated in jail. Whether it is prison or jail, I decide the appropriate length of incarceration after consulting the sentencing guidelines.
 - It depends on whether there is harm to the person or property.
 - Both.

Q6: When determining a sentence, will you consider the length of time or proportion of time the defendant will serve on the sentence you order?



Q7: When sentencing felony defendants, how does a lack of treatment/program resources affect your sentencing decision?

	Percent
More likely to incarcerate in jail	14.3%
More likely to incarcerate in prison	10.9%
Less likely to incarcerate	4.8%
No impact	28.6%
Not typically an issue in my jurisdiction	30.6%
Other	10.9%



Q7: When sentencing felony defendants, how does a lack of treatment/program resources affect your sentencing decision?

**SELECT RESPONSES
SHOWN**

Other (please describe)

15 RESPONSES



- I consider this issue on a case-by-case basis. (7)

- I do not believe the lack of treatment resources should be considered in determining a sentence.

- It makes it more difficult but unlikely to affect decision on incarceration.

- One can't generalize. Would make little or no difference in a murder case, may be significant in a drug case or property crime.



- Oftentimes, the defendant does not wish to participate in treatment or a program.

- Alternatives to incarceration of are often preferable for low level crime. In addition, sometimes the combination of a program and some time in jail is the best solution.

- No easy answer to this one. There are often mitigating circumstances that support a program rather than incarceration, but there is no program that will meet the needs of the offender. I just wrestle with the problem and try to make the best decision.

Your responses to the following questions will inform the Commission as to which factors you consider when sentencing individuals and how important those factors are in your sentencing decision.



Q8: Factors related to the sentencing hearing

	NOT AT ALL IMPORTANT 1	2	SOMEWHAT IMPORTANT 3	4	EXTREMELY IMPORTANT 5	N/A	TOTAL	WEIGHTED AVERAGE
Good rehabilitation potential	0.7%	0.0%	22.4%	53.2%	23.1%	0.7%	143	3.99
Sentencing Guidelines recommendation	0.7%	5.5%	19.9%	43.2%	30.8%	0.0%	146	3.98
Arrested for a new offense while in the community awaiting trial/sentencing	2.1%	10.3%	15.9%	35.9%	34.5%	1.4%	145	3.92
Accepted responsibility (did something beyond just pleading guilty)	0.7%	0.0%	34.3%	50.0%	15.1%	0.0%	146	3.79
Provided substantial assistance in the apprehension or prosecution of others	0.7%	6.2%	29.5%	45.9%	17.8%	0.0%	146	3.74
Has treatment needs	0.7%	6.2%	36.6%	45.5%	11.0%	0.0%	145	3.60



 **Q8: Factors related to the sentencing hearing**

	NOT AT ALL IMPORTANT 1	2	SOMEWHAT IMPORTANT 3	4	EXTREMELY IMPORTANT 5	N/A	TOTAL	WEIGHTED AVERAGE
Expressed remorse	2.7%	7.5%	36.3%	45.2%	8.2%	0.0%	146	3.49
Sentencing Guidelines nonviolent offender risk assessment instrument: Recommendation for alternative sanction (if applicable)	4.8%	12.4%	35.2%	29.7%	17.9%	0.0%	145	3.43
Obedied all conditions of pretrial release (if released)	2.8%	9.7%	39.3%	37.9%	9.7%	0.7%	145	3.42
Recommendation of the prosecutor	0.7%	9.6%	53.4%	26.7%	9.6%	0.0%	146	3.35
Request of defendant/defense attorney	0.7%	11.6%	59.6%	20.6%	7.5%	0.0%	146	3.23
Defendant pled guilty	2.8%	12.4%	54.5%	29.0%	0.7%	0.7%	145	3.13



Q9: Factors related to the current offense(s)

