Re-analysis of Virginia's Sentencing Guidelines and Midpoint Enhancements for Violent Offenders

October 1, 2022

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Commonwealth of Virginia

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Supreme Court of Virginia
Virginia Criminal Sentencing Commission

October 1, 2022

TO: The Honorable S. Bernard Goodwyn
        Chief Justice of the Supreme Court of Virginia

        The Honorable Glenn Youngkin
        Governor of Virginia

        The Honorable Members of the General Assembly of Virginia

The Virginia Criminal Sentencing Commission recently approved a comprehensive study to re-examine the state's Sentencing Guidelines system. The goal of the study is to re-benchmark the Guidelines so that they reflect current sentencing practices as accurately as possible. Virginia is distinct from most other states in that our Sentencing Guidelines are based on analysis of historical sentencing data. In fact, the *Code of Virginia*, in § 17.1-803, requires the Sentencing Commission to develop guidelines that take into account historical sentencing practices.

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. Pursuant to § 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, which have been in the *Code* since 1995, are not based on empirical analysis of sentencing data. The 2022 General Assembly passed legislation (House Bill 1320 and Senate Bill 423) 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. That aspect of the legislation takes effect on July 1, 2023.

The 2022 legislation requires the Commission to submit a report by October 1, 2022, documenting the impact on Sentencing Guidelines midpoints if the Commission were to recommend changes based solely on analysis of historical sentencing data. The Commission's study is not yet complete; however, the Commission has prepared this informative preliminary report, which is respectfully submitted for your consideration.

With kindest regards,

Edward L. Hogshire (Circuit Judge, Ret.)
Chairman

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Authority

This report has been prepared pursuant to the requirements of Chapters 723 and 783 of the 2022 Acts of Assembly. This provision requires the Virginia Criminal Sentencing Commission to submit a report to the General Assembly, the Governor, and the Chief Justice of the Supreme Court of Virginia by October 1, 2022, documenting the impact on Sentencing Guideline midpoints for each offense if the Commission were to recommend changes to the midpoints based on analysis of historical sentencing data. The legislation is presented in full in Appendix A. This report is submitted to fulfill the requirements specified in the 2022 legislation.

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Executive Summary

The Virginia Criminal Sentencing Commission recently approved a comprehensive study to re-examine the state's Sentencing Guidelines system. The purpose 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. Among its statutory mandates, the Commission is required by § 17.1-803 to develop guidelines that take into account historical sentencing practices. The Guidelines apply in approximately 95% of felony sentencing events in Virginia's circuit courts.

In essence, Virginia's Guidelines are designed to provide judges with a benchmark of the typical, or average, case outcome given the defendant's current offenses and his or her prior convictions. The rates at which defendants are recommended by the Guidelines for incarceration in jail or prison reflect the rate at which defendants have received those types of dispositions during the period analyzed. The Guidelines are not designed to recommend more or fewer people for incarceration. There is one exception to the historical basis of Virginia's Guidelines. Pursuant to § 17.1-805, the Guidelines must include enhancements to increase sentence recommendations for defendants with current or prior convictions for violent felonies. The percent enhancements specified in § 17.1-805, which have been in the *Code* since 1995, are not based on empirical analysis of sentencing data. The 2022 General Assembly passed legislation (House Bill 1320 and Senate Bill 423) 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. Rather than the percentages set in current *Code* (100%, 125%, 300%, or 500%), the legislation authorizes the Commission to set the magnitude of midpoint enhancements based on analysis of actual sentencing data. That aspect of the legislation takes effect on July 1, 2023. The 2022 legislation includes a requirement for the Commission to submit a report by October 1, 2022, documenting the impact on Sentencing Guideline midpoints if the Commission were to recommend changes based solely on analysis of sentencing data. The Commission's study is underway but not yet complete. Re-analysis of all Guidelines offense groups is a large-scale, multi-year project and work is expected to continue until late 2025 or early 2026. To fulfill the 2022 reporting requirements, the Commission has prepared this informative preliminary report for submission to the Chief Justice, the Governor, and the General Assembly.

The Commission's decision in 2021 to move forward with a new comprehensive analysis of the Guidelines was based on several factors. These include recent statutory changes by the General Assembly related to larceny, robbery, jury trials, and sentence credits that may be earned by some individuals serving time for felony offenses. It is unclear what impact these statutory changes may have on judicial sentencing practices (or charging practices of prosecutors). It is possible that sentencing patterns may shift over time and any such changes should be examined, thus supporting the need for the new Guidelines study.

In addition to the recent array of legislative changes, the Commission has identified areas of the Guidelines that appear to be out of sync with current sentencing practices. For example, while Virginia's Circuit Court judges concur with the Guidelines at a high rate overall, data show that judges often depart from the Guidelines in certain types of cases, such cases involving midpoint enhancements required by § 17.1-805. The Commission's new study will include a detailed examination of these cases and other areas of the Guidelines in which judges, overall, depart at a higher-than-average rate.

To address the critical need for information, the Commission integrated a Case Details Worksheet 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. It is designed to capture specific elements of the offense(s) in each case, including victim injury, weapon use, value stolen in property cases, and type of drug in narcotics cases that are not consistently available in any criminal justice data system in the Commonwealth. The information is fundamental for the Commission to fully understand sentencing practices in Virginia. Unfortunately, Guidelines forms received by the Commission since its implementation reveal that the Case Details Worksheet, in many cases, is either missing or incomplete. Lack of essential data may hamper or delay the re-analysis project. The Commission has encouraged judges to ensure the worksheet is completed by the Commonwealth's attorney or probation officer who is preparing Guidelines worksheets for the court.

The Commission currently is in the initial phase of this multi-year project. Thus, the Commission does not yet have results to present regarding the impact on Sentencing Guideline midpoints if the Commission were to recommend changes based solely on analysis of sentencing data. This report discusses the Commission's methodological approach to the analysis, the structure of the Guidelines, data sources for the study, and the range of recommendations that may result when the extensive and thorough data analysis has reached conclusion.

For this report, the Commission has conducted preliminary analysis of concurrence with, and departures from, the Virginia's Sentencing Guidelines for a recent five-year period. In Virginia, judicial concurrence with the Guidelines is voluntary. Judges may depart from the Guidelines in any case they feel the circumstances warrant it. Per § 19.2-298.01(B), if the judge orders a sentence which is either greater or less than that recommended by the Guidelines, the judge must file a written explanation of the departure. Concurrence rates with Guidelines recommendations, patterns of departure, and the departure explanations provided by judges provide some insight into current judicial thinking and suggest ways in which the Guidelines may need to be refined. For example, relatively low concurrence with a significant number of downward departures could suggest that the Guidelines for a particular offense may need to be refined downward to better reflect judicial thinking. Conversely, relatively low concurrence with a significant number of upward departures could suggest that the Guidelines for that offense should be refined upward. Analysis of Guidelines concurrence and departures, however, does not indicate definitively the direction in which the Guidelines for a specific offense may be revised when all of the data are collected and analyzed together. Nonetheless, review of Guidelines

concurrence and departure patterns, as well as the reasons judges cite when departing from the Guidelines recommendation, is informative. Concurrence rates and departure patterns for felonies covered by the Guidelines system are included in this report beginning on page 27.

Virginia's circuit court judges concur with the Guidelines at a high rate overall. During FY2018-FY2022, the overall concurrence rate was 81.9%.[1] In 7.5% of the felony sentencing events, the effective sentence (the imposed sentence less any suspended time) was higher than the Guidelines recommended range, whereas, in 10.7% of the felony sentencing events, the effective sentence was lower than the range recommended by the Guidelines.[2] When no midpoint enhancements apply, judges concur with the Guidelines in nearly 85% of the cases. When midpoint enhancements do apply, judges comply at a much lower rate – about 71%. When judges depart from the Guidelines in midpoint enhancement cases, they nearly always sentence below the range recommended by the enhanced Guidelines. Analysis reveals that concurrence rates vary somewhat across the 17 Guidelines offense groups. In general, property and drug offenses exhibit higher rates of concurrence than the violent offense categories. When examining departure cases, acceptance of a plea agreement is the most common reason cited by judges for sentencing outside of the Guidelines range for both upward and downward departures.

As noted above, the goal of the re-analysis study is to re-benchmark the Guidelines so that they reflect current sentencing practices as accurately as possible. As the re-analysis project progresses, the Commission will recommend revisions to the Guidelines for certain offenses or offense groups, when such modifications are supported by the data. All recommendations will be based on analysis of recent sentencing practices and will represent the best fit of the available data. Per § 17.1-806, any recommendations adopted by the Commission must be presented in its annual report, due to the General Assembly each December 1. The legislative session provides an opportunity for lawmakers to review the Commission's recommendations. Unless otherwise provided by law, the changes recommended by the Commission become effective on the following July 1.

Given its size and complexity, the Commission's re-analysis project will be conducted over the next several years. As of the submission of this report, the Commission plans to have the study fully completed in late 2025 or early 2026.

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[1] Data for FY2022 are preliminary as of September 9, 2022.
[2] Percentages may not add to 100% due to rounding.

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Overview of Virginia's Sentencing Guidelines

In 1994, the General Assembly passed legislation that changed the way individuals convicted of felonies were sentenced and served time in the Commonwealth. The legislation eliminated parole for felony offenses committed on or after January 1, 1995, and established a system of earned sentence credits which allowed for a reduction in sentence not to exceed 15%. Under the 1995 law, felony offenders were required to serve at least 85% of their incarceration sentences.[3] This approach, known as "truth-in-sentencing," represented a comprehensive change in Virginia's criminal justice system. Under the parole system (prior to 1995), offenders could receive sentence credits which reduced sentences by as much as 50% and could be released on parole after serving as little as one-fourth of the full sentence given by the judge or jury. With the changes that became effective on January 1, 1995, proponents of the new system asserted that sentencing had become more transparent and time served in prison was more predictable.

The 1994 legislation also created the Virginia Criminal Sentencing Commission and specified the framework for new Sentencing Guidelines. As specified in *Code of Virginia* § 17.1-801, the Commission was created "to assist the judiciary in the imposition of sentences by establishing a system of discretionary guidelines and to establish a discretionary sentencing guidelines system which emphasizes accountability of the offender and the criminal justice system to the citizens of the Commonwealth." Further, the Commission was charged with developing discretionary Sentencing Guidelines "to achieve the goals of certainty, consistency, and adequacy of punishment with due regard to the seriousness of the offense, the dangerousness of the offender, deterrence of individuals from committing criminal offenses and the use of alternative sanctions, where appropriate." Thus, one of the goals of Virginia's Guidelines is to establish rational and consistent sentencing standards that reduce unwarranted sentencing disparity. Dramatic and unexplained differences in sentences for similarly-situated defendants are not desirable. That is to say, defendants with similar criminal histories who are convicted of similar crimes should receive comparable sanctions. When sentencing varies dramatically and without seeming explanation, no reasonable expectation exists as to what the actual penalty will be for a crime. Widespread compliance with sentencing guidelines has been found to reduce unwarranted disparity.[4]

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[3] During a Special Session in the fall of 2020, the General Assembly passed House Bill 5148. The legislation, which took effect on July 1, 2022, increased the rate at which individuals serving time for certain nonviolent felony offenses can earn sentence credits. Under the provisions of House Bill 5148, persons serving time for certain nonviolent felonies are 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. During the 2021 General Assembly (Special Session I), the Governor recommended, and the General Assembly accepted, additional language in the Appropriation Act to specify that an individual serving time for both violent and nonviolent offenses is not eligible for the higher rate of sentence credits for any of the offenses associated with that term of incarceration. If an eligible nonviolent felon earns at the highest rate throughout his sentence, he will serve 67% of the court-ordered sentence.

[4] Ostrom, B. J., Ostrom, C. W., Hanson, R. A., & Kleiman, M. (2007). *Assessing Consistency and Fairness in Sentencing: A Comparative Study in Three States*. Williamsburg, VA: National Center for State Courts.

Virginia's Sentencing Guidelines were developed to provide sentence recommendations based on historical practices, using information regarding the nature of the current offense(s) and a defendant's criminal history. Unlike most states with guidelines, 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. Pursuant to § 17.1-805, the Sentencing Guidelines must include midpoint enhancements to increase sentence recommendations for defendants who have current or prior 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. By statute, the determination of "violent offender" is based on the entire criminal history, including juvenile delinquency adjudications. Approximately one in five convicted felons receives a Guidelines enhancement. The percent enhancements specified in § 17.1-805 were not based on empirical analysis of sentencing data. The percentage enhancements have been in the *Code* since 1995 and have been unchanged since that time. In contrast, the sentence recommendations for nonviolent offenders (i.e., offenders who have never been convicted of a violent felony as defined § 17.1-805) do not receive any midpoint enhancements. By design, nonviolent offenders receive recommendations such that they serve approximately the same amount of time under truth-in-sentencing, on average, as they did under the parole system (prior to 1995). The 1994 legislation also directed the Commission to develop a risk assessment instrument to identify the lowest-risk nonviolent offenders so that they could be recommended for alternative sanctions in lieu of traditional prison incarceration. For a more detailed discussion of the development of the Sentencing Guidelines that became effective in 1995, see Appendix B.

Pursuant to § 19.2-298.01, in all felony cases, other than Class 1 felonies, the court must (i) have presented to it the appropriate discretionary Sentencing Guidelines worksheets and (ii) review and consider the suitability of the Guidelines in the specific case before the court. Before imposing sentence, the court must state for the record that such review and consideration have been accomplished and the court must make the completed worksheets a part of the record of the case and open for inspection. While completion and review of the Guidelines is mandatory, judicial compliance with the Guidelines is voluntary. Judges are free to depart from the Guidelines in any case they feel the circumstances warrant it. However, as specified in § 19.2-298.01(B), if the judge orders a sentence which is either greater or less than that recommended by the Guidelines, the judge must file a written explanation of the departure. It should be noted that juries are not permitted to receive the Guidelines. After sentencing, the Clerk of the Circuit Court is required by law to send the Guidelines worksheets to the Sentencing Commission, where the information is automated and analyzed.

The Commission closely monitors the Sentencing Guidelines system and, each year, deliberates upon possible modifications to enhance the usefulness of the Guidelines as a tool for judges. The Commission draws on several sources of information to guide its discussions about modifications to the Guidelines system. The Commission welcomes input from Circuit Court judges, prosecutors, defense attorneys, and other stakeholders. In addition, the Commission closely examines concurrence with the Guidelines and departure patterns in order to pinpoint specific areas where the Guidelines may need adjustment to better reflect current judicial thinking. The opinions of the judiciary, as expressed in the reasons they write for departing from the Guidelines, are very important in directing the Commission's attention to areas of the Guidelines that may require amendment. Revisions recommended by the Commission, however, are based on analysis of actual sentencing practices. The midpoint enhancements currently specified in § 17.1-805 have been integrated into the revision process each year.

Pursuant to § 17.1-806, any recommendations adopted by the Commission must be presented in its annual report, due to the General Assembly each December 1. The legislative session provides an opportunity for lawmakers to review and either accept or reject the Commission's recommendations. Unless otherwise provided by law, the changes recommended by the Commission become effective on the following July 1.

Purpose of the Guidelines Re-analysis Study

The Sentencing Commission recently approved a comprehensive study to re-examine the state's Sentencing Guidelines system. The approach will be holistic and comprehensive. The goal of the study is to re-benchmark the Guidelines so that they reflect current sentencing practices as accurately as possible. The Commission understands that sentencing practice is not static and that it evolves over time. Since 1995, the Commission's approach to Guidelines revisions each year has focused on analysis for specific offenses. In contrast, prior to 1995, full re-analysis of Virginia's Guidelines was conducted annually. Guidelines were "benchmarked" to the most recent five years of sentencing data. Based on the re-analysis, the Guidelines recommendation for some defendants would increase in order to reflect emerging sentencing practices, while the recommendation for other defendants would decrease based on examination of the most recent data. Beginning in 1995, the midpoint enhancements specified in § 17.1-805, which required the enhancements to be of a certain magnitude, meant that the Guidelines were no longer based solely on empirical analysis of sentencing data and the inflexibility of the enhancements made wholescale re-analysis challenging.

The Commission's decision in 2021 to move forward with a new comprehensive analysis of the Guidelines was based on several factors. Recent statutory changes by the General Assembly were expected to impact sentencing patterns and, thus, created a strong rationale for conducting a new analysis. For example, a series of statutory changes has redefined penalties for the crime of larceny. Between 1980 and 2018, Virginia's felony larceny threshold was $200, meaning that thefts involving $200 or more were subject to felony prosecution. By 2018, Virginia was tied with one other state as having the lowest felony larceny threshold in the nation. The 2018 General Assembly passed legislation to increase the felony larceny threshold from $200 to $500.[5] In 2020, the General Assembly further increased the threshold to $1,000.[6] Virginia's felony larceny threshold is now equivalent to the median felony threshold value for all 50 states. Many offenses in the *Code of Virginia* are "deemed larceny" (meaning they are punishable in the same manner as larceny) or were otherwise affected by changes in the felony larceny threshold. Also, prior to July 1, 2021, conviction for a third or subsequent petit larceny (misdemeanor) could be punished as a Class 6 felony. This felony was eliminated as of July 1, 2021.[7] Thus, many crimes previously punished as felonies in Virginia are today punishable as misdemeanors.

Other legislation modified the punishment for robbery. The 2021 General Assembly passed legislation to create degrees of punishment for robbery based on the elements of the offense.[8] Robbery (§ 18.2-58) was previously punishable by imprisonment of five years to life. The effect of the legislation was to reduce the maximum penalty for completed robbery offenses except in cases involving serious bodily injury or death. The classes of robbery created by the

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[5] See House Bill 1550 and Senate Bill 105, 2018 General Assembly.
[6] See House Bill 995 and Senate Bill 788, 2020 General Assembly.
[7] See House Bill 2290, 2021 General Assembly, Special Session I.
[8] See House Bill 1936, 2021 General Assembly, Special Session I.

legislation are very different than the way robbery had been delineated in the Sentencing Guidelines. Current data are insufficient to perform the analysis necessary to develop Guidelines based on the new classes of robbery. Further, it is not known how charging practices or sentencing patterns for robbery will evolve under the new penalty structure. Most likely, the Guidelines previously used will not accurately reflect the typical or average robbery outcomes based on the new classifications. For these reasons, the Commission determined that robbery under § 18.2-58 would not be covered as a primary offense under the Guidelines until a full analysis of sentencing under the new penalty structure can be completed.

Another piece of legislation likely to affect sentencing outcomes is Senate Bill 5007 (2020 General Assembly, Special Session I), which substantially changed the jury trial process in Virginia, effective July 1, 2021. Virginia is one of five states in the nation that provides for jury sentencing in non-capital cases. Beginning July 1, 2021, the new law provides that, in a criminal case tried by a jury, the defendant will be sentenced by the judge unless he or she requests that the jury recommend punishment. Because juries give longer sentences, on average, than judges do in comparable cases, this procedural change may impact charging practices, plea negotiations between prosecution and defense, as well as sentencing patterns.

