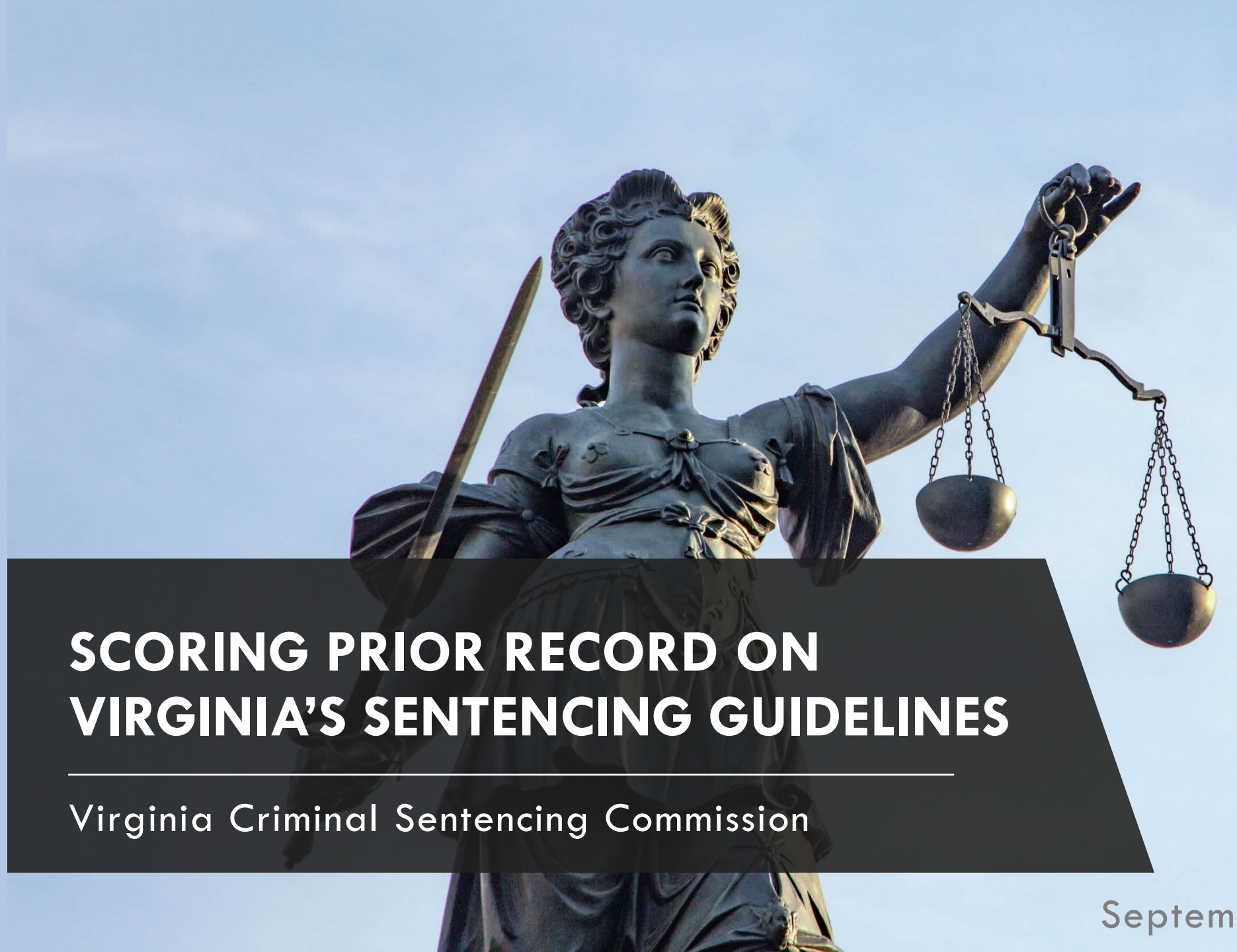
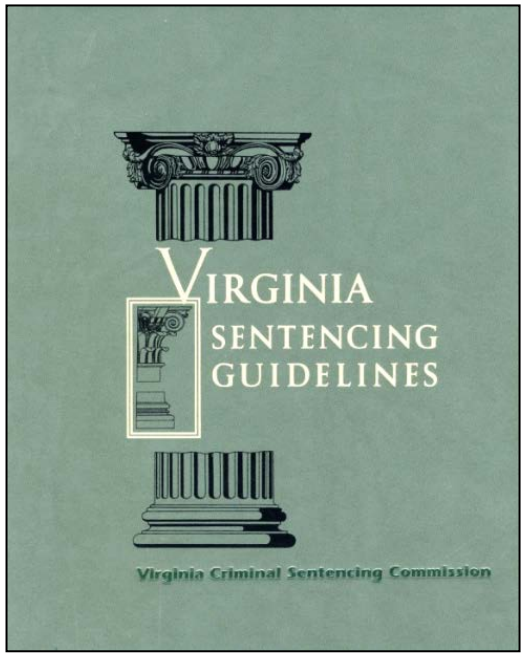