	NOT AT ALL IMPORTANT 1	2	SOMEWHAT IMPORTANT 3	4	EXTREMELY IMPORTANT 5	N/A	TOTAL	WEIGHTED AVERAGE
Degree/type of victim injury	0.0%	0.0%	1.4%	39.7%	58.9%	0.0%	146	4.58
Actual firearm brandished/used	0.0%	0.0%	4.8%	38.4%	56.2%	0.7%	146	4.52
Type of most serious offense resulting in conviction (person, property, drug, other)	0.0%	0.7%	6.9%	50.0%	41.8%	0.7%	146	4.34
The defendant was on probation or parole supervision at the time of offense	0.0%	0.0%	12.3%	43.2%	44.5%	0.0%	146	4.32
Elderly or incapacitated victim	0.0%	0.0%	14.4%	42.5%	43.2%	0.0%	146	4.29
On bond or other pretrial release when he/she committed the current offense(s)	0.0%	1.4%	13.0%	40.4%	45.2%	0.0%	146	4.29





Q9: Factors related to the current offense(s)

	NOT AT ALL IMPORTANT 1	2	SOMEWHAT IMPORTANT 3	4	EXTREMELY IMPORTANT 5	N/A	TOTAL	WEIGHTED AVERAGE
Young victim	0.0%	0.0%	16.4%	39.0%	44.5%	0.0%	146	4.28
Number of victims across all offenses in the sentencing event	0.0%	0.7%	12.3%	51.4%	35.6%	0.0%	146	4.22
Under suspended sentence or period of good behavior at time of offense	0.0%	0.7%	17.8%	48.0%	33.6%	0.0%	146	4.14
For felony drug distribution offenses, the amount of drug sold or distributed	0.7%	4.1%	14.4%	49.3%	31.5%	0.0%	146	4.07
Weapon other than a firearm was brandished or used	0.0%	1.4%	24.8%	50.3%	23.5%	0.0%	145	3.96
Simulated/feigned weapon was indicated (victim believed it to be real)	0.7%	3.4%	28.8%	43.2%	24.0%	0.0%	146	3.86





Q10: Factors related to prior record

	NOT AT ALL IMPORTANT 1	2	SOMEWHAT IMPORTANT 3	4	EXTREMELY IMPORTANT 5	N/A	TOTAL	WEIGHTED AVERAGE
Prior Category I violent felony record (as defined in § 17.1-805)	0.0%	0.0%	6.3%	34.7%	59.0%	0.0%	144	4.53
Prior Category II violent felony record (as defined in § 17.1-805)	0.0%	0.0%	10.4%	41.7%	47.9%	0.0%	144	4.38
# of prior felony convictions for crimes against the person	0.0%	0.0%	6.9%	50.7%	42.4%	0.0%	144	4.35
# of previous convictions for the same type of offense as the current offense(s) at sentencing	0.0%	0.0%	9.0%	47.2%	43.8%	0.0%	144	4.35
Length of criminal record (time period over which criminal record spans)	0.0%	1.4%	14.6%	52.1%	31.9%	0.0%	144	4.15
# of prior supervised probation/parole, etc., revocations	0.0%	2.1%	23.1%	54.6%	20.3%	0.0%	143	3.93



 **Q10: Factors related to prior record**

	NOT AT ALL IMPORTANT 1	2	SOMEWHAT IMPORTANT 3	4	EXTREMELY IMPORTANT 5	N/A	TOTAL	WEIGHTED AVERAGE
# of prior felony convictions for crimes against property	0.0%	0.0%	27.8%	56.3%	16.0%	0.0%	144	3.88
Gap period (lapse) between the current offense(s) and release from incarceration for previous convictions	0.0%	1.4%	34.7%	44.4%	19.4%	0.0%	144	3.82
# of prior felony convictions for drug offenses	0.0%	4.2%	33.3%	46.5%	16.0%	0.0%	144	3.74
# of prior state-responsible prison sentences served (sentences of 1 year or more)	0.0%	4.9%	37.5%	43.1%	14.6%	0.0%	144	3.67
# of misdemeanor convictions for crimes against the person	0.0%	3.5%	40.3%	44.4%	11.8%	0.0%	144	3.65
# of previous felony sentencing events (not # of convictions)	2.8%	9.0%	31.9%	43.8%	11.8%	0.7%	144	3.53



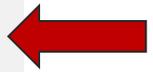
 **Q11: Factors related to substance use and mental health**