During the same Special Session in the fall of 2020, the General Assembly passed House Bill 5148. The legislation, which took effect on July 1, 2022, increases the rate at which certain offenders may earn sentence credits to reduce the time served in jail or prison. Since 1995, pursuant to § 53.1-202.3, all felons served a minimum of 85% of the active sentence ordered by the court (felons could 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 are 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. During the 2021 General Assembly (Special Session I), the Governor recommended, and the General Assembly accepted, additional language in the Appropriation Act to specify that an individual serving time for both violent and nonviolent offenses is not eligible for the higher rate of sentence credits for any of the offenses associated with that term of incarceration. The legislation applies retroactively, meaning that inmates in state facilities will have the higher rates of earned sentence credits applied to their entire term of confinement, and such inmates will be released earlier than they would have been otherwise. If a nonviolent felon earns at the highest rate throughout his sentence, he or she will serve 67% of the court-ordered sentence. Defendants convicted of offenses specified in § 53.1-202.3 (largely violent crimes or crimes against the person) will continue to earn rates resulting in a minimum 85% time-served. It is unclear what impact this statutory change may have on judicial sentencing practices (or charging practices of prosecutors). It is possible that sentencing patterns for defendants earning the higher rates of sentences credits may shift over time, thus providing additional rationale for the new Guidelines study.

In addition to recent to the array of legislative changes, the Commission has identified areas of the Guidelines that appear to be out of sync with current sentencing practices. For example, while Virginia's Circuit Court 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. When no enhancements apply, judges concur with the

Guidelines in nearly 85% of the cases. When enhancements do apply, judges comply at a much lower rate – about 71%. When judges depart from the Guidelines in midpoint enhancement cases, they nearly always sentence below the range recommended by the enhanced Guidelines. The Commission's new study will include a detailed examination of these cases and other areas of the Guidelines in which judges, overall, depart at a higher-than-average rate.

To ensure that the new study could be as comprehensive as possible, the Commission supported legislation in the 2022 General Assembly to provide the Commission with additional flexibility in its re-analysis work. House Bill 1320 and Senate Bill 423 clarified the Commission's authority to recommend revisions to the Guidelines based on historical sentencing data, specifically in regards to the size of midpoint enhancements. Rather than the percentages set in current *Code* (100%, 125%, 300%, or 500%), the legislation authorizes the Commission to set the size of midpoint enhancements based on analysis of actual sentencing data. As specified in the legislation, any recommendations adopted by the Commission to modify Guidelines enhancements would only become effective through the process established in current *Code* in § 17.1-806. This requires any modifications adopted by the Commission to be presented in the Commission's annual report and submitted to the General Assembly. If, after review, the General Assembly takes no action, the changes recommended by the Commission take effect the following July 1.

Re-analysis of all Guidelines offense groups is a large-scale, multi-year project. The study is expected to continue until late 2025 or early 2026. House Bill 1320 and Senate Bill 423 (now Chapters 723 and 783 of the 2022 Acts of Assembly) require the Commission to submit a report by October 1, 2022, to the General Assembly, the Governor, and the Chief Justice of the Supreme Court of Virginia by October 1, 2022, documenting the impact on Sentencing Guidelines midpoints for each offense if the Commission were to recommend changes to the midpoints based on analysis of historical sentencing data. The Commission's analysis is not complete; however, the Commission has prepared this preliminary report to discuss the Commission's methodological approach to the analysis, data sources, and the range of recommendations that may result when the extensive and thorough data analysis has concluded. Concurrence rates with Guidelines recommendations and patterns of departure from the recommended ranges provide some insight into current judicial thinking and suggest ways in which the Guidelines may need to be refined. Analysis of Guidelines concurrence and departures does not indicate definitively the direction in which the Guidelines for a specific offense may be revised when all of the supplemental data are collected and analyzed. However, review of the Guidelines concurrence and departures patterns can be informative and are worthy of examination. Concurrence rates and departure patterns for felonies covered by the Guidelines system are presented later in this report.

Structure of Virginia's Sentencing Guidelines

Virginia's Sentencing Guidelines are structured to reflect the judicial decision-making process. Previous studies of sentencing practices in Virginia found that judges consider different factors, or weigh factors differently, depending on the offense and type of decision being made. As revealed in past analyses, judicial decision-making in Virginia can be seen as a two-step process. The first step for the judge is deciding whether or not the defendant should receive an incarceration term of more than six months. This decision is modeled by the Guidelines Section A worksheet (the structure of the Sentencing Guidelines is shown in Figure 1 below). Section A is tied to an incarceration term of more than six months because, when the parole-abolition legislation took effect on January 1, 1995, a state-responsible prison sentence was defined as a sentence greater than six months. In 1997, the definition of a state-responsible prison sentence was revised to be a sentence of one year or more.[9] However, for purposes of the Guidelines, the Section A worksheet continues to make recommendations based on the six-month threshold. Generally, if Section A recommends a term of incarceration of more than six months, the range recommended by the Guidelines includes the minimum prison sentence of one year.

Figure 1
Structure of Virginia's Sentencing Guidelines

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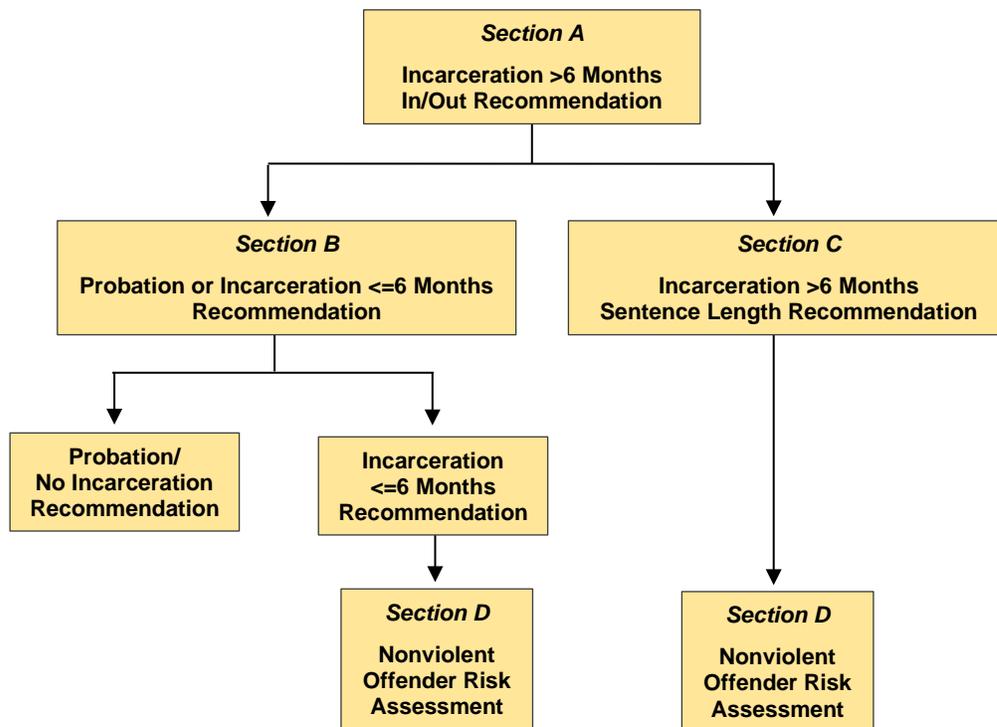
[9] While a sentence of one year or more is defined as a state-responsible prison sentence, a sentence of 12 months or less is defined as a local-responsible jail sentence. The wording of the court order is critically important in determining if a felon is considered a state prison or local jail inmate. See Item 73 of Chapter 2 (Appropriation Act) of the 2022 Acts of Assembly, Special Session I.

The second step in judicial decision-making takes one of two forms, depending on the results of the judge's first decision. If the judge decided that the defendant should not receive a term in excess of six months, then the second step is to decide whether the defendant should get a shorter incarceration period (six month or less) or probation without an active term of incarceration. This decision is modeled by Section B of the Guidelines. If the judge determines that the defendant should receive incarceration beyond six months, which could include a prison term, the second step is to decide how long the incarceration sentence should be. Section C of the Guidelines models the sentence length decision. The total score computed on the Section C worksheet is equal to the number of months of incarceration the Guidelines recommend. This is defined as the midpoint recommendation. The preparer of the Guidelines must look up the Section C total score in a table to determine the low-end and high-end Guidelines recommendation. Together, these establish the recommended Guidelines range for the judge's consideration.

As noted in the previous section, Virginia's Guidelines were developed based on analysis of historical data. Previous analysis revealed that the factors considered by judges in making the first of the two decisions are not necessarily the same as the factors considered in making the second decision. Thus, just as the Guidelines factors vary by the type of offense at conviction, they also vary by the nature of the judicial decision. Of course, some very common factors, such as the number of counts of the most serious offense and the presence of additional offenses, often prove to be important in both decisions. However, analysis shows that the relative importance, or weight given to, a factor may vary considerably for the two decisions. With regards to fraud sentences, for example, prior criminal record has been more influential in the decision to impose a prison term than it has been in the decision concerning the actual incarceration length.

Two risk assessment instruments have been incorporated into Virginia's Guidelines. Pursuant to a 1994 mandate from the General Assembly, the Commission developed a risk assessment instrument applicable to nonviolent felons convicted in Virginia courts. The purpose is this risk tool is to identify the lowest risk nonviolent felons and recommend them for alternative punishments rather than traditional incarceration. The Commission's methodological approach to studying criminal behavior for risk assessment purposes is identical to that used in other scientific fields such as medicine. In medical studies, individuals are studied in an attempt to identify the correlates of the development of diseases. Medical risks profiles do not perfectly fit every individual. For example, some heavy smokers may never develop lung cancer. Groups are defined by having a number of factors in common that are statistically relevant to predicting the likelihood of repeat offending. These groups exhibiting a high degree of re-offending are labeled high risk. No risk assessment research can ever predict a given outcome with 100% accuracy. The goal is to produce an empirically-based instrument that is broadly accurate and provides useful additional information to decision makers.

A nonviolent offender risk assessment worksheet was developed based on the factors that were found to be statistically significant in predicting recidivism. After pilot testing and refining, risk assessment was implemented statewide on July 1, 2002. Following a new study of more recent felony cases, revised risk assessment instruments became effective July 1, 2013. The

risk assessment is completed in larceny, fraud and drug cases for defendants who are recommended by the Guidelines for incarceration. Defendants recommended by the Guidelines for probation with no active term of incarceration do not undergo risk assessment, as they are already recommended for a community-based sanction. Defendants must also meet the eligibility criteria for risk assessment evaluation (e.g., defendants with current or prior violent felony convictions are excluded from risk assessment). For defendants who score low enough on the risk scale, the Guidelines cover sheet indicates a dual recommendation for the judge:

- Traditional incarceration, as recommended by the felony offense Guidelines, and
- Alternative sanction, as recommended by the risk assessment instrument.

If the judge sentences according to the traditional incarceration recommendation or the risk assessment recommendation for an alternative sanction, the judge is considered in concurrence with the Guidelines. The judge is not considered as having departed from the Guidelines if he or she follows the risk assessment recommendation.

In 1999, the General Assembly directed the Commission to develop a second risk assessment instrument applicable to sex offenders. The sex offender risk assessment tool, based on the risk of re-offending, has also been integrated into the Guidelines. For this risk tool, the Commission studied felony sex offenders released from incarceration (or given probation) and identified factors correlated with recidivism. Offenders were tracked for 5 to 10 years in the community (previous studies found sex offenders recidivate over a longer period of time prior to detection compared to other offenders). With the sex offender risk assessment tool, sex offenders who score above a specified threshold are always recommended for incarceration longer than six months and the upper end of the recommended sentence range is increased depending on the individual's score on the risk assessment tool. The extension of the upper end of the Guidelines range gives judges flexibility to take risk into consideration, should they wish to do so, and still be in concurrence with the Guidelines. The midpoint recommendation and low end of the Guidelines range remain unchanged.

It is important to note that each Guidelines worksheet is unique. Each Guidelines worksheet may contain different factors than other worksheets and the points assigned to the same factors may be different on each worksheet. Generally, current offense factors on the Guidelines worksheet may include factors related to the:

- Primary offense,
- Additional offenses at conviction,
- Weapon use/possession,
- Victim injury, and
- Legal restraint at time of offense.

Prior record factors may include, but are not limited to, the:

- Type of prior violent record,
- Prior convictions/adjudications (based on the five most recent and serious sentencing events),
- Prior incarcerations/commitments,
- Prior felony person convictions/adjudications,
- Prior felony drug convictions/adjudications,
- Prior felony property convictions/adjudications,
- Prior misdemeanor convictions/adjudications, and
- Prior felony convictions/adjudications for same type of offense.

Virginia's Sentencing Guidelines are organized into 17 offense groups. This allows the Guidelines to be tailored for each specific offense category. The Guidelines factors found within a particular offense group are those which proved consistently important in determining historical sentences for that crime category. Since the scores and factors for each offense category were developed on the basis of only those offenses within the category, the system does not lend itself to comparisons across offense worksheets. That is to say, the Guidelines for each offense category are tailored to the scores within that category alone and are not interchangeable.

The 17 Sentencing Guidelines offense groups are listed below.

1. Assault
2. Burglary-Dwelling
3. Burglary-Other
4. Drug-Schedule I/II
5. Drug-Other
6. Fraud
7. Kidnapping
8. Larceny
9. Murder/Homicide
10. Sexual Assault (excluding rape, forcible sodomy, object sexual penetration, obscenity)
11. Sexual Assault-Obscenity
12. Rape (includes rape, forcible sodomy, and object sexual penetration)
13. Robbery
14. Traffic (felonies only)
15. Weapons/Firearms
16. Miscellaneous-Person/Property
17. Miscellaneous-Other

All Guidelines worksheets can be found on the Commission's website at http://www.vcsc.virginia.gov/worksheets.html. As an example, the Guidelines for Schedule I /II drug offenses can be found in Appendix C.

In Virginia, one Sentencing Guidelines form applies to the entire sentencing event. All offenses sentenced in the same court by the same judge at the same time are included in one sentencing event. Sentencing events are identified by the primary, or most serious, conviction offense, based on rules specified in the Virginia Sentencing Guidelines Manual. For Guidelines purposes, the most serious offense is the one that carries the highest statutory maximum penalty as specified in the *Code of Virginia*.

The Guidelines apply in approximately 95% of felony sentencing events in Virginia's circuit courts. There are a small number of felonies that are not covered by the Guidelines. This occurs when the offense is a relatively new felony or the number of convictions for the offense is insufficient for the Sentencing Commission to conduct the analysis necessary to develop Guidelines. If the most serious offense at sentencing is a misdemeanor, the Guidelines do not apply. The Guidelines do not have any effect on the statutory penalty ranges set in the *Code of Virginia*. The prison and jail sentences recommended by the Guidelines are for the effective sentence, which is the imposed sentence after any suspended time has been subtracted.

Methodological Approach to Analyzing Sentencing Outcomes

The general methodological approach to analyzing sentencing practices in Virginia was developed in 1987, when the concept of discretionary sentencing guidelines was first approved by the Judicial Conference of Virginia. The Sentencing Guidelines Committee of the Judicial Conference of Virginia approved the concept of discretionary guidelines that were descriptive of historical sentencing practices and reflective of the historical incarceration rate. This descriptive approach to developing Guidelines makes Virginia unlike most states that have established sentencing benchmarks for judges.

In the first stage of the study, the Commission is collecting and reviewing recent literature including scholarly articles, government reports, judicial surveys, and any other sources relevant to judicial sentencing. The reviews provide information about the most pertinent legal and extralegal factors that may influence different sentencing decisions. Furthermore, the literature review will be useful in identifying critical research areas in recent academic studies. Lastly, this process is also important to highlight statistical techniques used in recent sentencing research that may improve the current methodology.

In developing sentencing models, two analysts examine each offense group but work independently of one another. Analysts may employ different statistical methods and work with the different sets of independent and dependent variables. Each analyst's model building is expected to have its own strength and shortcomings. The analysts then meet with other researchers to review differences between the models and develop approaches to reconciling the models or integrating the models into one. This approach minimizes the likelihood that implicit bias attributable to any one analyst makes its way into the final model, and this process is likely to produce a more stable final model by reducing the variance in the predictions of sentencing outcomes. The goal is to produce final models that are improved over models developed by any single analyst.

In the Commission's analyses, the most recent five years of available data is typically used to examine sentencing practices. Using the five years of data captures the most recent sentencing patterns, minimizes year-to-year fluctuations, and reduces the likelihood of spurious results in the sentencing models. Sentencing models are developed for each offense group and by type of judicial sentencing decision. For each offense category, the first sentencing model is based on the judge's decision as to whether or not the defendant should receive a longer incarceration term (such as a prison term). This is often referred to as the "in/out" decision. For cases in which the judge did not order a longer incarceration term, the second model is based on the judge's decision as to whether the defendant should get a shorter incarceration sentence (i.e., jail) or probation without an active term of incarceration. If the judge determined that a longer term of incarceration was appropriate in the case, the next sentencing model analyzes the sentence length decision. Under Virginia's descriptive approach, ranges recommended by the Guidelines are designed to reflect the middle 50% of historical sentences (the 25% extreme low and high sentences are excluded).

In analyzing sentencing data and developing sentencing models, the Commission applies commonly-used statistical techniques that include, but are not limited to, forms of logistic regression, discriminant analysis (e.g., linear discriminant analysis), and ordinary least squares (OLS) regression. The application of a particular statistical technique depends on the type of judicial sentencing decision under examination. Logistic regression is a statistical technique used to identify factors that best discriminate between two groups (e.g., defendants sentenced to prison and defendants not sentenced to prison, or defendants sentenced to jail versus probation without incarceration). An analyst can easily determine which factors are statistically significant in the sentencing model. The results of logistic regression are usually in terms of the log of the odds (e.g., the increase in the odds ratio of winning the state lottery per unit change in a predictor variable). When using this type of technique, however, the estimations must be converted from log-odds to a more readily interpretable form. Moreover, the logit function is not linear with respect to the predictor variables, making interpretation of the effect of each factor more complex, especially if the estimated predictor is not a binary variable. For this reason, other techniques may be used to assist in determining the independent effect of each factor found to be statistically significant in the logistic regression model. Discriminant analysis and similar feature/variable selection techniques (e.g., principal component analysis) may be used to identify factors that best discriminate among two or more groups. As it emphasizes more on the classification, discriminant analysis does not require a strong assumption about the distribution of the cases. If the linear discriminant analysis is incorporated, the classification involves linear boundaries. Therefore, it is relatively simple to implement, and the projected classification is very robust. The factors identified in the model maximize the separation of the classifications (e.g., probation, jail, or prison sentences). Determining which factors are statistically significant is more difficult than with logistic regression but estimating the relative importance of each factor is more straight forward than with logistic regression. Therefore, these techniques may be used on conjunction with each other to identify the statistically significant factors in judges' "in/out" decisions and the independent effect of each factor relative to others in the model.

Once the statistically significant factors are identified, only the legal factors are considered as factors for Guidelines worksheets. Factors such as race, education, and employment status would never be considered appropriate for a Guidelines worksheet. Worksheet scores are developed based on the factors in the model and their relative importance to one another. In other words, the number of points assigned for each factor reflects its relative importance in the final sentencing model.

On Section A, factor weights tend to be small because the in/out model simply determines if a defendant will be recommended for more than six months of incarceration versus a lesser sanction. Factor weights are adjusted so that the smallest score value will be at least one point. This process is referred as "standardizing." Since standardizing simply places the factors on the same scale, the relationships among the factors remain the same. After standardizing, the factor weights are used to develop worksheet scores. These types of techniques are used to model the decision to order a longer term of incarceration or not ("in/out") and the decision to order a short jail sentence versus a period of probation without incarceration. The rates at which defendants are recommended by the Guidelines for incarceration in jail or prison reflect the rate at which defendants have received those types of dispositions during the time period analyzed. That is to

say, the Guidelines are designed to recommend the same proportion of defendants for incarceration as historically received such a disposition. The Guidelines are not designed to recommend more or fewer people for incarceration.