SCORING PRIOR RECORD ON VIRGINIA'S SENTENCING GUIDELINES

Virginia Criminal Sentencing Commission

September 4, 2024

Virginia's Sentencing Guidelines



Guidelines must take into account historical sentencing practices (§ 17.1-803).

One of the primary goals of Virginia's Guidelines, dating back to 1985, has been the reduction of unwarranted sentencing disparity.

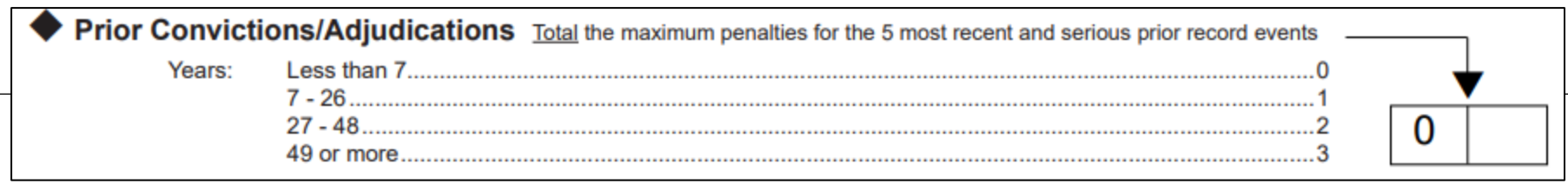
To develop Guidelines, researchers established consistent definitions for elements of the offense (e.g., degree of victim injury) and created standardized measures for prior record.

Instructions for Scoring a Defendant's Prior Record

Preparers use Virginia's current penalty structure to determine the statutory maximums for prior convictions/adjudications.

This approach to scoring prior record has been utilized throughout the history of Sentencing Guidelines in Virginia, beginning in the late 1980s.

EXAMPLE: Assault of a police officer prior to 1997 would appear as a misdemeanor on a criminal history report; however, that prior offense would be weighted as a felony, based on the current penalty.



Rationale for Scoring Prior Record Based on Current Penalty Structure

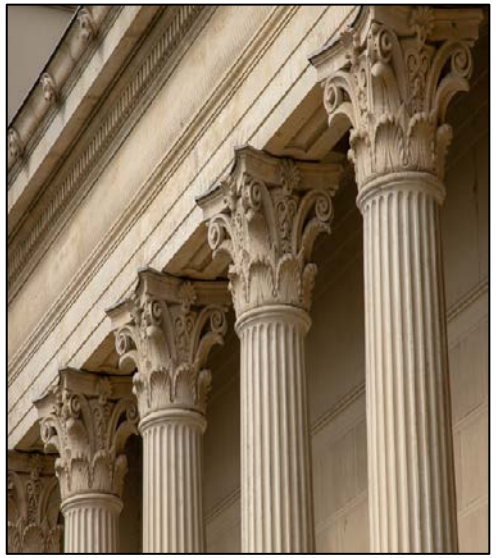
Statutory maximum penalties are used as a proxy for measuring previous criminal behavior.