	NOT AT ALL IMPORTANT 1	2	SOMEWHAT IMPORTANT 3	4	EXTREMELY IMPORTANT 5	N/A	TOTAL	WEIGHTED AVERAGE
Defendant has a mental health issue that played a role in the offense(s)	0.7%	2.1%	18.1%	50.7%	28.5%	0.0%	144	4.04
Defendant was actively engaged in treatment at time of the offense(s) or is actively engaged treatment at time of sentencing	0.0%	1.4%	35.4%	46.5%	16.7%	0.0%	144	3.78
Defendant has a drug addiction	0.7%	3.5%	38.2%	47.9%	9.7%	0.0%	144	3.63
Defendant has a substance use history prior to the offense(s) at sentencing	0.0%	4.2%	44.4%	45.1%	6.3%	0.0%	144	3.53
Defendant has an alcohol addiction	0.7%	6.3%	40.6%	44.1%	8.4%	0.0%	143	3.53



Q12: Factors related to defendant characteristics, behavior, family and peers

	NOT AT ALL IMPORTANT 1	2	SOMEWHAT IMPORTANT 3	4	EXTREMELY IMPORTANT 5	N/A	TOTAL	WEIGHTED AVERAGE
Gang membership or activity	0.0%	0.0%	12.5%	43.8%	42.4%	1.4%	144	4.30
Offender's positive behaviors since the offense (e.g., attending treatment or NA/AA meetings, employed, etc.)	0.0%	0.7%	20.1%	56.3%	22.9%	0.0%	144	4.01
Employment status (employed or working regularly?)	0.7%	2.1%	31.3%	42.4%	23.6%	0.0%	144	3.86
Young defendant	0.7%	3.5%	45.8%	37.5%	12.5%	0.0%	144	3.58
Positive support network (e.g., family, friends)	0.7%	7.6%	38.9%	43.1%	9.7%	0.0%	144	3.53
Older or handicapped defendant	0.7%	4.2%	50.0%	34.0%	11.1%	0.0%	144	3.51



Q13: Please describe any other factors you consider when sentencing felony defendants that are not listed in the previous factor questions.

Factor	Frequency
Defendant's <u>attitude</u> ; genuine <u>remorse</u> ; <u>understands consequences</u> of his behavior; <u>conduct in court</u> ; <u>untruthful testimony</u> by defendant	6
Victim Impact Statement; victim testimony	4
Violence inflicted upon women and children; vulnerable victim	3
Underlying reasons for commission of offense	2
Defendant's initiative; whether he has taken measures on his own, without being ordered, to address substance abuse, to pay restitution, etc.	2
Plan for rehabilitation	2
Any use of violence	2
Age and prior record	1
Disregard for authority (FTA, Obstruction, Assault on LEO, Elude, etc.)	1
Harm or endangerment to bystanders	1
Drug distribution	1



Q13: Please describe any other factors you consider when sentencing felony defendants that are not listed in the previous factor questions.

Factor	Frequency
Aggravating factors - e.g., failure to stop criminal behavior despite opportunity to do so prior to injury to others	1
→ Whether the offense was part of a single spree	1
→ There are multiple incidents charged as one crime - e.g., someone who embezzles in multiple ways, multiple times over time, but is indicted for one felony with a range of dates is treated differently than a person who took money on one occasion	1
Amount of thought and planning in crime	1
Treatment of co-defendants	1
Plea agreements made by CA in other similar cases	1
Potential employment and future stability	1
Past success or failure in utilizing rehabilitation resources	1
Balance need for punishment vs. rehab/treatment	1
Facts of specific offense relative to goals of sentencing - restraint, retribution, deterrence, rehabilitation	1

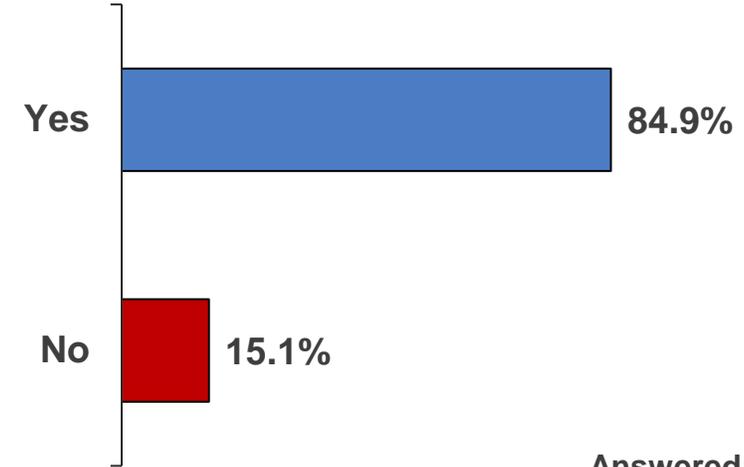


Q14: When you determine the sentence for a felony defendant, what three factors are most important to you?