Another set of regression techniques (typically Ordinary Least Squares, or OLS, regression) is used to model the sentence length decision for cases that resulted in a longer term of incarceration. This stage of analysis includes only those cases that received a sentence longer than six months. OLS and related regression techniques are used to identify factors (e.g., weapon use, victim injury, etc.) that influence a outcome measure (e.g., sentence length). OLS regression is a very common analytical technique used to quantify the association between explanatory and dependent (outcome) variables. This type of method is appropriate since the dependent variable is the length of the sentence while explanatory and control factors are constructed as binary or continuous. There are several advantages of using the OLS method. For example, the OLS provides a simple interpretation for the relationship between the explanatory and dependent variables, as the estimated coefficient value directly reflects the magnitude of the change in the dependent variable with a unit change of the explanatory (independent) variable. Under classical assumptions[10], the OLS produces the best unbiased linear estimations of the predictive power of the regression model (Wooldridge 2015; Angrist and Pischke 2009)[11]. Moreover, the multivariate OLS regression can address the biased estimations of the legal predictors by including controls for the set of extralegal offender characteristics (gender, age, etc.) that may confound the relationship between the predictors and dependent variables. Results are calculated by minimizing the model's prediction error. The analyst can easily determine which factors are statistically significant and interpretation of the effect of each variable is straight forward. Furthermore, even if the normality assumption of a dependent variable, such as sentence length, is violated, OLS regression can still perform well and generate the robust estimators. For instance, if OLS regression with robust standard errors is conducted with the sufficient sample size, it can still produce the unbiased parameter estimations. Worksheet scores are developed from the weights of factors in the model. For the sentence length model (Section C), the score represents months of incarceration. Once the worksheets have been developed, it is necessary to develop the recommendation ranges. For Section C, the recommended ranges generally reflect the middle 50% of defendants with that same offense/prior record profile.

In sum, the Commission conducts rigorous statistical analysis to thoroughly test many variables for inclusion in the empirical models. Through the various model specifications, the variables that consistently have significant effects on sentencing outcomes are chosen. Then, the Commission utilizes the set of scoring factors and control variables in the final models to develop the Guidelines worksheets and assign the appropriate points for each factor on the worksheet.

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[10] There are several assumptions for OLS regression. First, all parameters in the regression model reflect the linear pattern. Second, the population mean of errors term is zero. Third, independent variables are not correlated with the model's error term. Fourth, the errors terms are not correlated with each other. Fifth, the error term has a constant variance (homoscedasticity). Lastly, no independent variable is the perfect linear function of other independent variables (no perfect multicollinearity).
[11] Wooldridge, J. M. (2015). Introductory econometrics: A modern approach. Cengage learning. Angrist, J. D., & Pischke, J. S. (2009). Mostly harmless econometrics: An empiricist's companion. Princeton university press.

Data Sources for the Guidelines Re-analysis Study

To fulfill its legislative mandates, including development of discretionary Sentencing Guidelines, the Commission requires criminal case information of the highest quality. Unfortunately, there is currently no universal source of information for felony cases in the Commonwealth. Pre-sentence Investigation (PSI) reports can be ordered by Circuit Court judges and these will be prepared and submitted to the court prior to sentencing. While PSIs contain a wealth of information regarding the offense, the defendant and his or her criminal record, PSIs are not completed for all felony cases and, in fact, are prepared in only 40%-45% of felony sentencing events in Virginia. Furthermore, judges in some jurisdictions order PSIs at a higher rate than those in other areas; therefore, the PSIs that are completed do not provide an accurate representation of sentencing statewide.

To address the critical need for information, the Commission approved a Case Details Worksheet that was 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 Case Details Worksheet is shown in Figure 2 on page 17.

The majority of the Case Details Worksheet captures details of the offense(s) that must be known to accurately score the Guidelines, as well as other elements that judges have indicated as relevant in the sentencing decision. The last question on the Case Details Worksheet 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 PSI report ordered by the court). Information for the last question 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 are asked to complete the Sentencing Guidelines Cover Sheet and the Case Details Worksheet. This is extremely important, as the information will assist the Commission in developing Sentencing Guidelines for offenses not currently covered by the Guidelines system.

Essentially, the Case Details Worksheet is designed to provide the court and the Commission with details related to the offense(s) and the defendant similar to that contained in a PSI report. In addition, the Case Details Worksheet will provide critically important details that are not consistently available in other criminal justice data systems, including the value of property stolen in larceny, fraud and burglary cases, the types and quantities of drugs involved in narcotics cases, and the age of victims in person crimes, such as rape. This worksheet was

implemented on July 1, 2021, and it will require two years to accumulate sufficient data for the Commission's analysis. Based upon the information gathered through this worksheet, the Commission will be able to recommend revisions to the Guidelines to ensure that they reflect to most accurate benchmark of the typical sentencing outcome in similar cases. Unfortunately, Guidelines received by the Commission since implementation reveal that the Case Details Worksheet, in many cases, is either missing or incomplete. The Commission is working with judges, Commonwealth's Attorneys and Probation Officers to ensure that this vital information sheet is completed in every felony sentencing event.

Other data sources also will be used to supplement the Commission's own Guidelines and Case Details Worksheet data. The Commission will request criminal history record information for the defendants included in the analysis from the Virginia State Police. These records will be used to compute a number of measures of criminal history for each defendant in order to better understand the length, depth, breadth and recency of the individual's criminal record.[12] All Guidelines worksheets include at least one measure of prior record and most worksheets include multiple prior record factors. It is important to examine how judges weigh various aspects of prior record in their sentencing decisions.

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[12] It should be noted that the records from the Virginia State Police only reflect prior in-state (Virginia) criminal history records of defendants. Nevertheless, the information will provide the significant information about the various aspects of prior record at the aggregate level.

Figure 2
Sentencing Guidelines' Case Detail Worksheet

Sentencing Guidelines
Case Details Worksheet

SWIFT/DCN: _____

1. Defendant's Name: _____

2. **Defendant Information:** Gender: _____ Race: _____ Ethnicity: _____ Age: ____ Handicapped: ____ Unknown _____

3. **Type of Counsel:** ❑ Retained ❑ Court Appointed ❑ Public Defender ❑ Other ❑ Unknown

4. **Pretrial Status:** ❑ Secured Bond ❑ Unsecured Bond ❑ Own Recognizance ❑ Confinement ❑ Third Party Release ❑ Unknown

5. **Pretrial Supervision by Pretrial Services Agency:** ❑ No ❑ Yes ❑ Yes, ordered but did not complete/attend ❑ Unknown

6. **Posttrial Status:** ❑ Secured Bond ❑ Unsecured Bond ❑ Own Recognizance ❑ Confinement ❑ Third Party Release ❑ Unknown

7. **Source of Bond:** ❑ Personal ❑ Family ❑ Other ❑ Bonding Company ❑ N/A ❑ Unknown

8. **Total Time Served Prior to Sentencing:** Years_____ Months _____ Days _____ ❑ N/A

9. **Number of Codefendants:** _____

10. **Legal Status at Offense** *(check all that apply)*:
❑ Escaped ❑ Inmate ❑ Mandatory Parole ❑ Discretionary Parole
❑ Geriatric Release - § 53.1-40.01 ❑ Post Release - §19.2-295.2 ❑ Probation ❑ Bond
❑ Recognizance ❑ Community Program ❑ Pre-Trial Supervision ❑ Good Behavior ❑ Unknown
❑ Juvenile Probation ❑ Juvenile Parole ❑ Summons ❑ Other _____ ❑ None

11. **Weapon Use:** ❑ None ❑ Possessed ❑ Used to Injure ❑ Used to Threaten (by voice, note, text, etc.) ❑ Unknown
12. **Weapon Type:** ❑ Firearm ❑ Knife ❑ Explosive ❑ Simulated/Feigned Weapon ❑ Blunt Object
❑ Note/Verbal ❑ Vehicle ❑ Animal ❑ Other_____ ❑ N/A

13. **Offender's Role** ❑ Alone ❑ Leader ❑ Accomplice ❑ Police Officer/LEO ❑ Not Determined ❑ Unknown

14. **Value of Property Taken/Damaged:** Highest value for one item $_____ Total value of all items $ _____ ❑ N/A

15. **Location:** ❑ Bank ❑ Business ❑ Residence ❑ Street/Outside ❑ Automobile ❑ Other_____ ❑ N/A

16. **Injury to Victim:** ❑ Death ❑ Life Threatening ❑ Serious Physical ❑ Physical
❑ Emotional ❑ Threatened ❑ None ❑ N/A

17. **Victim Relationship to Offender:** ❑ None/Stranger ❑ Known ❑ Friend
❑ Family ❑ Police Officer/LEO ❑ Other _____ ❑ N/A

18. **Victim Information:** Gender: _____ Race: _____ Ethnicity: _____ Age: _____ Handicapped: _____ ❑ Unknown

19. **Type of Primary Drug:** _____ Quantity: _____ Unit: _____ ❑ N/A

20. **Number of Felony Juvenile Adjudications:** Person ____ Property ____ Drug ____ Other ____ ❑ None ❑ Unknown

Source for Question #21: ❑ Defense Attorney ❑ Defendant ❑ PSI/PSR ❑ Commonwealth's Attorney ❑ Probation Officer
❑ Information is not available

21. Other factors known at the time of sentencing *(check all that apply)*	Yes	Treatment: (in or completed treatment)
a. Drug abuse (admitted, family information, documented in reports)	❑	❑ prior to offense ……………❑ after arrest
b. Alcohol abuse (admitted, family information, documented in reports)	❑	❑ prior to offense …………❑ after arrest
c. Mental health issues (admitted, family information, documented in reports)	❑	❑ prior to offense …………❑ after arrest
d. Under the Influence of drugs/alcohol at the time of the offense	❑	

e. **Employment** ❑ Full or part-time for at least 18 months ❑ Full-time student ❑ Disabled
(Last 2 years): ❑ Stay-at-home spouse/parent ❑ Retired ❑ Unemployed/Not stable

f. **Housing (Last 2 years):** ❑ Stable/same residence 1+ yrs ❑ Multiple Changes ❑ Homeless at the time of the offense

g. **Provides support:** Enter Number dependents or family members supported _____

h. **Education:** ❑ Less than High school ❑ High school/GED ❑ Technical Training ❑ Some College
❑ College Degree ❑ Post-graduate/Professional ❑ Currently Enrolled (School, College Training)

i. **Military:** ❑ Active ❑ Reserve ❑ Honorably Discharged ❑ Undesirable Discharge
❑ Medical Discharge ❑ General Discharge ❑ Bad Conduct Discharge

j. **Defendant's** ❑ Accepts Responsibility ❑ Sought Treatment ❑ Developed Rehabilitation Plans
Response: ❑ Remorseful ❑ Paid All or Part Restitution

k. **Other:**_____

Concurrence with and Departures from Virginia's Sentencing Guidelines
FY2018-FY2022

The Sentencing Commission was created "to assist the judiciary in the imposition of sentences by establishing a system of discretionary guidelines and to establish a discretionary sentencing guidelines system which emphasizes accountability of the offender and the criminal justice system to the citizens of the Commonwealth" (§ 17.1-801). Virginia's Sentencing Guidelines were developed to provide sentence recommendations based on historical practices, using information regarding the nature of the current offense(s) and a defendant's criminal history. Under the current truth-in-sentencing/no-parole system, Guidelines recommendations for nonviolent offenders with no prior record of violence are tied to the amount of time they served prior to the abolition of parole in 1995. In contrast, offenders convicted of violent crimes, and those with prior convictions for violent felonies, are subject to Guidelines recommendations up to six times longer than the historical time served in prison by similar offenders under the parole system. In over a half-million felony cases sentenced under truth-in-sentencing/no-parole laws, judges have agreed with Guidelines recommendations in more than three out of four cases.

Prior to the onset of the COVID pandemic, Virginia's Circuit Courts handled approximately 25,000 felony sentencing events per year (Figure 3). The number of felony sentencing events during the pandemic has been lower than pre-pandemic figures. The pandemic and response policies implemented to mitigate the spread of the virus had an impact on the criminal justice system in a number of ways, including the workflow within the courts and clerks' offices. In addition to COVID, the reduction in felony cases may also be associated with changes in arrest patterns and the policies, charging decisions, and plea agreement practices of prosecutors. It remains unclear as to when, and to what extent, the criminal justice system will return to pre-pandemic levels or trends. During the most recent five-years (FY2018-FY2022), the Commission received Sentencing Guidelines worksheets for 113,036 felony sentencing events. The FY2022 figure is preliminary and will increase if additional forms are received from circuit court clerks.

Figure 3
Number of Felony Sentencing Events in Virginia, FY2013-FY2022
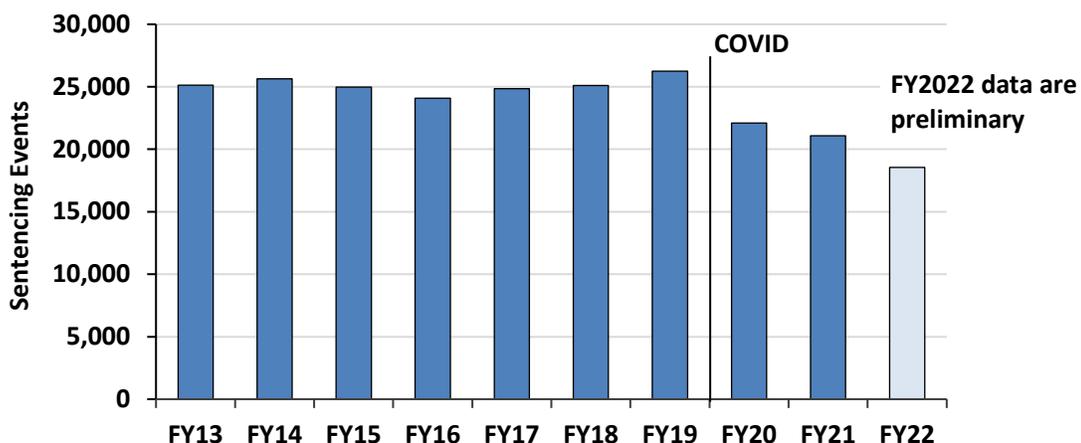
Source: Sentencing Guidelines Database (downloaded September 9, 2022)

In Virginia, judicial compliance with Sentencing Guidelines is voluntary. Judges are free to depart from the Guidelines in any case they feel the circumstances warrant it. As specified in § 19.2-298.01(B), if the judge orders a sentence outside of the Guidelines recommended range, he or she must file a written explanation of the departure. The overall concurrence rate summarizes the extent to which Virginia's judges concur with the Sentencing Guidelines that have been developed by the Commission, both in type of disposition and in length of incarceration. The Commission measures judicial agreement with the Guidelines using two classes of concurrence: strict and general. Together, they comprise the overall Guidelines concurrence rate. For a case to be in strict concurrence, the offender must be sentenced to the same type of sanction that the Guidelines recommend (probation, incarceration up to six months, incarceration for more than six months) and to a term of incarceration that falls exactly within the sentence range recommended by the Guidelines. General concurrence is comprised of cases considered by the Commission to be in concurrence with the Guidelines due to the nonviolent offender risk assessment, sex offender risk assessment, time served by defendant awaiting trial, the Commission's modest rounding allowance, or the judge's use of the First Offender option for drug offenders as authorized under § 18.2-251.

Concurrence by rounding provides for a modest rounding allowance in instances when the active sentence handed down by a judge or jury is very close to the range recommended by the Guidelines. For example, a judge would be considered in concurrence with the Guidelines if he or she gave an offender a two-year sentence based on a Guidelines recommendation with a high end of 1 year 11 months. In general, the Commission allows for rounding of a sentence that is within 5% of the Guidelines recommendation. When risk assessment for nonviolent offenders is applicable, a judge who sentences a recommended offender to an alternative punishment option is considered in concurrence with the Guidelines. When recommended by the sex offender risk assessment, the judge may sentence a defendant within an extended upper range and doing so is considered in concurrence with the Guidelines. Time served concurrence is intended to accommodate judicial discretion and the complexity of the criminal justice system at the local level. A judge may sentence an offender to the amount of pre-sentence incarceration time served in jail when the Guidelines call for a short jail term. Even though the judge does not sentence an offender to serve incarceration time after sentencing, the Commission typically considers this type of case to be in concurrence. Conversely, a judge who sentences an offender to time served when the Guidelines call for probation also is regarded as being in concurrence with the Guidelines because the offender was not ordered to serve any period of incarceration after sentencing.

This section of the report details the rates of concurrence with, and departures from, Virginia's Sentencing Guidelines. For most of the last decade, the overall concurrence rate with the Guidelines has hovered around 80%, with relatively balanced departures above and below the Guidelines recommended range (Figure 4).

Figure 4
Concurrence with and Departures from Virginia's Sentencing Guidelines, FY2013-FY2022
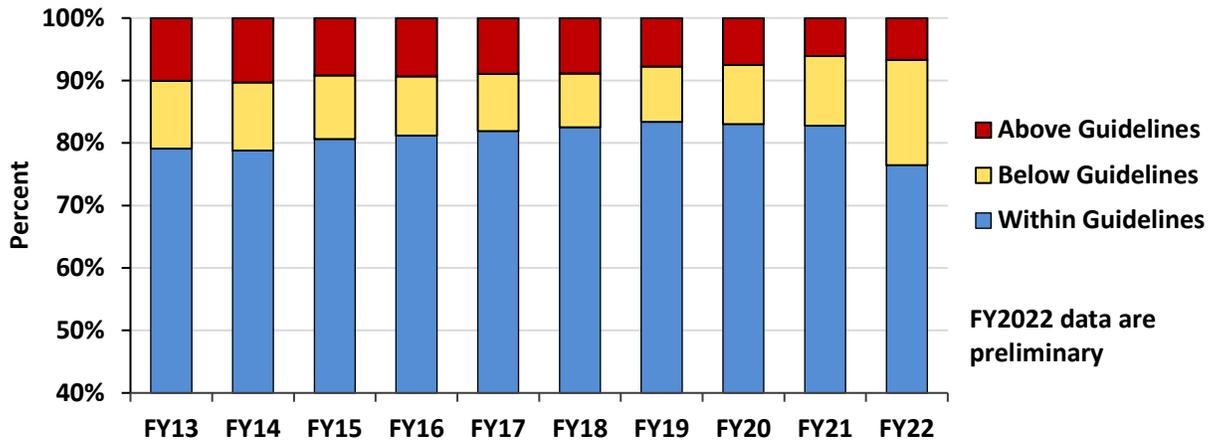
Source: Sentencing Guidelines Database (downloaded September 9, 2022)

The remainder of this report focuses on the period of FY2018 through FY2022. Using five years of data reflects recent sentencing practices, minimizes the effect of year-to-year fluctuations, and typically captures sufficient numbers of cases for nearly all offenses under examination. The analysis in this report excludes Guidelines worksheets incorrectly submitted for offenses that are not covered by the Guidelines (n=2,286) and worksheets containing errors or omissions that affect the analysis of the case (n=1,115). The remaining 109,635 felony sentencing events are analyzed. During FY2018-FY2022, the overall concurrence rate was 81.9%.[13] In 7.5% of the felony sentencing events, the judge's sentence was an upward departure from the Guidelines recommendation. Downward departures from the Guidelines accounted for 10.7% of the felony sentencing events during the five-year period.[14]

Dispositional concurrence is defined as the degree to which judges agree with the type of sanction recommended by the Guidelines (probation/no incarceration, incarceration one day to six months, or incarceration of more than six months). Overall, the correspondence between dispositions recommended by the Guidelines and the actual dispositions imposed in Virginia's circuit courts is quite high. For instance, among all felony offenders recommended for more than six months of incarceration during FY2018-FY2022, judges sentenced 83% to terms in excess of six months (Figure 5). Some offenders recommended for incarceration of more than six months received a shorter term of incarceration (one day to six months) or probation with no active incarceration, but the percentage of offenders receiving such dispositions was small. Also, 78.4% of offenders received a sentence resulting in confinement of six months or less when such a sanction was recommended. In some cases, judges felt probation to be a more appropriate sanction (14.1%) than the recommended jail term and, in other cases, offenders recommended for short-term incarceration received a sentence of more than six months (7.5%). Finally, 77.6% of offenders whose Guidelines recommendation called for no incarceration were given probation and no post-dispositional confinement. Some offenders with a "no incarceration" recom-

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[13] Data for FY2022 are preliminary as of September 9, 2022.
[14] Percentages may not add to 100% due to rounding.

mendation received a short jail term of less than six months (19.3%), but rarely did these offenders receive an incarceration term of more than six months (3.2%).