By using the current statutory maximums to score priors, all prior convictions/adjudications are given the same weight regardless of when the offense was committed or where the defendant was convicted.

Guidelines preparers (prosecutors and state probation officers) are already familiar with existing penalty structure.

Alternative Approaches to Scoring Prior Record

Since 1995, two alternative approaches to scoring prior record have been suggested.



1) Ranking system

Based on a survey of judges, prosecutors, and public defenders in which respondents were asked to rank the seriousness of offenses relative to others.

The ranking of offenses was markedly different from the statutory maximums established by the legislature.

Commission decided to retain the existing approach.

Alternative Approaches to Scoring Prior Record

2) Based on the penalty in place at the time and in the state where the offense was committed.

Commission members considered this second alternative during a meeting in November 2018.

The Commission concluded that no action should be taken at that time.

Scoring Prior Record Based on Penalty When and Where Offense Was Committed

Alternative approach does not reflect the analysis of historical sentencing data used to develop the Guidelines.

- Without performing new analyses, such a change would be the first prescriptive policy decision made by the Commission.

If proposed, the change must be submitted to the General Assembly for review.

- The change would impact Guidelines recommendations for some offenders.

Scoring Prior Record Based on Penalty When and Where Offense Was Committed

Alternative approach may increase sentencing disparity.

- Same prior criminal behavior would be weighed differently on the Guidelines.

Rap sheets do not always contain sufficient detail to determine statutory penalty in effect when/where offense was committed.

- If the seriousness of a prior offense is not clear, the preparer must do research to determine the earlier penalty.
- Probation officers would be at a disadvantage as their offices are unlikely to maintain *Code* books and other resources needed for this type of legal research.

Scoring Prior Record Based on Penalty When and Where Offense Was Committed

In 2018, DOC reported that such a change would have a significant impact on agency staff.

- Probation officers typically do not have the expertise or access to resources necessary to conduct legal research of this nature.

A change in prior record scoring would necessitate a large-scale re-training effort.

- Scoring of prior record is a critical element of the Guidelines and the proposal is a significant policy change.

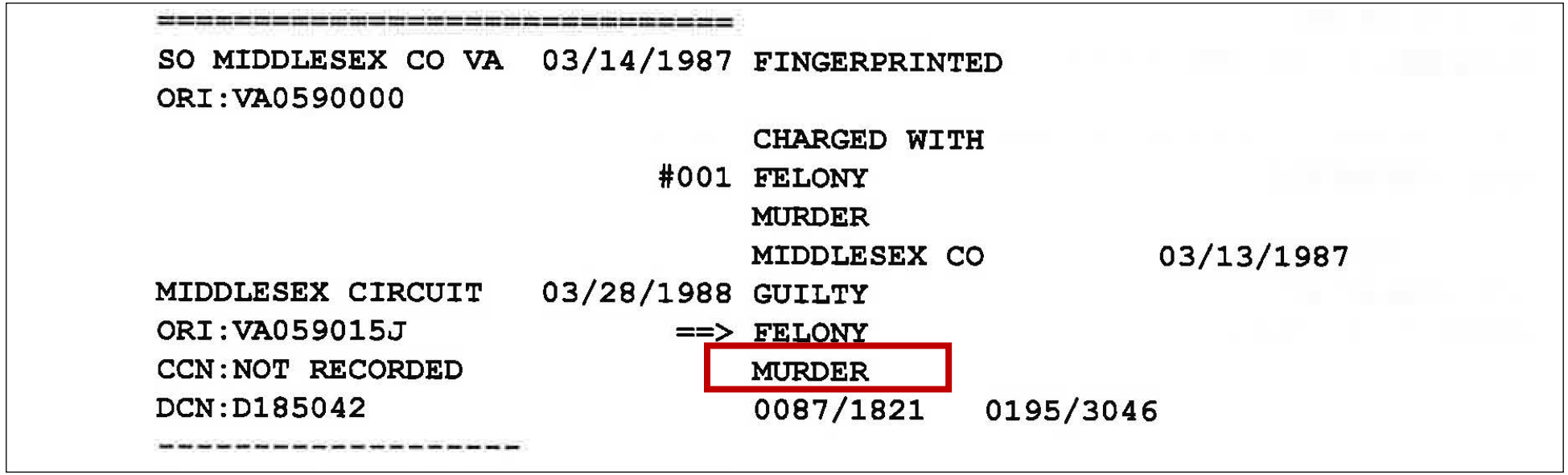
Scoring Prior Record Based on Penalty When and Where Offense Was Committed