Factor	Frequency
Prior Criminal History – Generally	94
Type of Offense/Severity of Offense	64
Victim Injury/Impact on Victim	35
Rehabilitation Potential/Effort or Treatment May Work	25
Accepts Responsibility/Expresses Remorse	19
Facts of Case/Specific Circumstances	18
Public Safety	15
Substance Abuse or Mental Health Issues	13
Violent/Person Crime	12
Offense Involved Violence/Degree of Violence	8
Prior Violent Criminal History	6
SG Recommendation	5



Q15: In drug cases involving the sale, distribution, or possession with intent to distribute, do you consider certain drugs to be more serious and therefore warranting a harsher sentence?



Answered: 139 Skipped: 9

If YES, what types of drugs do you consider to be more serious?

Drug	Percent
Fentanyl	61.7%
Heroin	46.1%
Methamphetamine	19.1%
Opioids	18.3%
Cocaine	13.0%

Responses: 115



Q16: Please identify the statement that most closely approximates the way you think the Guidelines should address a defendant's prior record.

	Percent
All prior record convictions should be given the same weight on the Guidelines.	10.6%
Older prior record should be discounted or weighed less on the Guidelines if the defendant has been relatively crime-free for a period of time.	31.9%
Older prior record should be discounted or weighed less on the Guidelines even if the defendant has had convictions in the interim.	0.0%
Certain types of convictions should always be given full weight on the Guidelines (e.g., murder, robbery, or rape) regardless of how long ago they occurred, even if other types of prior record convictions are discounted or weighed less.	47.5%
Prior record from a certain number of years in the past should not be scored at all on the Guidelines	2.1%
Other (Please explain)	7.8%



Q16: Please identify the statement that most closely approximates the way you think the Guidelines should address a defendant's prior record.

SELECT RESPONSES
SHOWN

Other (please specify)

11 RESPONSES

- 
- Prior record of a similar type as current offense should be given more weight.
 - Prior record should be considered based on severity of the prior offense.
 - To discount prior convictions because the law changed is not reasonable or fair - it minimizes the victims in those prior cases and artificially reduces the recommendation which often results in unfair calculations.
 - The prior record needs to be considered by the court in conjunction with the other circumstances of the case so it depends and there is no way to substitute the discretion of the court with some predetermined formula. (3)
 - The Guidelines are already too weak in most circumstances.