Figure 5
Dispositional Concurrence:
Recommended versus Actual Dispositions, FY2018-FY2022

Recommended Disposition	Actual Disposition		
	Probation/ No Incarceration	Incarceration 1 day- 6 months	Incarceration > 6 months
Probation/No Incarceration	77.6%	19.3%	3.2%
Incarceration 1 day- 6 months	14.1%	78.4%	7.5%
Incarceration > 6 months	7.5%	9.0%	83.5%

Source: Sentencing Guidelines Database (downloaded September 9, 2022)

While overall concurrence is quite high and, overall, departures above and below the Guidelines are roughly balanced in most years, concurrence rates and departure patterns vary by offense group. In general, property and drug offenses exhibit higher rates of concurrence than the violent offense categories (Figure 6). During FY2018-FY2022, four violent offense groups (i.e, Murder/Homicide, Rape, Robbery, and Sexual Assault) had concurrence rates below 70%, whereas most of the property and drug offense groups had concurrence rates well above 80%.

Figure 6
Concurrence and Departures by Guidelines Offense Group, FY2018-FY2022

Guidelines Offense Group	Number of Events	Sentencing Outcome		
		Within Guidelines	Below Guidelines	Above Guidelines
Assault	7,260	76.7%	13.0%	10.3%
Burglary – Dwelling	2,316	71.7%	15.2%	13.2%
Burglary – Other	1,451	77.3%	16.2%	6.5%
Drugs – Schedule I or II	48,696	85.1%	9.3%	5.6%
Drugs – Other	3,560	85.3%	8.1%	6.5%
Fraud	6,376	83.9%	11.9%	4.2%
Kidnapping	632	75.3%	9.7%	15.0%
Larceny	17,762	83.4%	11.0%	5.6%
Miscellaneous – Other	1,929	81.4%	13.6%	5.0%
Miscellaneous – Person & Property	2,166	75.5%	10.0%	14.5%
Murder/Homicide	1,144	66.6%	11.3%	22.1%
Obscenity	1,184	71.3%	9.9%	18.8%
Rape, Forcible Sodomy, Obj. Sex. Pen.	740	68.6%	14.2%	17.2%
Robbery	1,770	69.8%	21.8%	8.5%
Sexual Assault	1,434	66.8%	9.1%	24.1%
Traffic	6,756	79.6%	10.6%	9.7%
Weapon	4,459	76.4%	11.5%	12.1%
Overall	109,635	81.9%	10.7%	7.5%

Source: Sentencing Guidelines Database (downloaded September 9, 2022)

Figure 6 does not include FY2022 sentencing events in which Robbery (§ 18.2-58) was the most serious offense. The 2021 General Assembly passed legislation to create degrees of punishment for robbery based on the elements of the offense (House Bill 1936, 2021 General Assembly, Special Session I). Robbery (§ 18.2-58) was previously punishable by imprisonment of five years to life. The effect of the legislation was to reduce the maximum penalty for completed robbery offenses except in cases involving serious bodily injury or death. The classes of robbery created by the legislation are very different than the way robbery had been delineated in the Sentencing Guidelines. Current data are insufficient to perform the analysis necessary to develop Guidelines based on the new classes of robbery. Further, it is not known how charging practices or sentencing patterns for robbery will evolve under the new penalty structure. Most likely, the Guidelines previously used (prior to FY2022) will not accurately reflect the typical or average robbery outcomes based on the new classifications. For these reasons, the Commission determined that robbery (§ 18.2-58) would no longer be covered as a primary offense under the Guidelines until a full analysis of sentencing under the new penalty structure can be completed. For FY2022, only carjacking (§ 18.2-58.1) sentencing events are included in the table for the Robbery offense group.

When the parole-abolition legislation took effect on January 1, 1995, a state-responsible prison sentence was defined as a sentence greater than six months.[15] Pursuant to § 17.1-805, whenever the Guidelines call for an incarceration term exceeding six months, scoring enhancements ensure that the sentences recommended for violent felons are significantly longer than the time they typically served in prison under the parole system (prior to 1995). Defendants convicted of nonviolent crimes with no history of violent offenses are not subject to any scoring enhancements and the Guidelines recommendations for these defendants result in periods of confinement that approximate the average time served by nonviolent offenders prior to the abolition of parole (1995). Approximately one in five felony defendants receives an enhancement on the Guidelines either because the current offense is violent or because he or she has previously been convicted of a violent offense. Violent offenses for the purposes of Guidelines are defined in § 17.1-805(C) and a defendant's prior record is categorized based on the seriousness of the prior violent felony offense, as measured by the statutory maximum penalty in *Code*. A Category I prior record, the more serious type, is defined as having any prior conviction or juvenile adjudication for a violent crime with a statutory maximum penalty of 40 years or more. A Category II prior record, the less serious type, is defined as having any prior conviction or juvenile adjudication for a violent crime with a statutory maximum penalty less than 40 years. The enhancements increase the Section C score assigned to the primary (most serious) offense in the sentencing event. Since 1995, § 17.1-805 has prescribed the size of enhancements to be incorporated into the Guidelines. The table in Figure 7 lists the enhancements specified in that *Code* section.

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[15]   In 1997, the definition of a state-responsible prison sentence was revised to be a sentence of one year or more. While a sentence of one year or more is defined as a state-responsible prison sentence, a sentence of 12 months or less is defined as a local-responsible jail sentence. The wording of the court order is critically important in determining if a felon is considered a state prison (sentence of one year or more) or local jail inmate (sentence of 12 months or less). See Item 73 of Chapter 2 (Appropriation Act) of the 2022 Acts of Assembly, Special Session I.

Figure 7
Sentencing Guidelines Midpoint Enhancements Specified in *Code of Virginia* § 17.1-805

Category II prior record: Prior violent felony conviction with a statutory maximum
penalty of less than 40 years
Category I prior record: Prior violent felony conviction with a statutory maximum
penalty of 40 years or more

How the enhancements apply:
The enhancements increase the Section C score assigned to the primary (most serious)
offense in the sentencing event. These enhancements represent the percent increases
over the historical time served in prison by offenders convicted of the same offenses
who served their sentences under Virginia's parole system (1988-1992).

Primary (Most Serious) Offense at Sentencing for Current Event	Magnitude of Enhancements Specified in § 17.1-805		
	Current Offense Enhancement	Prior Record Enhancement	
		Category II record	Category I record
First-degree murder	125%	300%	Guidelines recommend life
Second-degree murder	125%	300%	500%
Rape, forcible sodomy, object sexual penetration, and aggravated sexual battery	125%	300%	500%
Voluntary manslaughter	100%	300%	500%
Robbery	100%	300%	500%
Aggravated malicious wounding or malicious wounding,	100%	300%	500%
Burglary of dwelling house or statutory burglary of dwelling house	100%	300%	500%
Burglary committed while armed with a deadly weapon or any statutory burglary committed while armed with a deadly weapon	100%	300%	500%
Manufacturing, selling, giving, distributing, or possessing with intent to distribute a Schedule I or II drug	None	200%	400%
All other felony offenses not specified above	None	100%	300%

While Virginia's Circuit Court judges concur with the Guidelines at a high rate overall, data show that judges often depart in cases involving midpoint enhancements integrated into the Guidelines pursuant to § 17.1-805. Examination of sentencing patterns suggests that judges do order longer terms for defendants with convictions for violent felonies; however, in many cases, judges do not concur with the magnitude of the enhancement specified in *Code*. When no

enhancements apply, judges concur with the Guidelines in nearly 85% of the cases (Figure 8). When enhancements do apply, judges concur at a much lower rate – less than 71%. When judges depart in midpoint enhancement cases, they nearly always sentence below the range recommended by the enhanced Guidelines (23.4% downward departures versus only 6.1% upward departures). The Commission's new study will include a detailed examination of these cases and other areas of the Guidelines in which judges depart at a higher-than-average rate.

Figure 8
Concurrence and Departures from Virginia's Sentencing Guidelines
by Events with and without Midpoint Enhancement, FY2018-FY2022

Events without Midpoint Enhancements

Above Guidelines 7.8%

Below Guidelines 7.7%

Within Guidelines 84.5%

Events with Midpoint Enhancements

Above Guidelines 6.1%

Below Guidelines 23.4%

Within Guidelines 70.6%
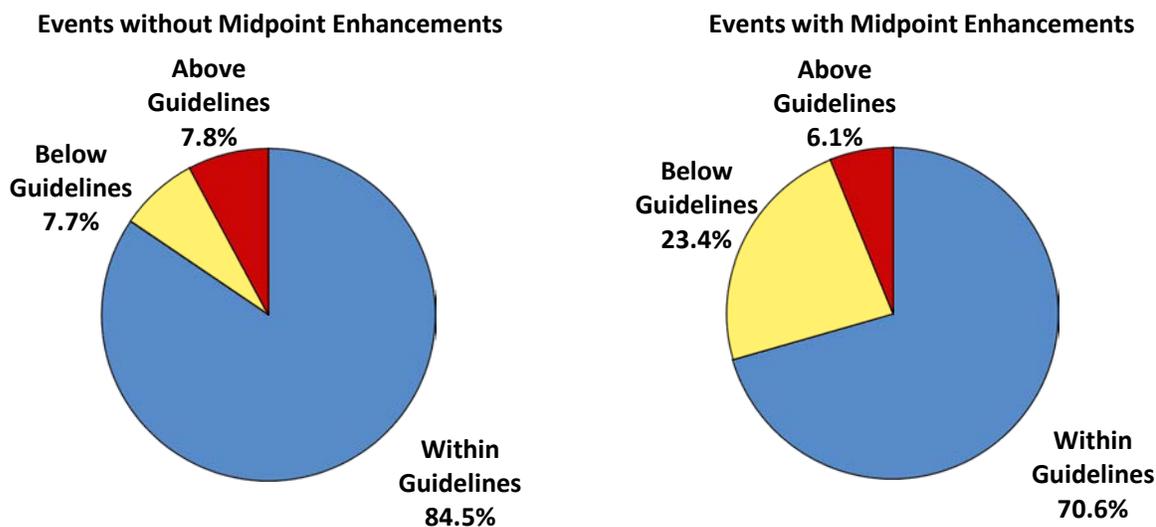
Source: Sentencing Guidelines Database (downloaded September 9, 2022)

Although not obligated to sentence within Guidelines, judges are required by § 19.2-298.01 of the *Code of Virginia* to submit to the Commission their written reason(s) for sentencing outside the Guidelines range. The *Code* does not specify any minimum criteria for departure explanations; therefore, judges are not limited to any standardized set of departure reasons. Judges may report more than one departure reason and the Commission's data system captures up to three departure reasons per sentencing event. The most frequently cited departure explanations are shown in Figure 9. For both downward and upward departures from the Guidelines, judges most often cite the acceptance of a plea agreement between the Commonwealth's attorney and the defendant. Plea agreement is cited in 34.2% of the below-Guidelines departures and 33.3% of above-Guidelines departures. After plea agreement, judge most frequently refer to a sentence recommendation from the Commonwealth's attorney, the unusual circumstances of the crime, the defendant's cooperation with authorities in apprehending or prosecuting others, and the defendant's medical or mental issues when sentencing below the Guidelines recommended range. Other than plea agreement, judges most often report upward departure reasons associated with the aggravated circumstances/facts of the case, other offenses or counts that were reduced or not prosecuted, the judge's imposition of a jury-recommended sentence, and the defendant's record of convictions for the same or similar crimes.

Figure 9
Most Frequently Reasons Cited by Judges for
Departing from the Guidelines Recommendation

Sentencing Events with DOWNWARD Departures: Most Frequently-Cited Reasons	Percentage of sentencing events in which this reason was cited
Plea agreement between Commonwealth and defendant	34.2%
Sentence was recommended by the CA; joint recommendation, oral recommendation	8.2%
Unusual circumstances of the crime; mitigating circumstances, facts of case, evidence supports	7.6%
Cooperated with authorities in apprehending or prosecuting others; substantial assistance	6.0%
Medical or mental issues of the defendant	5.1%
Offender shows remorse; accepts responsibility	3.5%
Will serve a sentence in another jurisdiction or another case or will be extradited	3.5%
Made progress in rehabilitating himself since the commission of the offense	3.3%
Witness refused to testify, could not be located or offered testimony lacking credibility	3.3%
Victim agrees, victim or family wants a lenient sentence or wants to expedite case	3.1%

Sentencing Events with UPWARD Departures: Most Frequently-Cited Reasons	Percentage of sentencing events in which this reason was cited
Plea agreement between Commonwealth and defendant	33.3%
Aggravated circumstances; facts of the case; flagrancy or seriousness of offense	21.0%
Counts dropped in plea; additional charges not prosecuted, reduced, nolle prossed	15.7%
Sentence was recommended by a jury	3.9%
Multiple convictions for similar offenses in a short period; prior convictions for same type of offense	3.4%
The sentence was recommended by the Commonwealth; joint recommendation	3.2%
Defendant has extensive criminal history, prior record	3.2%
Neither shows remorse nor accepts responsibility, in denial	2.9%
Violated the First Offender Statute 18.2-251,18.2-258.1, etc.	2.4%
The offense involved a drug amount or quantity or purity level substantially greater than typical	2.2%

On the following pages, the concurrence and departure rates are presented for each offense group, and each crime within the offense group, for the period of FY2018-FY2022. Concurrence and departure rates are shown separately for events in which prior record enhancements do not apply and events in which prior record enhancements do apply. Figures are further broken down by the type of prior enhancement. The tables shown below exclude offenses with fewer than 20 sentencing events during the last five fiscal years; however, those offenses will be examined as part of the Commission's overall study. The Drug offense tables are presented first, as drug crimes have accounted for the largest share of felony sentencing events during the last five fiscal years. Property offense tables are then presented, followed by crimes against the person and, finally, miscellaneous offenses.

Concurrence rates with Guidelines recommendations and patterns of departure from the recommended ranges provide some insight into current judicial thinking and suggest ways in which the Guidelines may need to be refined. Generally, concurrence rates and departure patterns indicate that the Guidelines for many offenses are very much in line with current judicial thinking when midpoint enhancements do not apply. In cases in which midpoint enhancements apply, judges depart at higher rates. This suggests that the Commission should examine such cases closely as part of its upcoming Guidelines study. Generally, relatively low concurrence with a significant number of downward departures could suggest that the Guidelines for a particular offense may need to be refined downward to better reflect judicial thinking. Conversely, relatively low concurrence with a significant number of upward departures could suggest that the Guidelines for that offense should be refined upward. Analysis of Guidelines concurrence and departure patterns alone does not indicate definitively the direction in which the Guidelines for a specific offense may be revised when all of the supplemental data are collected and all factors are analyzed together. Nonetheless, review of Guidelines concurrence and departure patterns, as well as the reasons judges cite when departing from the Guidelines, is informative and will be useful for the Commission's upcoming study.

Following the data tables, the report concludes with an overview of the Commission's next steps for the re-analysis project.

			Sentencing Outcome		
Most Serious Offense at Sentencing		**Guidelines Prior Record Enhancement**	**Number of Events**	**Within Guidelines**	**Below Guidelines**	**Above Guidelines**
18.2-248(C)	Distribute Schedule I/II drug, provide, give (to be resold by others)	None	2919	84.5%	9.2%	6.3%
		Category II	477	57.9%	39.6%	2.5%
		Category I	135	51.1%	48.1%	.7%
18.2-248(C)	Manufacture Schedule I/II drugs	None	18	66.7%	22.2%	11.1%
		Category II	5	60.0%	40.0%	0.0%
		Category I	1	0.0%	100.0%	0.0%
18.2-248(C)	Possession with intent to sell, etc. Schedule I/II drug	None	3256	81.7%	9.9%	8.4%
		Category II	665	60.5%	35.5%	4.1%
		Category I	174	51.7%	45.4%	2.9%
18.2-248(C)	Sale, etc., for profit Schedule I/II drug	None	2171	87.1%	7.5%	5.5%
		Category II	358	59.2%	38.5%	2.2%
		Category I	65	38.5%	56.9%	4.6%
18.2-248(C)	Second distribution, sale, etc., Schedule I/II drug	None	811	77.2%	7.8%	15.0%
		Category II	182	55.5%	40.1%	4.4%
		Category I	43	53.5%	41.9%	4.7%
18.2-248(C)	3rd or subsequent distribution, sale, etc. Schedule I/II drug	None	202	69.3%	10.9%	19.8%
		Category II	52	76.9%	7.7%	15.4%
		Category I	6	50.0%	50.0%	0.0%
18.2-248(C1)	Manufacture methamphetamine	None	160	81.9%	15.6%	2.5%
		Category II	22	50.0%	45.5%	4.5%
		Category I	1	100.0%	0.0%	0.0%
18.2-248(D)	Accommodation providing Schedule I/II drugs	None	586	84.6%	9.4%	6.0%
		Category II	95	76.8%	23.2%	0.0%
		Category I	30	46.7%	53.3%	0.0%
18.2-248(G)	Distribution, sale, manuf., etc., imitation Schedule I/II drugs	None	196	90.3%	5.6%	4.1%
		Category II	25	60.0%	40.0%	0.0%
		Category I	10	90.0%	10.0%	0.0%
18.2-250(A,a)	Possession Schedule I/II drug	None	32892	88.7%	6.2%	5.1%
		Category II	1552	68.9%	28.4%	2.7%
		Category I	376	52.9%	44.9%	2.1%
18.2-251	First Offender Violation (§18.2-251); original offense was felony	None	1195	85.0%	2.3%	12.6%
		Category II	6	83.3%	16.7%	0.0%
		Category I	5	60.0%	40.0%	0.0%

Note: Table excludes offenses with fewer than 20 sentencing events during the last five fiscal years; however, such offenses will be examined as part of the Commission's overall study.