Rap sheets often lack sufficient detail

- Missing offense date
- Missing Virginia Crime Code (VCC)
- Unclassed felonies = 32% of the felony charges in circuit court
- Generic offense descriptions

Lack of familiarity with statutes / legislative history in other states

Need list of violent offenses (§ 17.1-805) including date when offenses were defined as violent by the General Assembly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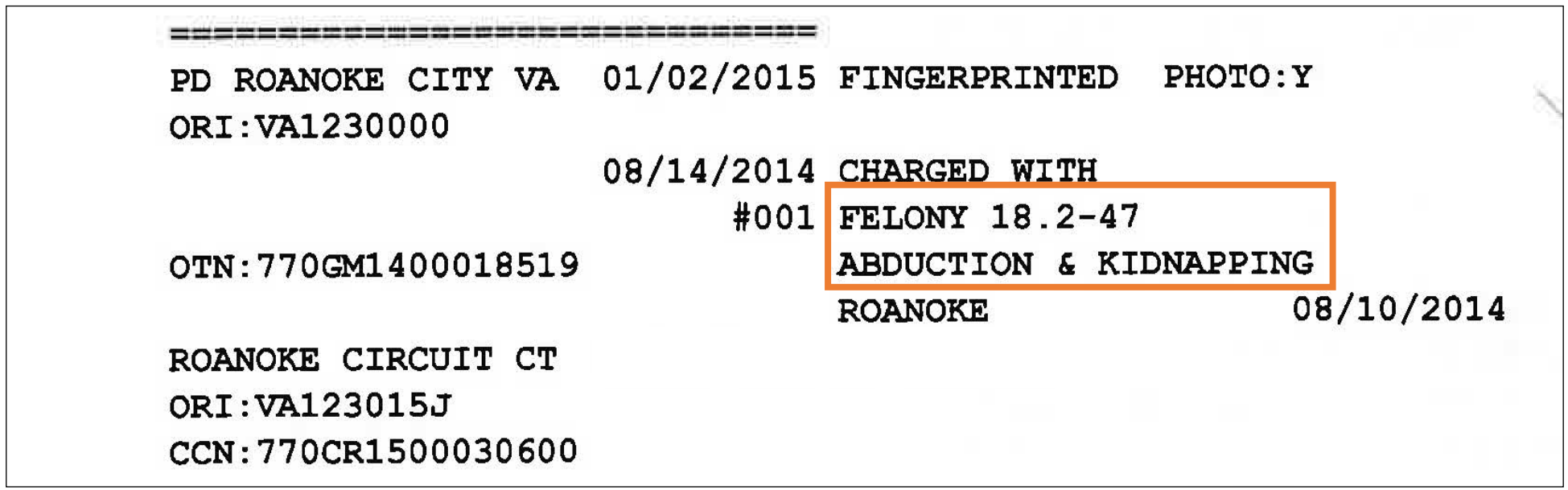
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ROANOKE CIRCUIT CT
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Court Decisions Related to Virginia's Sentencing Guidelines

- Virginia's Guidelines are merely tools to assist the judge in fixing an appropriate punishment within the range defined by the legislature.
- The discretionary Guidelines are procedural tools.
- Because they are discretionary, there is no due process violation when a court applies the Guidelines in effect at the time of sentencing, even if they are more punitive than the Guidelines in effect when the offense was committed.
- Revision of the Guidelines is left to the discretion of the Sentencing Commission.

Possible Options

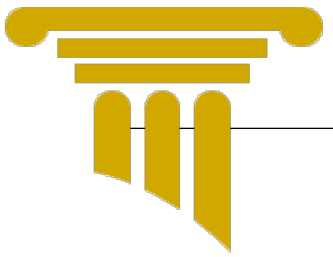
1) Retain the existing, research-oriented, policy for scoring prior record.