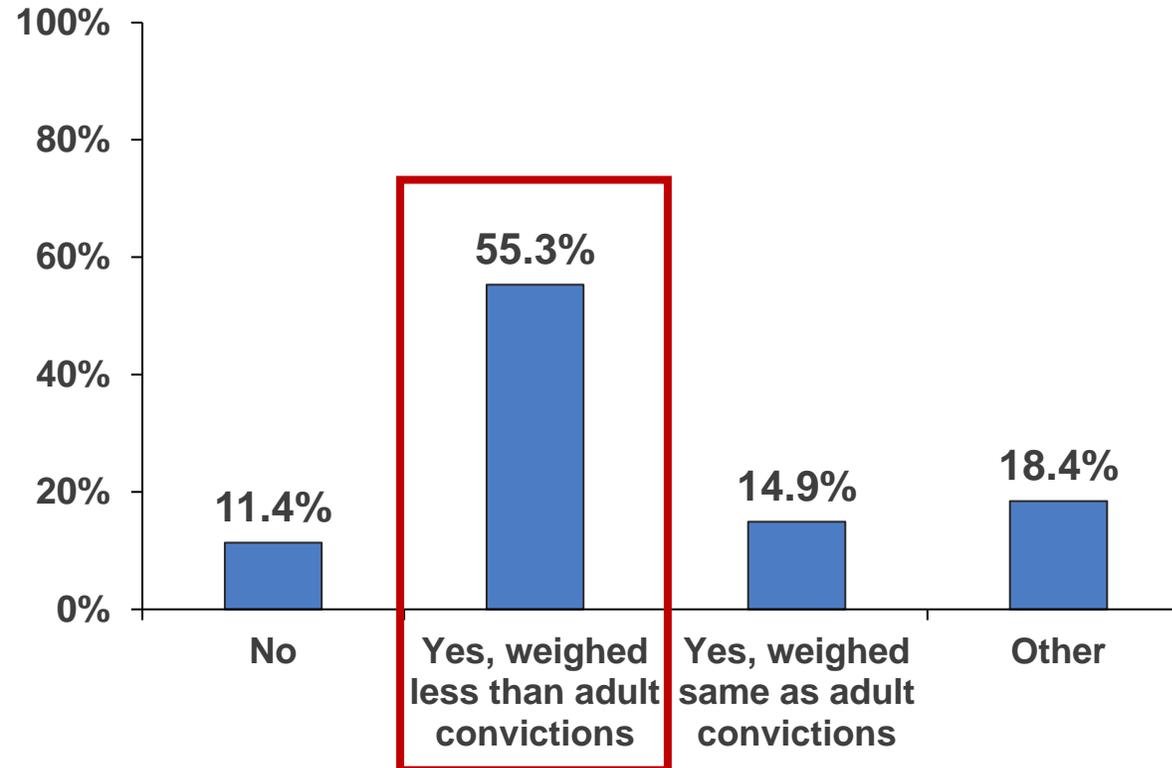


Q17: If you feel that older prior record should be weighed less or should not be scored on the Guidelines, what period of time do you think is most appropriate for the prior record “look back” period?

	Percent
Not applicable to me (i.e., no time limit, include all convictions)	36.3%
Most <u>recent 10 years of prior record</u> (or most recent 10 years since release to the community following time served for a previous conviction)	23.0%
Most <u>recent 15 years of prior record</u> (or most recent 15 years since release to the community following time served for a previous conviction)	20.0%
Most recent <u>20 years of prior record</u> (or most recent 20 years since release to the community following time served for a previous conviction)	15.6%
Other	5.2%



Q18: Should the defendant's juvenile adjudications of delinquency be scored on the Guidelines?



Q18: Should the defendant's juvenile adjudications of delinquency be scored on the Guidelines?

SELECT RESPONSES SHOWN

Other (please specify)

26 RESPONSES

- Only juvenile adjudications involving serious offenses and crimes of violence should be scored; only Category I/II offenses. (4)
- Juvenile adjudications should be weighed the same for violent offenses/Category I or II offenses, but less for other offenses. (4)
- Juvenile adjudications should be weighed less unless they are fairly recent violent offenses (say within 5 years); should be discounted over passage of time. (5)
- Juvenile adjudication should be scored if it was a violent felony and when the defendant is under 25 years old (indicating they are not rehabilitating).
- Only felonies and they should be weighed the same as adult convictions.
- Weight given depends on type of conviction and number.
- It depends upon other facts, e.g., defendant's age and similarities offense and prior juvenile record. (2)
- Let the judge decide how much weight to give; case-by case. (2)
- Report to court but do not score.



Q19: What do you think would make the Guidelines more helpful?

SELECT RESPONSES
SHOWN

Other (please specify)

46 RESPONSES

- Shorter, simpler forms. (3)
- It is not appropriate to go back into time and reevaluate prior convictions because aspects of the law change; if you stole \$200 or more years ago, it was a felony whether it is now or not. (2)
- In criminal history, provide dates of incarceration as it is often difficult to determine if a period without criminal activity is due to defendant's incarceration; noting amount of time since last court appearance before the offense date of the current case. (2)
- They should provide for additional flexibility and not put judges in the position of having to justify their actions by way of mandating explanations. (2)
- Quantity of heroin and fentanyl should be scored.
- Capping the recommended sentence after a certain number of counts in cases which typically have numerous counts, e.g., forgery/uttering, pornography.
- Get rid of all risk assessment tools.