				Sentencing Outcome		
Most Serious Offense at Sentencing		**Guidelines Prior Record Enhancement**	**Number of Events**	**Within Guidelines**	**Below Guidelines**	**Above Guidelines**
18.2-248(E1)	Sell, distribute, etc., Schedule III drug (not steroid)	None	566	84.5%	11.8%	3.7%
		Category II	70	84.3%	12.9%	2.9%
		Category I	8	37.5%	50.0%	12.5%
18.2-248(E2)	Sell, distribute, etc., Schedule IV drug	None	120	85.0%	11.7%	3.3%
		Category II	4	50.0%	50.0%	0.0%
		Category I	2	100.0%	0.0%	0.0%
18.2-248.01	Transport into Commonwealth: 5 lbs. or more marijuana	None	32	65.6%	0.0%	34.4%
		Category II	2	100.0%	0.0%	0.0%
		Category I	0	na	na	na
18.2-248.1(a,2)	Sell, distribute, PWI, etc., marijuana: more than 1 oz, less than 5 lbs	None	1817	86.5%	6.4%	7.1%
		Category II	140	82.1%	16.4%	1.4%
		Category I	39	71.8%	25.6%	2.6%
18.2-248.1(a,3)	Sell, distribute, PWI, etc., marijuana: 5 lbs pounds or more	None	159	86.2%	5.7%	8.2%
		Category II	7	57.1%	42.9%	0.0%
		Category I	7	42.9%	57.1%	0.0%
18.2-248.1(c)	Manufacture marijuana (not for personal use)	None	66	81.8%	6.1%	12.1%
		Category II	8	50.0%	37.5%	12.5%
		Category I	4	25.0%	50.0%	25.0%
18.2-258.1(A)	Obtain drugs by forgery, fraud	None	405	92.1%	2.5%	5.4%
		Category II	2	0.0%	100.0%	0.0%
		Category I	2	0.0%	100.0%	0.0%
18.2-258.1(E)	Utter false or forged prescription	None	24	91.7%	4.2%	4.2%
		Category II	0	na	na	na
		Category I	0	na	Na	na

Note: Table excludes offenses with fewer than 20 sentencing events during the last five fiscal years; however, such offenses will be examined as part of the Commission's overall study.

			Number of Events	Sentencing Outcome		
Most Serious Offense at Sentencing		**Guidelines Prior Record Enhancement**		**Within Guidelines**	**Below Guidelines**	**Above Guidelines**
18.2-95(i)	Grand larceny - $5 or more from person	None	483	72.5%	3.1%	24.4%
		Category II	74	71.6%	21.6%	6.8%
		Category I	47	74.5%	17.0%	8.5%
18.2-95(ii)	Grand larceny - auto theft	None	973	84.5%	7.1%	8.4%
		Category II	285	75.8%	21.8%	2.5%
		Category I	63	66.7%	33.3%	0.0%
18.2-95(ii)	Grand larceny - $1,000 or more not from person[16]	None	4561	86.3%	7.1%	6.6%
		Category II	786	73.2%	24.7%	2.2%
		Category I	229	70.3%	27.1%	2.6%
18.2-95(iii)	Larceny of firearms, regardless of value, not from person	None	415	78.3%	6.7%	14.9%
		Category II	61	63.9%	24.6%	11.5%
		Category I	9	66.7%	22.2%	11.1%
18.2-98	Larceny of bank notes, checks, etc., worth $1,000 or more[16]	None	45	88.9%	6.7%	4.4%
		Category II	10	60.0%	40.0%	0.0%
		Category I	3	66.7%	33.3%	0.0%
18.2-102	Unauthorized use of animal, auto, boat worth $1,000 or more[16]	None	627	88.2%	7.3%	4.5%
		Category II	87	64.4%	33.3%	2.3%
		Category I	27	74.1%	25.9%	0.0%
18.2-103	Shoplift, alter price tags - $1,000 or more[16]	None	1024	88.4%	6.3%	5.3%
		Category II	107	74.8%	23.4%	1.9%
		Category I	43	58.1%	41.9%	0.0%
18.2-103	Shoplift, alter price tags – less than $1,000 (3rd time) [17]	None	1626	87.6%	10.2%	2.2%
		Category II	245	75.9%	22.4%	1.6%
		Category I	48	52.1%	45.8%	2.1%
18.2-104	Larceny, etc. – 3rd or subsequent conviction[17]	None	2700	86.0%	11.6%	2.4%
		Category II	549	74.3%	25.3%	.4%
		Category I	156	56.4%	42.9%	.6%
18.2-108(A)	Receive stolen goods - $1,000 or more[16]	None	416	89.7%	4.3%	6.0%
		Category II	89	75.3%	20.2%	4.5%
		Category I	13	53.8%	46.2%	0.0%

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[16] Between 1980 and 2018, Virginia's felony larceny threshold was $200, meaning that thefts involving $200 or more were subject to felony prosecution. The 2018 General Assembly passed legislation to increase the felony larceny threshold from $200 to $500. In 2020, the General Assembly further increased the threshold to $1,000. Many offenses in the *Code of Virginia* are "deemed larceny" (punishable in the same manner as larceny) or were otherwise affected by changes in the felony larceny threshold.

[17] Prior to July 1, 2021, conviction for a third or subsequent petit larceny (misdemeanor) could be punished as a Class 6 felony. This felony was eliminated as of July 1, 2021; therefore, this crime will be excluded from the Commission's study.

Most Serious Offense at Sentencing		Guidelines Prior Record Enhancement	Number of Events	Sentencing Outcome		
				Within Guidelines	Below Guidelines	Above Guidelines
18.2-108.1	Receive stolen firearm	None	78	76.9%	3.8%	19.2%
		Category II	3	100.0%	0.0%	0.0%
		Category I	1	0.0%	100.0%	0.0%
18.2-108.01(A)	Larceny $1,000 or more with intent to sell or distribute[18]	None	186	85.5%	7.0%	7.5%
		Category II	43	88.4%	11.6%	0.0%
		Category I	14	71.4%	28.6%	0.0%
18.2-108.01(B)	Sell, etc., stolen property aggregate value $1,000 or more[18]	None	71	83.1%	14.1%	2.8%
		Category II	10	70.0%	30.0%	0.0%
		Category I	3	100.0%	0.0%	0.0%
18.2-111	Embezzlement, $1,000 or more[18]	None	1363	86.5%	4.9%	8.6%
		Category II	38	73.7%	23.7%	2.6%
		Category I	12	33.3%	66.7%	0.0%
18.2-117	Bailee, fail to return animal, auto, etc., $1,000 or more[18]	None	34	85.3%	11.8%	2.9%
		Category II	3	33.3%	66.7%	0.0%
		Category I	2	0.0%	100.0%	0.0%
18.2-118	Fail to return leased personal property, $1,000 or more[18]	None	28	85.7%	10.7%	3.6%
		Category II	4	100.0%	0.0%	0.0%
		Category I	1	0.0%	100.0%	0.0%

Note: Table excludes offenses with fewer than 20 sentencing events during the last five fiscal years; however, such offenses will be examined as part of the Commission's overall study.

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[18] Between 1980 and 2018, Virginia's felony larceny threshold was $200, meaning that thefts involving $200 or more were subject to felony prosecution. The 2018 General Assembly passed legislation to increase the felony larceny threshold from $200 to $500. In 2020, the General Assembly further increased the threshold to $1,000. Many offenses in the *Code of Virginia* are "deemed larceny" (punishable in the same manner as larceny) or were otherwise affected by changes in the felony larceny threshold.

				Sentencing Outcome		
Most Serious Offense at Sentencing		**Guidelines Prior Record Enhancement**	**Number of Events**	**Within Guidelines**	**Below Guidelines**	**Above Guidelines**
18.2-168	Forging public record	None	525	85.3%	10.3%	4.4%
		Category II	122	78.7%	18.9%	2.5%
		Category I	32	75.0%	25.0%	0.0%
18.2-168	Uttering public record	None	51	88.2%	7.8%	3.9%
		Category II	6	100.0%	0.0%	0.0%
		Category I	1	0.0%	100.0%	0.0%
18.2-170	Forging - Coins or bank notes	None	214	87.9%	7.9%	4.2%
		Category II	31	83.9%	12.9%	3.2%
		Category I	8	50.0%	37.5%	12.5%
18.2-172	Forgery	None	511	86.5%	10.4%	3.1%
		Category II	88	72.7%	27.3%	0.0%
		Category I	27	55.6%	37.0%	7.4%
18.2-172	Uttering	None	394	88.3%	8.6%	3.0%
		Category II	49	65.3%	34.7%	0.0%
		Category I	15	60.0%	40.0%	0.0%
18.2-173	Possess forged bank notes or coins - 10 or more	None	19	94.7%	5.3%	0.0%
		Category II	1	100.0%	0.0%	0.0%
		Category I	0	na	na	na
18.2-178	Obtain money by false pretenses, $1,000 or more[19]	None	1303	84.3%	9.0%	6.8%
		Category II	200	70.0%	25.5%	4.5%
		Category I	63	57.1%	42.9%	0.0%
18.2-181	Bad checks, $1,000 or more[19]	None	119	84.0%	10.9%	5.0%
		Category II	7	71.4%	28.6%	0.0%
		Category I	1	100.0%	0.0%	0.0%
18.2-181.1	Bad checks, two or more w/in 90 days, $1,000 or more[19]	None	41	90.2%	7.3%	2.4%
		Category II	3	66.7%	33.3%	0.0%
		Category I	2	50.0%	50.0%	0.0%
18.2-186(B)	False statement to obtain property/credit, $1,000 or more[19]	None	22	77.3%	13.6%	9.1%
		Category II	0	na	na	na
		Category I	0	na	na	na
18.2-186.3(D)	Identity Fraud - Obtain info to defraud etc. - 2nd or subsequent	None	81	81.5%	14.8%	3.7%
		Category II	28	71.4%	28.6%	0.0%
		Category I	6	33.3%	66.7%	0.0%

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[19] Between 1980 and 2018, Virginia's felony larceny threshold was $200, meaning that thefts involving $200 or more were subject to felony prosecution. The 2018 General Assembly passed legislation to increase the felony larceny threshold from $200 to $500. In 2020, the General Assembly further increased the threshold to $1,000. Many offenses in the *Code of Virginia* are "deemed larceny" (punishable in the same manner as larceny) or were otherwise affected by changes in the felony larceny threshold.

				Sentencing Outcome		
Most Serious Offense at Sentencing		**Guidelines Prior Record Enhancement**	**Number of Events**	**Within Guidelines**	**Below Guidelines**	**Above Guidelines**
18.2-186.3(D)	Identity Fraud - Financial loss, $1,000 or more[20]	None	97	86.6%	8.2%	5.2%
		Category II	4	75.0%	25.0%	0.0%
		Category I	1	100.0%	0.0%	0.0%
18.2-192(1,a)	Theft of credit card / numbers	None	1154	87.9%	8.1%	4.0%
		Category II	205	69.8%	27.8%	2.4%
		Category I	41	73.2%	24.4%	2.4%
18.2-192(1,b)	Receive stolen credit cards or numbers	None	55	90.9%	7.3%	1.8%
		Category II	5	60.0%	20.0%	20.0%
		Category I	2	100.0%	0.0%	0.0%
18.2-193	Forgery/uttering of credit card	None	98	88.8%	9.2%	2.0%
		Category II	8	87.5%	12.5%	0.0%
		Category I	4	75.0%	25.0%	0.0%
18.2-195(1)	Credit Card Fraud, $1,000 or more over 6 month period[20]	None	202	87.1%	5.9%	6.9%
		Category II	19	68.4%	31.6%	0.0%
		Category I	9	55.6%	44.4%	0.0%
18.2-200.1	Fail to perform construction in return for advances, $1,000 or more[20]	None	166	86.1%	8.4%	5.4%
		Category II	28	71.4%	28.6%	0.0%
		Category I	2	50.0%	50.0%	0.0%
63.2-502	Knowingly make any false application for welfare assistance	None	42	92.9%	7.1%	0.0%
		Category II	1	100.0%	0.0%	0.0%
		Category I	0	na	na	na
63.2-522	Fraudulently obtaining welfare assistance, $1,000 or more[20]	None	189	89.9%	7.4%	2.6%
		Category II	12	66.7%	25.0%	8.3%
		Category I	2	50.0%	50.0%	0.0%
18.2-168	Forging public record	None	525	85.3%	10.3%	4.4%
		Category II	122	78.7%	18.9%	2.5%
		Category I	32	75.0%	25.0%	0.0%

Note: Table excludes offenses with fewer than 20 sentencing events during the last five fiscal years; however, such offenses will be examined as part of the Commission's overall study.

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[20] Between 1980 and 2018, Virginia's felony larceny threshold was $200, meaning that thefts involving $200 or more were subject to felony prosecution. The 2018 General Assembly passed legislation to increase the felony larceny threshold from $200 to $500. In 2020, the General Assembly further increased the threshold to $1,000. Many offenses in the *Code of Virginia* are "deemed larceny" (punishable in the same manner as larceny) or were otherwise affected by changes in the felony larceny threshold.

Most Serious Offense at Sentencing		Guidelines Prior Record Enhancement	Number of Events	Sentencing Outcome		
				Within Guidelines	Below Guidelines	Above Guidelines
18.2-89	Burglary dwelling at night to commit larceny, other felony	None	126	74.6%	8.7%	16.7%
		Category II	60	63.3%	31.7%	5.0%
		Category I	8	62.5%	25.0%	12.5%
18.2-89	Burglary dwelling at night to commit larceny etc., w/deadly weapon	None	17	58.8%	17.6%	23.5%
		Category II	7	71.4%	28.6%	0.0%
		Category I	1	100.0%	0.0%	0.0%
18.2-90	Statutory burglary of dwelling with intent to murder, rape, rob, arson	None	31	67.7%	12.9%	19.4%
		Category II	8	100.0%	0.0%	0.0%
		Category I	2	50.0%	50.0%	0.0%
18.2-90	Statutory burglary of dwelling with intent to murder, etc., w/deadly weapon	None	46	76.1%	10.9%	13.0%
		Category II	8	50.0%	12.5%	37.5%
		Category I	2	50.0%	50.0%	0.0%
18.2-91	Statutory burglary of dwelling to commit other felony or A&B	None	1281	73.2%	10.5%	16.2%
		Category II	463	70.6%	24.4%	5.0%
		Category I	63	54.0%	38.1%	7.9%
18.2-91	Statutory burglary of dwelling to commit other felony or A&B, w/deadly weapon	None	76	72.4%	10.5%	17.1%
		Category II	18	66.7%	22.2%	11.1%
		Category I	4	75.0%	25.0%	0.0%
18.2-91	Statutory burglary of other structure to commit larceny, etc.	None	807	80.3%	9.5%	10.2%
		Category II	409	75.1%	24.4%	.5%
		Category I	74	59.5%	39.2%	1.4%
18.2-92	Break & enter occupied dwelling to commit misdemeanor	None	79	74.7%	13.9%	11.4%
		Category II	9	44.4%	55.6%	0.0%
		Category I	3	66.7%	33.3%	0.0%
18.2-94	Possession of burglary tools	None	93	83.9%	10.8%	5.4%
		Category II	20	70.0%	30.0%	0.0%
		Category I	7	57.1%	42.9%	0.0%

Note: Table excludes offenses with fewer than 20 sentencing events during the last five fiscal years; however, such offenses will be examined as part of the Commission's overall study.

			Sentencing Outcome		
Most Serious Offense at Sentencing		**Guidelines Prior Record Enhancement**	**Number of Events**	**Within Guidelines**	**Below Guidelines**	**Above Guidelines**

Most Serious Offense at Sentencing		Guidelines Prior Record Enhancement	Number of Events	Within Guidelines	Below Guidelines	Above Guidelines
18.2-41	Assault (shoot, cut, stab) by mob	None	29	58.6%	31.0%	10.3%
		Category II	21	57.1%	42.9%	0.0%
		Category I	6	33.3%	66.7%	0.0%
18.2-51	Malicious wounding - Stab, cut, wound with malicious intent	None	958	75.4%	10.9%	13.8%
		Category II	281	69.8%	15.7%	14.6%
		Category I	87	73.6%	23.0%	3.4%
18.2-51	Unlawful injury - Stab, cut, wound without malicious intent	None	1189	71.1%	8.9%	20.0%
		Category II	305	74.4%	19.3%	6.2%
		Category I	99	67.7%	29.3%	3.0%
18.2-51.1	Malicious injury to law enforcement, fire/EMS personnel	None	29	62.1%	6.9%	31.0%
		Category II	8	62.5%	12.5%	25.0%
		Category I	1	100.0%	0.0%	0.0%
18.2-51.2(A)	Malicious wounding - victim permanently impaired	None	199	63.8%	12.6%	23.6%
		Category II	61	70.5%	11.5%	18.0%
		Category I	23	91.3%	8.7%	0.0%
18.2-51.4(B)	DWI with reckless disregard - victim permanently impaired	None	87	54.0%	3.4%	42.5%
		Category II	8	100.0%	0.0%	0.0%
		Category I	0	na	na	na
18.2-51.6	Strangulation resulting in wounding/bodily injury	None	693	77.6%	7.9%	14.4%
		Category II	187	79.7%	14.4%	5.9%
		Category I	39	71.8%	28.2%	0.0%
18.2-52	Non-malicious injury by caustic substance or fire	None	13	84.6%	7.7%	7.7%
		Category II	5	40.0%	40.0%	20.0%
		Category I	3	100.0%	0.0%	0.0%
18.2-57(C)	Simple assault law enforcement, judge, fire/medical services	None	1463	90.1%	7.0%	2.9%
		Category II	396	77.5%	20.2%	2.3%
		Category I	146	67.8%	31.5%	.7%
18.2-57.2(B)	Simple assault against a family member, 3rd offense	None	524	76.3%	19.1%	4.6%
		Category II	326	74.8%	23.0%	2.1%
		Category I	30	60.0%	40.0%	0.0%

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Most Serious Offense at Sentencing		Guidelines Prior Record Enhancement	Number of Events	Sentencing Outcome		
				Within Guidelines	Below Guidelines	Above Guidelines
18.2-47(A)	Abduct by force, deception, etc., without justification	None	428	73.8%	9.6%	16.6%
		Category II	104	77.9%	14.4%	7.7%
		Category I	19	73.7%	26.3%	0.0%
18.2-48(i)	Abduct with intent to gain pecuniary benefit (extortion)	None	24	70.8%	0.0%	29.2%
		Category II	7	57.1%	0.0%	42.9%
		Category I	11	72.7%	0.0%	27.3%
18.2-48(ii)	Abduction of person with intent to defile	None	17	88.2%	0.0%	11.8%
		Category II	5	80.0%	0.0%	20.0%
		Category I	2	100.0%	0.0%	0.0%

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Most Serious Offense at Sentencing		Guidelines Prior Record Enhancement	Number of Events	Sentencing Outcome		
				Within Guidelines	Below Guidelines	Above Guidelines
18.2-32	First-degree murder	None	246	87.4%	7.7%	4.9%
		Category II	69	76.8%	21.7%	1.4%
		Category I	31	64.5%	25.8%	9.7%
18.2-32	Second-degree murder	None	237	62.4%	12.2%	25.3%
		Category II	45	64.4%	11.1%	24.4%
		Category I	24	66.7%	29.2%	4.2%
18.2-33	Felony murder	None	45	55.6%	20.0%	24.4%
		Category II	11	81.8%	18.2%	0.0%
		Category I	2	100.0%	0.0%	0.0%
18.2-35	Voluntary manslaughter	None	116	59.5%	12.1%	28.4%
		Category II	20	80.0%	5.0%	15.0%
		Category I	11	72.7%	9.1%	18.2%
18.2-36	Involuntary manslaughter	None	132	48.5%	4.5%	47.0%
		Category II	8	37.5%	12.5%	50.0%
		Category I	4	25.0%	0.0%	75.0%
18.2-36.1(A)	Involuntary manslaughter, under the influence - vehicular	None	72	62.5%	9.7%	27.8%
		Category II	7	71.4%	14.3%	14.3%
		Category I	5	80.0%	20.0%	0.0%
18.2-36.1(B)	Involuntary manslaughter - vehicular, aggravated	None	52	50.0%	5.8%	44.2%
		Category II	5	40.0%	0.0%	60.0%
		Category I	2	100.0%	0.0%	0.0%