2) Make a normative policy decision to adopt the proposed alternative approach to scoring prior record (this option must be presented as a recommendation in the *Annual Report*).

3) Make a normative policy decision to score only larceny/property offenses affected by the dollar threshold change using the seriousness of the offense when it was committed (Minnesota).

4) Direct staff to collect data, study the potential impact of the proposed change.

5) Define some other measure to weigh prior record convictions (will require a new research study designed for this purpose).



Drug/Other — Section A

Offender Name: _____

Primary Offense

		Score
A.	Other than listed below (1 count)	1
B.	Sell, etc. 1/2 ounce - 5 pounds of marijuana for profit; Sell, etc. marijuana to inmate for accommodation	
	1 count	3
	2 counts	8
C.	Sell, etc. more than 5 pounds of marijuana for profit; Sell, etc. third or subsequent felony (1 count)	12
D.	Sell, etc. marijuana to minor (1 count)	11
E.	Manufacture marijuana not for personal use (1 count)	8
F.	Transport 5 pounds or more of marijuana into Commonwealth (1 count)	12
G.	Sell, etc. Schedule III or IV drug to minor (1 count)	11
H.	Sell, etc. Schedule III drug-not anabolic steroid	
	1 count	8
	2 counts	10
I.	Sell, etc. Schedule IV drug	
	1 count	6
	2 counts	8

Primary Offense Remaining Counts

Total the maximum penalties for counts of the primary not scored above

Years:		Score
	5 - 10	0
	11 - 21	2
	22 - 30	3
	31 - 42	4
	43 or more	5

Additional Offenses

Total the maximum penalties for additional offenses, including counts

Years:		Score
	Less than 4	0
	4 - 10	1
	11 - 21	2
	22 - 30	3
	31 - 42	4
	43 or more	5

Knife or Firearm in Possession at Time of Offense

If YES, add 2 → Score

Conviction in Current Event Requiring Mandatory Minimum Term (6 mos or more)

If YES, add 9 → Score

Prior Convictions/Adjudications

Total the maximum penalties for the 5 most recent and serious prior record events

Years:		Score
	Less than 7	0
	7 - 26	1
	27 - 48	2
	49 or more	3

Prior Incarcerations/Commitments

If YES, add 2 → Score

Prior Felony Drug Convictions/Adjudications

Number of Counts:		Score
	1 - 2	1
	3 - 4	2
	5	3
	6 or more	4

Prior Juvenile Record

If YES, add 1 → Score

Legally Restrained at Time of Offense

	Score
None	0
Other than parole/post-release, supervised probation or CCCA	1
Parole/post-release, supervised probation or CCCA	4

Total Score

If total is 10 or less, go to **Section B**. If total is 11 or more, go to **Section C**.

Primary Offense Remaining Counts

Total the maximum penalties for counts of the primary not scored above

Years:	5 - 10	0
	11 - 21	2
	22 - 30	3
	31 - 42	4
	43 or more	5

0

Additional Offenses

Total the maximum penalties for additional offenses, including counts

Years:	Less than 4	0
	4 - 10	1
	11 - 21	2
	22 - 30	3
	31 - 42	4
	43 or more	5

0

Knife or Firearm in Possession at Time of Offense

If YES, add 2 → 0

Conviction in Current Event Requiring Mandatory Minimum Term (6 mos or more)

If YES, add 9 → 0

Prior Convictions/Adjudications/Violations

Prior Convictions/Adjudications

Total the maximum penalties for the 5 most recent and serious prior record events

Years:	Less than 7	0
	7 - 26	1
	27 - 48	2
	49 or more	3

0

Prior Incarcerations/Commitments

If YES, add 2 → 0

Prior Felony Drug Convictions/Adjudications

(Do not count probation or suspended sentence violations)

Number of Counts:	1 - 2	1
	3 - 4	2
	5	3
	6 or more	4

0