Q19: What do you think would make the Guidelines more helpful?

SELECT RESPONSES
SHOWN

Other (please specify)

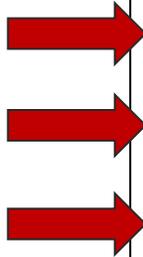
46 RESPONSES

- Get rid of short-cut boxes designed to give a judge cover when he or she is actually departing.
- Consider adding potential time for embezzlement, or crimes involving a fiduciary, even if first time offenders (0 to 6 months, for example).
- The Sentencing Guidelines do not significantly distinguish between an individual with 3 DWI convictions and one with 4, 5, 6, 7 or more.
- Recommended range could be more narrow for shorter recommendations (for example, use midpoint with range +/- 3 or 6 mos).
- Greater sentencing ranges.
- Eliminate factors of little concern in sentencing (e.g., whether an offender was on bond at the time of the instant offense). Prior incarcerations of 30 days or less should not be scored.
- Provide more space for explaining deviations.



Q20: Is there anything else you would like to communicate to the Sentencing Commission regarding the Guidelines?

SELECT RESPONSES SHOWN



Other (please specify)

48 RESPONSES

- More empathy for victims; more accountability for "property crimes," particularly burglary. (2)
- Robbery Guidelines are needed.
- Most serious offenses should not be determined based on the statutory maximum (sometimes discounts what is really the most serious offense).
- Guidelines should have a higher upper range for crimes of violence.
- Guidelines should have a higher upper range for distribution of fentanyl, opiates, methamphetamine and PCP.
- Guidelines for B&E-Dwelling and Strangulation/Unlawful Wounding are too low; a first offense should automatically go to Worksheet C.
- Increase font size on Guidelines worksheet; have less on the page.
- Remove the Case Details Worksheet - defense lawyers refuse to complete it. (2)



Q20: Is there anything else you would like to communicate to the Sentencing Commission regarding the Guidelines?

**SELECT RESPONSES
SHOWN**

Other (please specify)

48 RESPONSES

- I am concerned that you are intentionally promoting some factors and diminishing others to impact the end results of the guidelines. For instance, you are making it easy to check boxes that will allow a judge to rationalize lower sentences, but you don't have boxes that rationalize higher sentences.

This survey also appears oriented towards finding ways to rationalize results in one direction only.

I believe your use of a risk tool that results in different scores merely due to sex/age is unfair and possibly unconstitutional.

Your promotion of SWIFT is designed to place more requirements on judges in order to save on staffing at the Commission.





Major Take Aways

- The Commission achieved a very good response rate for the survey.
- When determining a sentence, the majority of responding judges decide whether or not a defendant should be incarcerated (jail or prison) and then they decide on the sentence length.
- The majority of responding judges will consider the length of time or proportion of time the defendant will serve on the sentence ordered.
- Responding judges provided insight into the factors that, on average, are weighed most heavily in felony sentencing decisions. Examples:
 - Victim injury
 - Prior violent record/crimes against person
 - Previous convictions for the same type of offense
 - Use of a firearm
 - Type of most serious offense in the current event
 - Defendant was on probation/parole at time of current offense
- The vast majority of responding judges felt that, in cases involving the sale, distribution, or PWID, certain drugs warrant a harsher sentence (fentanyl and heroin were cited most often).



Major Take Aways

- Only 1 in 10 responding judges said that all prior record convictions should be given the same weight on the Guidelines.
- According to nearly half of responding judges, certain types of convictions should always be given full weight on the Guidelines (e.g., murder, robbery, or rape) regardless of how long ago they occurred, even if other types of prior record convictions are discounted or weighed less.
- Nearly one-third of responding judges felt that older prior record should be discounted or weighed less on the Guidelines if the defendant has been relatively crime-free for a period of time.
- When asked about the most appropriate “look back” period, four in ten responding judges selected a period of 10 or 15 years.
- More than half of responding judges felt that juvenile record should be scored on the Guidelines but weighed less than adult convictions.
 - Prior juvenile record for violent offenses is the most important.



VIRGINIA CRIMINAL SENTENCING COMMISSION

Questions?