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Most Serious Offense at Sentencing		Guidelines Prior Record Enhancement	Number of Events	Sentencing Outcome		
				Within Guidelines	Below Guidelines	Above Guidelines
18.2-61(A,i)	Intercourse with victim by force, threat or intimidation, victim age 13+	None	134	71.6%	15.7%	12.7%
		Category II	25	76.0%	16.0%	8.0%
		Category I	23	78.3%	17.4%	4.3%
18.2-61(A,ii)	Intercourse w/victim through the victim's mental incapacity/ helplessness	None	22	63.6%	27.3%	9.1%
		Category II	5	40.0%	40.0%	20.0%
		Category I	2	50.0%	50.0%	0.0%
18.2-61(A,iii)	Intercourse, victim under age 13	None	87	59.8%	4.6%	35.6%
		Category II	8	62.5%	25.0%	12.5%
		Category I	6	50.0%	16.7%	33.3%
18.2-67.1(A,1)	Sodomy, victim under age 13	None	104	60.6%	13.5%	26.0%
		Category II	14	57.1%	7.1%	35.7%
		Category I	10	80.0%	20.0%	0.0%
18.2-67.1(A,1)	Sodomy, victim under age 13 (offender indicted as an adult)	None	20	95.0%	0.0%	5.0%
		Category II	6	100.0%	0.0%	0.0%
		Category I	1	100.0%	0.0%	0.0%
18.2-67.1(A,2)	Forcible sodomy by force, threat, etc., victim age 13+	None	72	72.2%	16.7%	11.1%
		Category II	15	80.0%	6.7%	13.3%
		Category I	5	60.0%	40.0%	0.0%
18.2-67.2(A,1)	Object sexual penetration, victim under age 13	None	50	66.0%	10.0%	24.0%
		Category II	7	71.4%	14.3%	14.3%
		Category I	5	80.0%	20.0%	0.0%
18.2-67.2(A,2)	Object sexual pene-tration by force, threat, etc., victim age 13+	None	68	66.2%	23.5%	10.3%
		Category II	15	80.0%	6.7%	13.3%
		Category I	10	80.0%	20.0%	0.0%

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Most Serious Offense at Sentencing		Guidelines Prior Record Enhancement	Number of Events	Sentencing Outcome		
				Within Guidelines	Below Guidelines	Above Guidelines
18.2-63(A)	Carnal knowledge/ statutory rape, victim age 13, 14	None	224	63.4%	4.0%	32.6%
		Category II	33	84.8%	9.1%	6.1%
		Category I	9	66.7%	22.2%	11.1%
18.2-67.3(A,1)	Aggravated sexual battery, victim under age 13	None	410	69.5%	9.8%	20.7%
		Category II	56	78.6%	16.1%	5.4%
		Category I	17	64.7%	35.3%	0.0%
18.2-67.3(A,2)	Aggravated sexual battery - mental incapacity/helplessness of victim	None	91	61.5%	7.7%	30.8%
		Category II	10	60.0%	30.0%	10.0%
		Category I	3	100.0%	0.0%	0.0%
18.2-67.3(A,3)	Aggravated sexual battery by parent, grandparent, etc., victim age 13-17	None	52	69.2%	1.9%	28.8%
		Category II	5	100.0%	0.0%	0.0%
		Category I	0	na	na	na
18.2-67.3(A,4,a)	Aggravated sexual battery, victim age 13 or 14	None	29	62.1%	3.4%	34.5%
		Category II	5	100.0%	0.0%	0.0%
		Category I	1	100.0%	0.0%	0.0%
18.2-67.3(A,4,b)	Aggravated sexual battery by force with serious injury	None	23	65.2%	8.7%	26.1%
		Category II	5	100.0%	0.0%	0.0%
		Category I	0	na	na	na
18.2-357	Pander, pimp, or receive money from prostitute	None	24	45.8%	4.2%	50.0%
		Category II	4	50.0%	50.0%	0.0%
		Category I	3	66.7%	33.3%	0.0%
18.2-370(A)	Indecent liberties with child under age 15	None	158	65.8%	8.2%	25.9%
		Category II	27	74.1%	18.5%	7.4%
		Category I	6	100.0%	0.0%	0.0%
18.2-370.1(A)	Take indecent liberties with child by custodian	None	132	56.1%	9.8%	34.1%
		Category II	19	84.2%	10.5%	5.3%
		Category I	6	66.7%	33.3%	0.0%

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Most Serious Offense at Sentencing		Guidelines Prior Record Enhancement	Number of Events	Sentencing Outcome		
				Within Guidelines	Below Guidelines	Above Guidelines
18.2-374.1(B,2)	Produce, make child pornography, child age < 15, offender 7+ yrs older	None	13	69.2%	0.0%	30.8%
		Category II	2	50.0%	0.0%	50.0%
		Category I	3	66.7%	0.0%	33.3%
18.2-374.3(B)	Procure minor for obscene material using communication system	None	60	61.7%	8.3%	30.0%
		Category II	8	87.5%	12.5%	0.0%
		Category I	0	na	na	na
18.2-374.3(C)	Propose sex act through communication system	None	171	80.7%	3.5%	15.8%
		Category II	30	83.3%	3.3%	13.3%
		Category I	2	50.0%	0.0%	50.0%
18.2-374.3(C)	Propose sex act through communication system	None	21	85.7%	0.0%	14.3%
		Category II	6	50.0%	0.0%	50.0%
		Category I	2	100.0%	0.0%	0.0%
18.2-374.3(C)	Propose sex act through communication system, child age <15	None	163	63.2%	4.9%	31.9%
		Category II	7	85.7%	14.3%	0.0%
		Category I	1	100.0%	0.0%	0.0%
18.2-374.3(D)	Propose sex act through communication system, child age 15+, offender 7+ yrs older	None	57	68.4%	17.5%	14.0%
		Category II	6	83.3%	0.0%	16.7%
		Category I	1	100.0%	0.0%	0.0%
18.2-374.3(E)	Procure minor for prostitution, sodomy, porn by communication system	None	17	52.9%	0.0%	47.1%
		Category II	1	0.0%	100.0%	0.0%
		Category I	0	na	na	na
18.2-374.1:1(A)	Possess child pornography (1st offense)	None	214	72.0%	15.0%	13.1%
		Category II	16	81.3%	12.5%	6.3%
		Category I	1	100.0%	0.0%	0.0%
18.2-374.1:1(B)	Possess child pornography (2nd or subsequent offense)	None	132	71.2%	24.2%	4.5%
		Category II	34	88.2%	0.0%	11.8%
		Category I	4	100.0%	0.0%	0.0%
18.2-374.1:1(C,i)	Reproduce, transmit, sell, etc., child pornography	None	72	66.7%	11.1%	22.2%
		Category II	7	85.7%	14.3%	0.0%
		Category I	1	0.0%	100.0%	0.0%
18.2-374.1:1(C,i)	Reproduce, transmit, sell, etc., child pornography (2nd or subsequent offense)	None	39	59.0%	5.1%	35.9%
		Category II	4	50.0%	0.0%	50.0%
		Category I	1	0.0%	100.0%	0.0%

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The 2021 General Assembly passed legislation to create degrees of punishment for robbery based on the elements of the offense (House Bill 1936, 2021 General Assembly, Special Session I). Robbery (§ 18.2-58) was previously punishable by imprisonment of five years to life. The effect of the legislation was to reduce the maximum penalty for completed robbery offenses except in cases involving serious bodily injury or death. The classes of robbery created by the legislation are very different than the way robbery had been delineated in the Sentencing Guidelines. Current data are insufficient to perform the analysis necessary to develop Guidelines based on the new classes of robbery. Further, it is not known how charging practices or sentencing patterns for robbery will evolve under the new penalty structure. Most likely, the Guidelines previously used will not accurately reflect the typical or average robbery outcomes based on the new classifications. For these reasons, the Commission determined that robbery would not be covered as a primary offense under the Guidelines until a full analysis of sentencing under the new penalty structure can be completed.

Most Serious Offense at Sentencing		Guidelines Prior Record Enhancement	Number of Events	Sentencing Outcome		
				Within Guidelines	Below Guidelines	Above Guidelines
18.2-266	Driving while intoxicated - 3rd conviction w/in 5 years	None	439	79.0%	1.8%	19.1%
		Category II	31	77.4%	19.4%	3.2%
		Category I	16	75.0%	18.8%	6.3%
18.2-266	Driving while intoxicated - 3rd conviction w/in 5 years, BAC .15-.20	None	54	63.0%	1.9%	35.2%
		Category II	3	33.3%	0.0%	66.7%
		Category I	1	100.0%	0.0%	0.0%
18.2-266	Driving while intoxicated - 3rd conviction w/in 5 years, BAC >.20	None	35	80.0%	2.9%	17.1%
		Category II	3	66.7%	0.0%	33.3%
		Category I	0	na	na	na
18.2-266	Driving while intoxicated – 3rd conviction w/in 10 years	None	960	83.6%	5.2%	11.1%
		Category II	52	75.0%	19.2%	5.8%
		Category I	16	87.5%	12.5%	0.0%
18.2-266	Driving while intoxicated - 3rd conviction w/in 10 years, BAC .15-.20	None	110	89.1%	2.7%	8.2%
		Category II	3	66.7%	33.3%	0.0%
		Category I	0	na	na	na
18.2-266	Driving while intoxicated - 3rd conviction w/in 10 years, BAC >.20	None	92	87.0%	1.1%	12.0%
		Category II	4	75.0%	25.0%	0.0%
		Category I	0	na	na	na
18.2-266	Driving while intoxicated - 4th or subsequent conviction w/in 10 years	None	160	80.0%	1.3%	18.8%
		Category II	16	87.5%	12.5%	0.0%
		Category I	6	83.3%	0.0%	16.7%
18.2-266	DWI with prior conviction for DWI-related manslaughter, assault or felony DWI	None	139	85.6%	.7%	13.7%
		Category II	23	100.0%	0.0%	0.0%
		Category I	5	80.0%	20.0%	0.0%
18.2-272(A)	Driving after forfeiture of license, etc., 3rd conviction w/in 10 years	None	120	75.8%	21.7%	2.5%
		Category II	20	70.0%	25.0%	5.0%
		Category I	2	100.0%	0.0%	0.0%

Note: Table excludes offenses with fewer than 20 sentencing events during the last five fiscal years; however, such offenses will be examined as part of the Commission's overall study.

			Number of Events	Sentencing Outcome		
Most Serious Offense at Sentencing		**Guidelines Prior Record Enhancement**		**Within Guidelines**	**Below Guidelines**	**Above Guidelines**
46.2-357(B,2)[21]	Habitual Offender - DWI	None	20	95.0%	0.0%	5.0%
		Category II	11	81.8%	18.2%	0.0%
		Category I	2	50.0%	50.0%	0.0%
46.2-357(B,2)[19]	Habitual Offender - license revoked - endangerment	None	23	82.6%	4.3%	13.0%
		Category II	18	83.3%	5.6%	11.1%
		Category I	1	0.0%	100.0%	0.0%
46.2-357(B,3)[19]	Habitual Offender - 2nd or subsequent offense	None	330	92.7%	2.4%	4.8%
		Category II	170	88.8%	10.0%	1.2%
		Category I	19	26.3%	73.7%	0.0%
46.2-391(D,2a,i)	Drive after license revoked for DWI/etc., endangerment	None	55	90.9%	0.0%	9.1%
		Category II	10	100.0%	0.0%	0.0%
		Category I	0	na	na	na
46.2-391(D,2a,ii)	Drive after license revoked for DWI/etc. and DWI/etc. violation	None	115	81.7%	7.0%	11.3%
		Category II	25	76.0%	4.0%	20.0%
		Category I	5	80.0%	20.0%	0.0%
46.2-391(D,3)	Drive after license revoked for DWI/etc. - subsequent offense	None	53	81.1%	3.8%	15.1%
		Category II	14	78.6%	21.4%	0.0%
		Category I	5	60.0%	40.0%	0.0%
46.2-817(B)	Disregard police command to stop, endangerment	None	1681	75.8%	14.8%	9.3%
		Category II	465	79.4%	14.4%	6.2%
		Category I	106	64.2%	33.0%	2.8%
46.2-894	Hit and run, driver fails to report $1000+ damage to property	None	638	81.2%	13.3%	5.5%
		Category II	101	78.2%	14.9%	6.9%
		Category I	23	65.2%	26.1%	8.7%
46.2-894	Hit and run, driver fails to stop/report, victim injury	None	439	72.9%	12.8%	14.4%
		Category II	64	68.8%	25.0%	6.3%
		Category I	25	84.0%	12.0%	4.0%

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[21] The 2021 General Assembly (Special Session I) repealed § 46.2-357 (effective July 1, 2021); therefore, this crime will be excluded from the Commission's study.

Most Serious Offense at Sentencing		Guidelines Prior Record Enhancement	Number of Events	Sentencing Outcome		
				Within Guidelines	Below Guidelines	Above Guidelines
18.2-279	Unlawfully discharge firearm, missile in/at occupied building	None	94	79.8%	9.6%	10.6%
		Category II	11	81.8%	18.2%	0.0%
		Category I	0	na	na	na
18.2-279	Maliciously discharge firearm, missile in/at occupied building	None	119	73.9%	6.7%	19.3%
		Category II	26	65.4%	7.7%	26.9%
		Category I	2	100.0%	0.0%	0.0%
18.2-286.1	Discharge firearm from motor vehicle	None	68	61.8%	7.4%	30.9%
		Category II	4	75.0%	25.0%	0.0%
		Category I	1	100.0%	0.0%	0.0%
18.2-300(B)	Possess sawed-off shotgun	None	54	90.7%	0.0%	9.3%
		Category II	14	85.7%	0.0%	14.3%
		Category I	1	100.0%	0.0%	0.0%
18.2-308(A)	Carry concealed weapon, 2nd conviction	None	114	84.2%	11.4%	4.4%
		Category II	9	66.7%	11.1%	22.2%
		Category I	2	100.0%	0.0%	0.0%
18.2-308(A)	Carry concealed weapon, 3rd or subsequent conviction	None	25	88.0%	12.0%	0.0%
		Category II	5	100.0%	0.0%	0.0%
		Category I	0	na	na	na
18.2-308.1(B)	Firearm, possess on school property	None	17	88.2%	0.0%	11.8%
		Category I	1	0.0%	100.0%	0.0%
		Category II	1	100.0%	0.0%	0.0%
18.2-308.2(A)	Convicted non-violent felon possess firearm, etc. (prior conviction more than 10 years old)	None	818	74.0%	13.8%	12.2%
		Category II	300	70.7%	19.0%	10.3%
		Category I	91	54.9%	39.6%	5.5%
18.2-308.2(A)	Convicted non-violent felon possess firearm, etc. (prior conviction w/in last 10 years)	None	569	82.2%	4.0%	13.7%
		Category II	431	66.6%	2.8%	30.6%
		Category I	135	87.4%	3.0%	9.6%
18.2-308.2(A)	Convicted violent felon possess firearm, etc.	None	62	77.4%	8.1%	14.5%
		Category II	170	87.6%	1.8%	10.6%
		Category I	121	86.8%	7.4%	5.8%
18.2-308.2(A)	Convicted felon possess explosives, ammunition, weapon - not firearm	None	422	74.2%	13.3%	12.6%
		Category II	186	72.6%	24.7%	2.7%
		Category I	45	55.6%	42.2%	2.2%
18.2-308.2:2(K)	False statement on criminal history check consent form for purchasing firearm	None	497	84.5%	13.3%	2.2%
		Category II	30	56.7%	40.0%	3.3%
		Category I	14	50.0%	50.0%	0.0%

Note: Table excludes offenses with fewer than 20 sentencing events during the last five fiscal years; however, such offenses will be examined as part of the Commission's overall study.

			Sentencing Outcome		
Most Serious Offense at Sentencing		**Guidelines Prior Record Enhancement**	**Number of Events**	**Within Guidelines**	**Below Guidelines**	**Above Guidelines**
18.2-46.2	Gang member participates in criminal act for benefit of gang	None	31	64.5%	12.9%	22.6%
		Category II	8	75.0%	25.0%	0.0%
		Category I	7	57.1%	28.6%	14.3%
18.2-60(A,1)	Threat by letter, communication, or electronic message	None	121	72.7%	14.0%	13.2%
		Category II	39	76.9%	15.4%	7.7%
		Category I	7	57.1%	42.9%	0.0%
18.2-77(A,i)	Arson of occupied dwelling place or church	None	89	67.4%	10.1%	22.5%
		Category II	12	66.7%	16.7%	16.7%
		Category I	6	50.0%	33.3%	16.7%
18.2-77(B)	Arson of unoccupied dwelling place or church	None	26	80.8%	7.7%	11.5%
		Category II	4	50.0%	50.0%	0.0%
		Category I	1	0.0%	100.0%	0.0%
18.2-81	Arson of personal property, standing grain, etc., $1,000 or more	None	43	79.1%	2.3%	18.6%
		Category II	6	83.3%	16.7%	0.0%
		Category I	2	50.0%	50.0%	0.0%
18.2-83	Bomb threat, etc., by person age 15 or over	None	206	82.5%	4.4%	13.1%
		Category II	46	82.6%	8.7%	8.7%
		Category I	6	83.3%	16.7%	0.0%
18.2-137(B,ii)	Intentionally damage any property/ monument, damage of $1,000 or more	None	379	81.0%	11.3%	7.7%
		Category II	62	71.0%	21.0%	8.1%
		Category I	12	83.3%	16.7%	0.0%
18.2-154	Shoot or throw missile at train, car, vessel w/malice	None	93	74.2%	2.2%	23.7%
		Category II	20	55.0%	10.0%	35.0%
		Category I	4	50.0%	25.0%	25.0%
18.2-371.1(A)	Child abuse and neglect, serious injury	None	167	62.3%	6.0%	31.7%
		Category II	13	53.8%	23.1%	23.1%
		Category I	6	66.7%	0.0%	33.3%
18.2-371.1(B)	Gross, wanton, or reckless care for child	None	578	76.0%	10.2%	13.8%
		Category II	31	87.1%	3.2%	9.7%
		Category I	8	75.0%	25.0%	0.0%
18.2-434	Perjury - Falsely swear an oath	None	109	80.7%	7.3%	11.9%
		Category II	12	83.3%	16.7%	0.0%
		Category I	4	100.0%	0.0%	0.0%

		Guidelines Prior Record Enhancement	Number of Events	Sentencing Outcome		
Most Serious Offense at Sentencing				**Within Guidelines**	**Below Guidelines**	**Above Guidelines**
18.2-472.1(A)	Other sex offender, provide false info or fail to register, 2nd or subsequent conviction	None	111	88.3%	2.7%	9.0%
		Category II	29	82.8%	6.9%	10.3%
		Category I	5	60.0%	20.0%	20.0%
18.2-472.1(B)	Tier III sex offender, provide false info or fail to register	None	252	87.7%	7.9%	4.4%
		Category II	118	76.3%	21.2%	2.5%
		Category I	123	78.0%	21.1%	.8%
18.2-472.1(B)	Tier III sex offender, provide false info or fail to register, 2nd or subsequent conviction	None	254	86.6%	8.3%	5.1%
		Category II	134	82.1%	14.9%	3.0%
		Category I	86	77.9%	20.9%	1.2%
19.2-128	Fail to appear in court for felony offense	None	264	78.4%	15.5%	6.1%
		Category II	55	89.1%	9.1%	1.8%
		Category I	16	62.5%	37.5%	0.0%
40.1-103	Endangerment, cruelty or injuries to children	None	167	76.6%	9.6%	13.8%
		Category II	9	66.7%	0.0%	33.3%
		Category I	3	66.7%	33.3%	0.0%
53.1-203(1)	Escape from a correctional facility	None	6	100.0%	0.0%	0.0%
		Category II	6	100.0%	0.0%	0.0%
		Category I	4	75.0%	25.0%	0.0%

Note: Table excludes offenses with fewer than 20 sentencing events during the last five fiscal years; however, such offenses will be examined as part of the Commission's overall study.

Next Steps

The Commission currently is in the initial phase of its multi-year Guidelines re-analysis project. The Commission does not yet have results to present regarding the impact on Sentencing Guideline midpoints if the Commission were to recommend changes based solely on analysis of sentencing data. This report has described the structure of the Guidelines, the Commission's methodological approach to the analysis, and data sources for the study. The Commission's preliminary analysis of Guidelines concurrence rates and departure patterns also has been presented.

As a next step in the project, the Commission has approved a survey of all circuit court judges. The purpose of the survey is to obtain judicial input for the re-analysis study. Survey results will be useful in pointing staff to areas of the Guidelines that are in need of revision and to factors that are most important to judges. The Commission's previous survey, related to Probation Violation Guidelines, was very informative. In that survey, nearly 90% of active circuit court judges responded. As with the previous survey, judges will have the option of taking the survey through an online application or on paper. To encourage full and open responses from judges, the survey will not include any identifying information and participants will remain anonymous. The Commission has approved the content of the survey and staff will administer the survey in October and November 2022.

Following review of survey results, the Commission will assess the data being collected on the Case Details Worksheet. This worksheet was implemented on July 1, 2021, and it will require two years to accumulate sufficient data for the Commission's analysis. The Case Details Worksheet will provide critically important details that are not consistently available in other criminal justice data systems, including the value of property stolen in larceny, fraud and burglary cases, the types and quantities of drugs, and the age of the victim. Of note, Guidelines received by the Commission since implementation reveal that the Case Details Worksheet, in many cases, is either missing or incomplete. This is a serious concern for the Commission, as the lack of essential data may hamper or delay the re-analysis project. The Commission is working with judges, Commonwealth's Attorneys and Probation Officers to ensure that this vital information sheet is completed in every felony sentencing event.

Once sufficient data has been collected, the Commission will begin conducting the statistical analysis necessary to refine Virginia's historically-based Guidelines. As discussed earlier in this report, the purpose of the study is to re-benchmark the Guidelines so that they reflect current sentencing practices as accurately as possible. Furthermore, the Commission's approach complies with the requirements of § 17.1-803 of the *Code of Virginia*. Updates on the Commission's progress in the project will be provided in future annual reports, which are submitted to the General Assembly each December 1.

Appendices

Appendix A
2022 Legislation Related to Sentencing Guidelines Enhancements

2022 SESSION

CHAPTER 783

*An Act to amend the Code of Virginia by adding a section numbered **17.1-805.1**, relating to discretionary sentencing guidelines; midpoint for violent felony offenses.*

[H 1320]

Approved April 27, 2022

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered **17.1-805.1** as follows:

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

*The Commission shall adopt discretionary felony sentencing guidelines that may 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 in accordance with § **17.1-806**.*

2. That the provisions of this act may result in a net increase in periods of imprisonment or commitment. Pursuant to § **30-19.1:4** of the Code of Virginia, the estimated amount of the necessary appropriation is $0 for periods of imprisonment in state adult correctional facilities and cannot be determined for periods of commitment to the custody of the Department of Juvenile Justice.

3. That the Virginia Criminal Sentencing Commission (the Commission) shall submit a report to the General Assembly, the Governor, and the Chief Justice of the Supreme Court of Virginia by October 1, 2022, documenting the impact on sentencing guideline midpoints for each offense if the Commission were to recommend changes to the midpoints based on analysis of historical sentencing data.

4. That the provisions of the first enactment of this act shall become effective on July 1, 2023.

(See also Chapter 723 of the 2022 Acts of Assembly - Senate Bill 423)

Appendix B
Development of Sentencing Guidelines and Application of
Midpoint Enhancements

Introduction

During a September 1994 Special Session, the Virginia General Assembly passed legislation that revised the system by which felons are sentenced and serve incarceration time in the Commonwealth of Virginia. The legislation abolished parole for offenders sentenced for felony offenses committed on or after January 1, 1995, and required individuals convicted of felony offenses to serve at least 85% of the sentence ordered by the court (at most, felony offenders could earn 15% off in sentence credits, regardless of whether their sentence was served in a state facility or a local jail).[22] This approach, known as "truth in sentencing," was a significant change in Virginia's criminal justice system at that time. Under the previous system, offenders could receive sentence credits which reduced sentences by as much as 50% and could be released on parole after serving a small portion of the full sentence given by the judge or jury. The General Assembly passed accompanying legislation in 1994 that established the Virginia Criminal Sentencing Commission. The Commission was charged with developing and administering a system of discretionary Sentencing Guidelines, compatible with the new criminal sentencing system, to assist the judiciary in the imposition of felony sentences in the Commonwealth. This section of the report describes the process by which the Commission developed the first set of Sentencing Guidelines implemented at the outset of the no-parole/truth-in-sentencing system (effective on January 1, 1995).

Analysis by Offense Groups

Virginia's Sentencing Guidelines are organized into offense groups. This organization is based on an historical analysis showing that the offense and offender factors considered by judges and the relative importance of these factors varied with the type of primary crime at conviction. Therefore, the Guidelines factors found within a particular offense group are those which proved consistently important in determining historical sentences for that crime category. Since the scores and factors for each offense group were developed on the basis of only those offenses within the category, the Guidelines for each offense group are tailored to the scores within that category alone and are not interchangeable among offense groups.

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[22] During a Special Session in the fall of 2020, the General Assembly passed House Bill 5148. The legislation, which took effect on July 1, 2022, increased the rate at which individuals serving time for certain nonviolent felony offenses can earn sentence credits. Under the provisions of House Bill 5148, persons serving time for certain nonviolent felonies are 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. During the 2021 General Assembly (Special Session I), the Governor recommended, and the General Assembly accepted, additional language in the Appropriation Act to specify that an individual serving time for both violent and nonviolent offenses is not eligible for the higher rate of sentence credits for any of the offenses associated with that term of incarceration. If an eligible nonviolent felon earns at the highest rate throughout his sentence, he will serve 67% of the court-ordered sentence.

Conversion to Historical Time Served

The first set of Sentencing Guidelines implemented at the outset of the no-parole/truth-in-sentencing system were developed by first analyzing five years of sentencing data from Virginia's circuit courts. Sentencing decisions from 1988 to 1992 were selected, providing a total of 105,624 felony level cases. Because judges would no longer be sentencing in a system with discretionary parole release and, going forward, would be sentencing in a system with an 85% minimum time-served requirement, simply analyzing historical sentencing decisions was not sufficient to develop the new Guidelines. Staff then studied data on the time served in jail or prison for offenders released from incarceration from 1988 through 1992. Such analysis revealed that offenders sentenced to prison at that time served, on average, only about one-quarter to one-third of the sentence imposed by the judge or jury. By converting the models to the time actually served by felony offenders, Guidelines recommendations, at this stage, reflected historical patterns of sentence dispositions (whether the offender received prison, jail, or no incarceration) and historical patterns of time served for those receiving a term of incarceration.

Anticipation of Earned Sentence Credits

Recommendations for incarceration sentence lengths, which at this stage reflected historical time served, were then increased by 13.4%. This increase reflected the projected award of sentence credits that would be earned under the new system. Although offenders could earn a reduction of up to 15% in the form of sentence credits, not all inmates would earn at the maximum rate. It was anticipated that, on average, prisoners would earn at a rate of 13.4%, on average, and recommended sentence lengths were increased by that amount to account for the awarding of sentence credits during the incarceration term.

Elimination of Extreme Lengths of Stay

Examining similarly-situated offenders (offenders convicted of the same/similar crimes with similar criminal histories), the Commission eliminated sentences that fell in the upper and lower quartiles (i.e., the lowest 25% and the highest 25% of sentences were removed from the analysis). The approach captured the middle 50% of the 1988-1992 cases based on time served in prison, without the most extreme lengths of stay at either end. The remaining high and low incarceration lengths of stay marked the high and low ends of the new recommended sentencing range, with the median (middle) sentence marking the new Sentencing Guidelines midpoint.

Case Example: First-Time Felony Drug Offenders

The figure below displays 1988-1992 sample cases for offenders convicted of the sale of a Schedule I or II drug (e.g., cocaine or heroin) who had no prior felony record. The vertical bars represent historical sentences (after any suspended time) given by judges and juries under the system of parole and good conduct allowance in place at that time. A horizontal band has been superimposed on the chart to represent the historical Sentencing Guidelines recommended range (3 to 7 years, with a midpoint recommendation of 5 years).

Case Example

Sentencing Guidelines Recommendation Based on *HISTORICAL SENTENCES*:
Sale Schedule I/II Drugs for Profit, No Prior Record
Offenders Sentenced 1988-1992
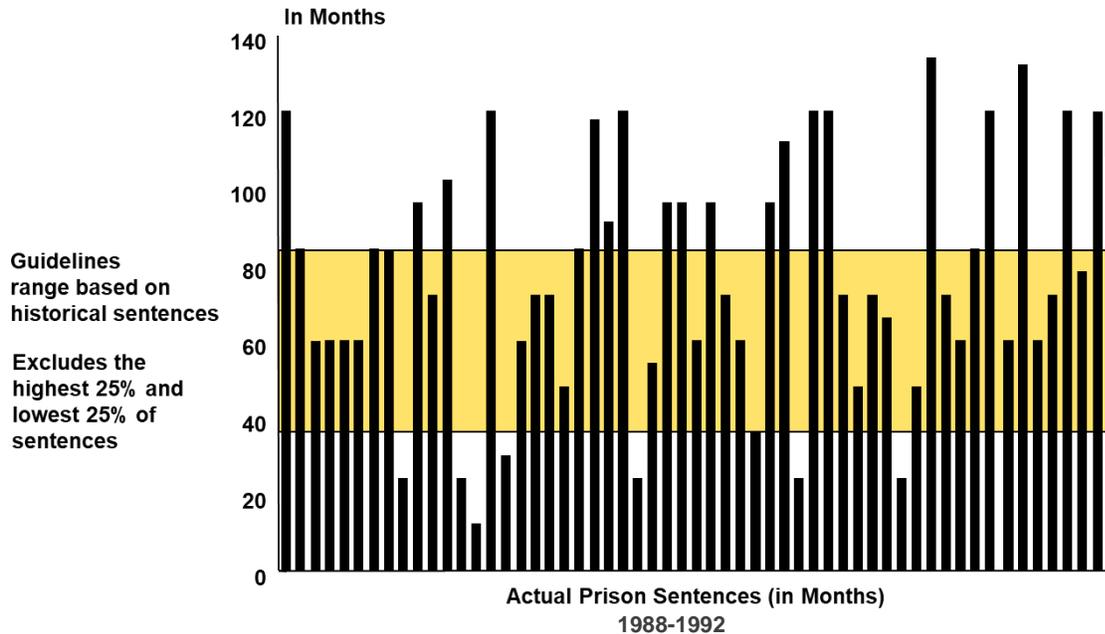
The next figure shows the same sample of offenders; however, the vertical bars now represent the time actually served on sentences ordered by the court. The horizontal bands show the historical Sentencing Guidelines range (pre-1995) and the truth-in-sentencing Guidelines range beginning in 1995. The truth-in-sentencing Guidelines recommendation is 7 to 16 months with a 1-year midpoint. The Guidelines recommendation under the truth-in-sentencing system is much lower than the Guidelines under the previous parole-based system. However, under the old system a first-time drug felon receiving a 5-year sentence served, on average, about 10 months. Under the no-parole system, a first-time drug dealer who received a 1-year sentence would serve, on average, about 10 months. Through this methodology, time actually served in prison remains about the same, but the sentence pronounced by the court is much shorter.

Case Example (continued)
Sentencing Guidelines Recommendation Based on *HISTORICAL TIME SERVED*:
Sale Schedule I/II Drugs for Profit, No Prior Record
Offenders Sentenced 1988-1992
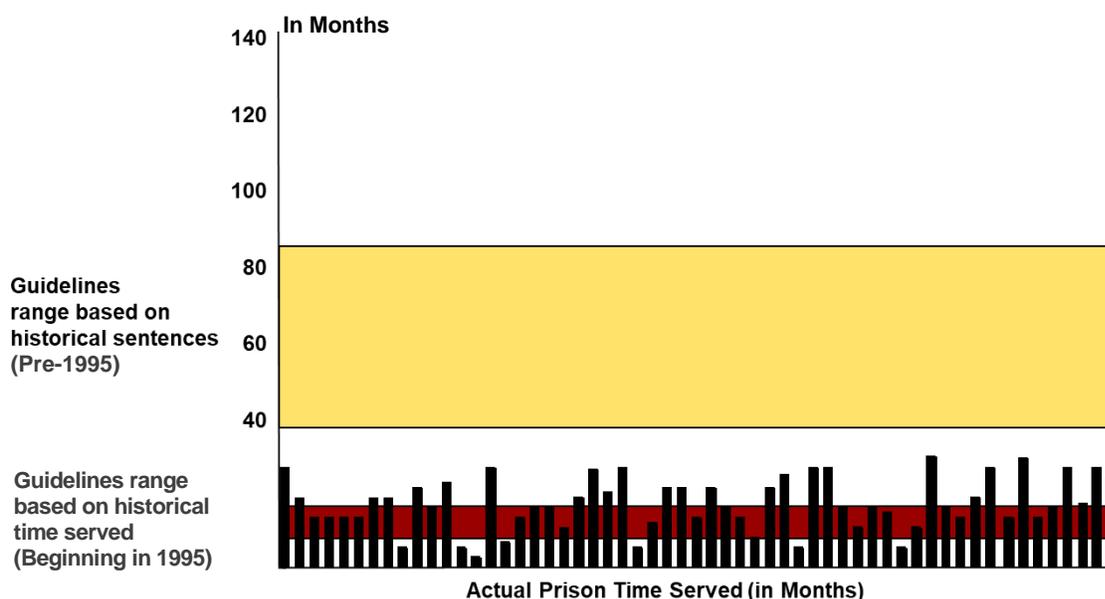
Longer Sentence Recommendations for Violent Offenders

Achieving "truth in sentencing," however, was not the only goal of the 1994 legislation. During its September 1994 Special Session, the General Assembly acted to alter recommendations for certain categories of crimes, prescribing prison sentence recommendations that were significantly greater than historical time served for these offenses. These prescriptive, or normative, adjustments to the Guidelines are made in cases with a current or prior conviction for a violent felony offense, as defined in § 17.1-805.

Longer Sentences through Midpoint Enhancements

The midpoint enhancements to be incorporated into the Sentencing Guidelines were stipulated by the General Assembly in the 1994 legislation (now § 17.1-805 of the *Code of Virginia*). The normative adjustments were implemented by increasing the new Guidelines midpoint recommendations (after converting to historical incarceration time served) for cases involving violent offenders. Specifically, on Section C, the Guidelines score for the primary (most serious) offense in a case was raised, or "enhanced." Additionally, the legislation specified degrees of enhancements depending on the nature of the primary offense and the seriousness of the offender's prior record of violence. For the crimes of first-degree murder, second-degree murder, rape in violation of § 18.2-61, forcible sodomy, object sexual penetration, and aggravated sexual battery, the Guidelines-recommended prison midpoint for the primary offense factor was increased by 125% for offenders without prior convictions for violent crimes, 300%

for those with at least one prior violent felony conviction or juvenile adjudication with a statutory maximum penalty of less than 40 years (classified as a Category II criminal record), and 500% for those with a criminal record that had at least one prior violent felony conviction or juvenile adjudication with a statutory maximum penalty of 40 years or more (classified as a Category I criminal record).

Guidelines Enhancements § 17.1-805

For first-degree murder, second-degree murder, rape in violation of § 18.2-61, forcible sodomy, object sexual penetration, and aggravated sexual battery:

Increase midpoints by:

			Life
		500%	
	300%		
125%			
No Violent Priors	**Category II Record: Violent Prior with Max Penalty <40 yrs**	**Category I Record: Violent Prior with Max Penalty >=40 yrs**	**Category I Record and Prior 1st-Degree Murder Conv.**
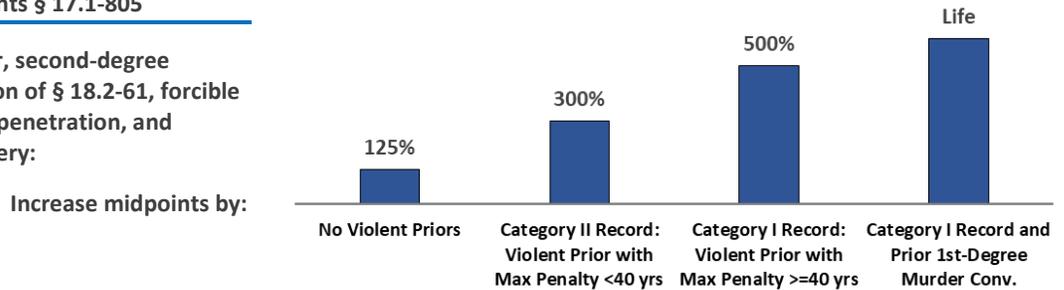
For the crimes of voluntary manslaughter, robbery, aggravated malicious wounding, malicious wounding, any burglary of a dwelling house or statutory burglary of a dwelling house or any burglary committed while armed with a deadly weapon or any statutory burglary committed while armed with a deadly weapon, the Guidelines-recommended prison midpoint for the primary offense factor was enhanced by 100% for offenders with no prior violent convictions, 300% for Category II records, and 500% for Category I records.

Guidelines Enhancements § 17.1-805

For voluntary manslaughter, robbery, aggravated malicious wounding, malicious wounding, any burglary of a dwelling house, or any burglary while armed with a deadly weapon:

Increase midpoints by:

		500%
	300%	
100%		
No Violent Priors	**Category II Record: Violent Prior with Max Penalty <40 yrs**	**Category I Record: Violent Prior with Max Penalty >=40 yrs**
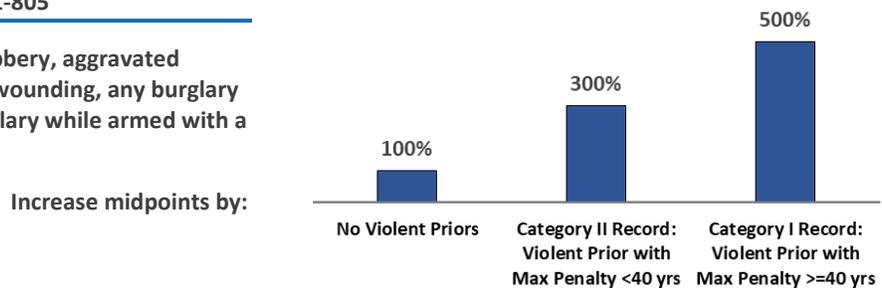
For the crimes of manufacturing, selling, giving or distributing, or possessing with the intent to do any of the former, of a Schedule I or II controlled substance, the Guidelines-recommended prison midpoint for the primary offense factor was not enhanced for those without a prior violent crime, but was increased by 200% for individuals with a Category II record and 400% for those with a Category I record.

Guidelines Enhancements § 17.1-805

For manufacturing, selling, giving or distributing, or possessing with the intent to do any of the former, of a Schedule I or II drug:

Increase midpoints by:

		400%
	200%	
None		
No Violent Priors	**Category II Record: Violent Prior with Max Penalty <40 yrs**	**Category I Record: Violent Prior with Max Penalty >=40 yrs**
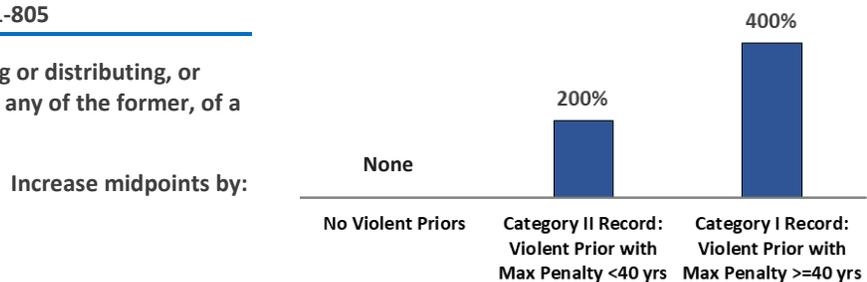
For any offense not listed above, the recommended prison midpoint for the primary offense factor was not enhanced for those without a prior violent crime but was increased by 100% for Category lI and 300% for Category I records.

Guidelines Enhancements § 17.1-805

For any offense not listed above:

Increase midpoints by:

	300%
	100%
None	
No Violent Priors	Category II Record: Violent Prior with Max Penalty <40 yrs	Category I Record: Violent Prior with Max Penalty >=40 yrs
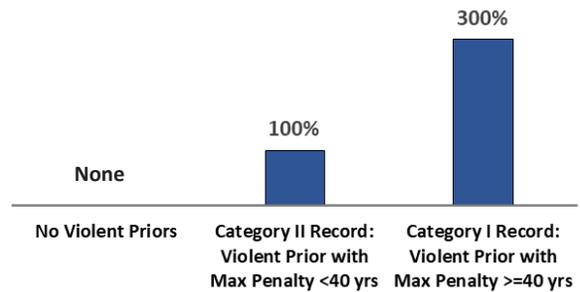
The figure below displays how the midpoint enhancements for violent offenders apply in cases of offenders convicted of rape. Under the parole sentencing system (1988-1992), an offender convicted of rape with no prior history of violence (labeled the "basic case") served, on average, approximately 5.6 years in prison before release, while a prisoner convicted of rape who had a prior violent felony conviction served, on average, 6.7 years. In 1995, the new Sentencing Guidelines called for a 125% increase in historical time served as the new midpoint recommendation. Thus, the 1995 Guidelines recommended a sentence of 12.6 years for an offender with no violent criminal history. For an offender convicted of rape who had committed a prior violent felony with a statutory maximum penalty of less than 40 years (a Category II prior record), the 1995 Guidelines midpoint was 22.3 years; while someone convicted of rape who had a prior violent felony with a statutory maximum penalty of 40 years or more (a Category I prior record) would qualify for a 1995 Guidelines midpoint of 33.5 years. Again, offenders sentenced under the no-parole/truth-in-sentencing system were to serve at least 85% of the sentence ordered by the court.

Guidelines Enhancements § 17.1-805

1988-1992 Time Served (Parole System) versus
1995 Guidelines Midpoint Recommendation (No-Parole/Truth-in-Sentencing System)

☐ 1988-1992 Time Served
■ 1995 Guidelines Midpoint Recommendation

	Basic Case	Category II Prior Record	Category I Prior Record
1988-1992 Time Served	5.6	6.7	6.7
1995 Guidelines Midpoint Recommendation	12.6	22.3	33.5
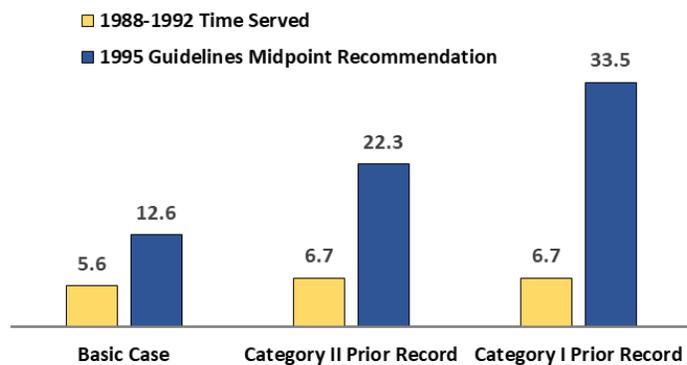
Summary

The 1994 legislation abolished parole for offenders sentenced for felony offenses committed on or after January 1, 1995, and required individuals convicted of felony offenses to serve at least 85% of the sentence ordered by the court. Beginning January 1, 1995, Guidelines recommendations reflected actual time to be served in jail or prison, less a reduction of no more than 15% for earned sentence credits. Thus, judges and the public could predict actual time served in jail or prison with a high degree of accuracy. The Sentencing Guidelines implemented in 1995 represented a departure from the previous Guidelines system. The previous Guidelines recommended a sentence, a large portion of which was not served after application of parole and good conduct allowance credit. In addition, the previous system was entirely based on historical sentences, with no prescriptive or normative adjustments. Under the truth-in-sentencing system, with the elimination of parole, the judge's sentence would indicate the actual time to be served in incarceration, with the offender only eligible for limited earned sentence credits. For nonviolent offenders, the new Sentencing Guidelines midpoints and ranges appeared shorter than under the previous system but resulted in actual time served in jail or prison that was about the same as under the parole system (1988-1992). Per legislative requirements, the Guidelines implemented in 1995 called for longer terms of incarceration for violent offenders, who were recommended to spend up to six times longer in prison than the historical average under parole (based on enhancements specified in § 17.1-805). The amount of additional time depended on the seriousness of the crime and the offender's prior criminal record of violent offenses. The Guidelines yield recommendations such that violent offenders serve, on the average, significantly longer prison terms for crimes committed in 1995 or after.

Drug/Schedule I/II ❖ Section A

Offender Name: _____

◆ **Primary Offense**

A. Possess Schedule I or II drug or First offender violation
    1 count 1
    2 counts 3
    3 counts 8

B. Sell, distribute, possession with intent, etc., Schedule I or II drug
    1 count 12
    2 counts 13
    3 counts 14
    4 counts 15

C. Manufacture Schedule I/II drug § 18.2-248(C) or Methamphetamine (1st or 2nd conviction) § 18.2-248(C1)
    1 count 12
    2 counts 13
    3 counts 14
    4 counts 15

D. Accommodation - Sell, distribute, possession with intent Schedule I or II drug
    1 count 5
    2 counts 7

E. Sell, etc., imitation Schedule I or II drug (1 count) 4

F. Possess precursors with intent to manufacture methamphetamine (1 count)........................6

G. Sell, etc., Schedule I or II drug to minor (1 count) 11

Score ▼ [ ][ ]

◆ **Primary Offense Remaining Counts** Total the maximum penalties for counts of the primary not scored above

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

▼ [0]

◆ **Additional Offenses** Total the maximum penalties for additional offenses, including counts

Years:
Less than 4 0   22 - 30 3
4 - 10 1   31 - 42 4
11 - 21 2   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** 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**

Primary offense:
F: Possession of Methamphetamine precursors

Number of Counts	Points
1	3
2 or more	6

Primary offense:
All other offenses

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

▼ [0]

◆ **Prior Juvenile Record** — If YES, add 1 ▶ [0]

◆ **Legally Restrained at Time of Offense**

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

▼ [0]

SCORE THE FOLLOWING FACTOR **ONLY** IF PRIMARY OFFENSE IS **A: POSSESSION OF SCHEDULE I/II DRUG** (§ 18.2-250(A,a))

◆ **Two or More Prior Felony Convictions/Adjudications** — If YES, add 2 ▶ [0]
For Possession, Possession with Intent, Distribution, Manufacture or Sale of Schedule I or II Drug, etc.

Total Score ━━━━━━━━━━▶ [ ][ ]

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

Drug/Schedule I/II ❖ Section B

Offender Name: _____

◆ **Primary Offense**

   A.   Possess Schedule I or II drug or First offender violation

                 1 count 3

                 2 counts 6

   B.   Accommodation - Sell, distribute, possession with intent Schedule I or II drug

Score

                 1 count 8

                 2 counts 9

▼

   C.   Sell, etc., imitation Schedule I or II drug (1 count) 4

   D.   Possession of methamphetamine precursors (1 count) 6

                                    `0`

◆ **Primary Offense Remaining Counts** <u>Total</u> the maximum penalties for counts of the primary not scored above

     Years: 5 - 9 2

               10 - 19 3

               20 - 28 4   ▼

               29 - 38 5

               39 or more 6   `0`

◆ **Additional Offenses** <u>Total</u> the maximum penalties for additional offenses, including counts

     Years: Less than 1 0

               1 - 9 2

               10 - 19 3   ▼

                20 - 28 4

               29 - 38 5

               39 or more 6   `0`

◆ **Knife or Firearm in Possession at Time of Offense** ————————— If YES, add 2 ▶ `0`

◆ **Prior Convictions/Adjudications** <u>Total</u> the maximum penalties for the 5 most recent and serious prior record events

     Years: Less than 1 0

               1 - 22 1   ▼

               23 - 43 2

               44 or more 3   `0`

◆ **Prior Misdemeanor Convictions/Adjudications** (Excludes Traffic)

   Number of   1 - 4 1

   Counts: 5 - 9 2   ▼

                10 or more 3   `0`

◆ **Prior Incarcerations/Commitments**

Primary offense:	Primary offense:
D. Possession of methamphetamine precursors	**All other offenses**
If YES, add 2	If YES, add 1

▼   `0`

◆ **Prior Juvenile Record** ———————————————————— If YES, add 1 ▶ `0`

◆ **Legally Restrained at Time of Offense**

       None 0

       Other than parole/post-release, supervised probation or CCCA 2   ▼

       Parole/post-release, supervised probation or CCCA 3   `0`

SCORE THE FOLLOWING FACTOR **ONLY** IF PRIMARY OFFENSE IS **A: POSSESSION OF SCHEDULE I/II DRUG** (§18.2-250(A,a))

◆ **Two or More Prior Felony Convictions/Adjudications** ——————— If YES, add 2 ▶ `0`

   For Possession, Possession with Intent, Distribution, Manufacture or Sale of Schedule I or II Drug, etc.

       Total Score ═══════════════════════════════════▶ `[  ]`

           See **Drug/Schedule I/II Section B Recommendation Table** to convert score to guidelines sentence.

           Then, go to **Section D Nonviolent Risk Assessment** and follow the instructions.

Drug/Schedule I/II ❖ Section C

Offender Name: _____

◆ **Primary Offense**

Prior Record Classification

☐ Category I ☐ Category II ☐ Other
(scores for attempted/conspired offenses are in parentheses)

A. Possess Schedule I or II drug or First offender violation
  Attempted, conspired or completed:
    1 count .... 20 .... 10 5
    2 counts .... 28 .... 14 7
    3 counts .... 36 .... 18 9

B. Sell, Distribute, Possession with intent, etc., Schedule I or II drug
  Completed (Attempted or Conspired):
    1 count .... 60 (48) .... 36 (24) 12 (12)
    2 counts .... 80 (64) .... 48 (32) 16 (16)
    3 counts .... 95 (76) .... 57 (38) 19 (19)
    4 counts .... 130(104) .... 78 (52) 26 (26)

C. Sell, etc., Schedule I or II drug, second offense
  Completed (Attempted or Conspired):
    1 count .... 110 (88) .... 66 (44) 22 (22)
    2 counts .... 310(248) .... 186(124) 62 (62)

D. Sell, etc., Schedule I or II drug - third or subsequent offense
  Attempted, conspired or completed:
    1 count .... 175 .... 105 35
    2 counts .... 390 .... 234 78

E. Manufacture Schedule I/II drug § 18.2-248(C) or Methamphetamine, 1st or 2nd offense, § 18.2-248(C1)
  Attempted, conspired or completed: 1 count ...... 130 .... 78 26

F. Sell, etc., Schedule I or II drug to minor
  Attempted, conspired or completed: 1 count .... 60 .... 30 15

G. Accomodation—Sell, etc., Schedule I or II drug
  Attempted, conspired or completed:
    1 count .... 32 .... 16 8
    2 counts .... 40 .... 20 10

H. Sell, etc., imitation Schedule I or II drug; Possession of methamphetamine precursors
  Attempted, conspired or completed:
    1 count .... 12 .... 6 3
    2 counts .... 20 .... 10 5

Score
☐☐☐

◆ **Primary Offense Remaining Counts** Assign points to each count of the primary not scored above and total the points

Maximum Penalty (years)   5,10 1   40 or more .... 5 ➤ ☐☐☐

◆ **Additional Offenses** Assign points to each additional offense (including counts) and total the points

Primary offense D: Sell, etc., Sch. I/II 3rd or Subsequent	
Years	Points
Less than 5	0
5,10	2
20	4
30	6
40 or more	7

Primary offense: All other offenses	
Years	Points
Less than 5	0
5,10	1
20	2
30	4
40 or more	5

☐☐☐

◆ **Mandatory Minimum for Weapon Conviction(s) in Current Event** Assign points to each additional
offense with a mandatory minimum and total the points
  2 Year Mandatory Minimum......13   3 Year Mandatory Minimum......25   5 Year Mandatory Minimum......32 ➤ 0

◆ **Firearm in Possession at Time of Offense** ——————— If YES, add 5 ➤ 0 0

◆ **Prior Convictions/Adjudications** Assign points to the 5 most recent and serious prior record events and total the points

Maximum Penalty: (years)			
Less than 5	0	30	3
5, 10	1	40 or more	4
20	2		

➤ 0

◆ **Prior Felony Drug Convictions/Adjudications**

Primary offense D: Sell, etc., Sch. I/II 3rd or Subsequent	
Number of Counts	Score
2	9
3	10
4	17
5 or more	20

Primary offense: All other offenses	
Number of Counts	Score
1	2
2	3
3	5
4	7
5	8
6 or more	10

0

◆ **Prior Felony Convictions/Adjudications Against Person**

Number of Counts:			
1	3	3	9
2	6	4 or more	12

➤ 0

◆ **Prior Felony Property Convictions/Adjudications**

Number of Counts:			
1,2	1	4 or more	3
3	2		

➤ 0 0

◆ **Prior Juvenile Record** —————————————— If YES, add 1 ➤ 0 0

◆ **Legally Restrained at Time of Offense** ———————— If YES, add 3 ➤ 0 0

◆ **Type of Additional Offense** (Score if primary offense is E: Manufacture Methamphetamine § 18.2-248 (C1))

Additional offense of child present during manufacture of methamphetamine ————— If YES, add 14 ➤ 0

◆ **Sale/Quantity of Cocaine** (Score if primary offense is B, C, D, or F: § 18.2-248(C) or §18.2-255(A))

Quantity of Cocaine: Less than 28.35 grams 0   28.35 g to less than 226.8 grams 36   226.8 grams or more ....60 ➤ 0

Total Score ————————————————————————➤ ☐☐☐

See **Drug/Schedule I/II Section C Recommendation Table** for guidelines sentence range.
Then go to **Section D Nonviolent Risk Assessment** and follow the instructions.

Nonviolent Risk Assessment ❖ Drug/Schedule I/II Section D

◆ **Ineligibility Conditions**   Offender Name: _____

A.	Was the offender recommended for **Probation/No Incarceration** on Section B?	☐ Yes	☐ No
B.	Do any of the offenses at sentencing involve the sale, distribution, or possession with intent, etc. of cocaine of a combined quantity of 28.35 grams (1 ounce) or more?	☐ Yes	☐ No
C.	Are any prior record offenses violent (Category I/II listed in Appendix A of the Guidelines Manual)?...............	☐ Yes	☐ No
D.	Are any of the offenses at sentencing violent (Category I/II listed in Appendix A of the Guidelines Manual)?................	☐ Yes	☐ No
E.	Do any of the offenses at sentencing require a mandatory term of incarceration?	☐ Yes	☐ No

> If answered YES to ANY, go to "Nonviolent Risk Assessment Recommendations" on cover sheet and check
> Not Applicable. If answered NO to ALL, complete remainder of Section D worksheet.

◆ **Offender Age at Time of Offense**

Younger than 21 years...9
21 to 29 years...6
30 to 43 years...3
Older than 43 years...1

◆ **Gender**

Offender is Male...2   `0`

◆ **Prior Juvenile Adjudication**

Female with prior juvenile adjudication 1   `0`
Male with prior juvenile adjudication 7
☐ Juvenile record unknown

◆ **Prior Adult Felony Convictions**

Number   0...0
of Counts: 1 - 2..1
                3...5
                4 or more...15

◆ **Prior Adult Incarcerations**

Number: 0...0
                1 - 3..1   `0`
                4 or more..8

◆ **Prior Arrest or Confinement Within Past 12 Months (Prior to Offense)** —If YES, add 3 ——▶ `0`

Total Score ——————————————————————▶

☐ 15 or less, check Recommended for Alternative Punishment.
☐ 16 or more, check NOT Recommended for Alternative Punishment.   Drug/Schedule I or II
                                                                                   Section D
Go to **Cover Sheet** and fill out **Nonviolent Risk Assessment Recommendations**.

Appendix D
Sentencing Commission Members

APPOINTMENTS BY THE CHIEF JUSTICE OF THE SUPREME COURT	
Judge Edward L. Hogshire (Ret.), Chair*	Judge Charles S. Sharp (Ret.), Vice Chair
Judge Steven C. Frucci 2nd Judicial Circuit	Judge Patricia Kelly 15th Judicial Circuit
Judge W. Revell Lewis, III 2nd Judicial Circuit	Judge Jack S. Hurley, Jr. 29th Judicial Circuit
Judge Stacey W. Moreau 22nd Judicial Circuit	
ATTORNEY GENERAL OR DESIGNEE	
Serves for term of office	
GOVERNOR'S APPOINTMENTS	
Timothy S. Coyne, Esq. Deputy Director Virginia Indigent Defense Commission	Michon J. Moon, Ph.D. North Chesterfield, Virginia
Linda Brown Chesapeake, Virginia	The Honorable Shannon L. Taylor Commonwealth's Attorney Henrico County
SENATE APPOINTMENTS	
Senator John S. Edwards	Marcus Elam Virginia Department of Corrections
HOUSE OF DELEGATES APPOINTMENTS	
Delegate Leslie R. Adams	Judge Dennis L. Hupp (Ret.)
K. Scott Miles Deputy Commonwealth's Attorney City of Norfolk	

* Subject to confirmation by the General Assembly

Sentencing Commission Staff

STAFF OF THE COMMISSION	
Meredith Farrar-Owens, Director	Jody T. Fridley, Deputy Director
Tom Y. Barnes Research Associate	Alfreda A. Cheatham Data Quality Specialist
Catherine Chen, Ph.D. Data Scientist	Chang Kwon, Ph.D. Chief Methodologist
Kimberly F. Thomas Training Associate	Carolyn A. Williamson Research Associate