

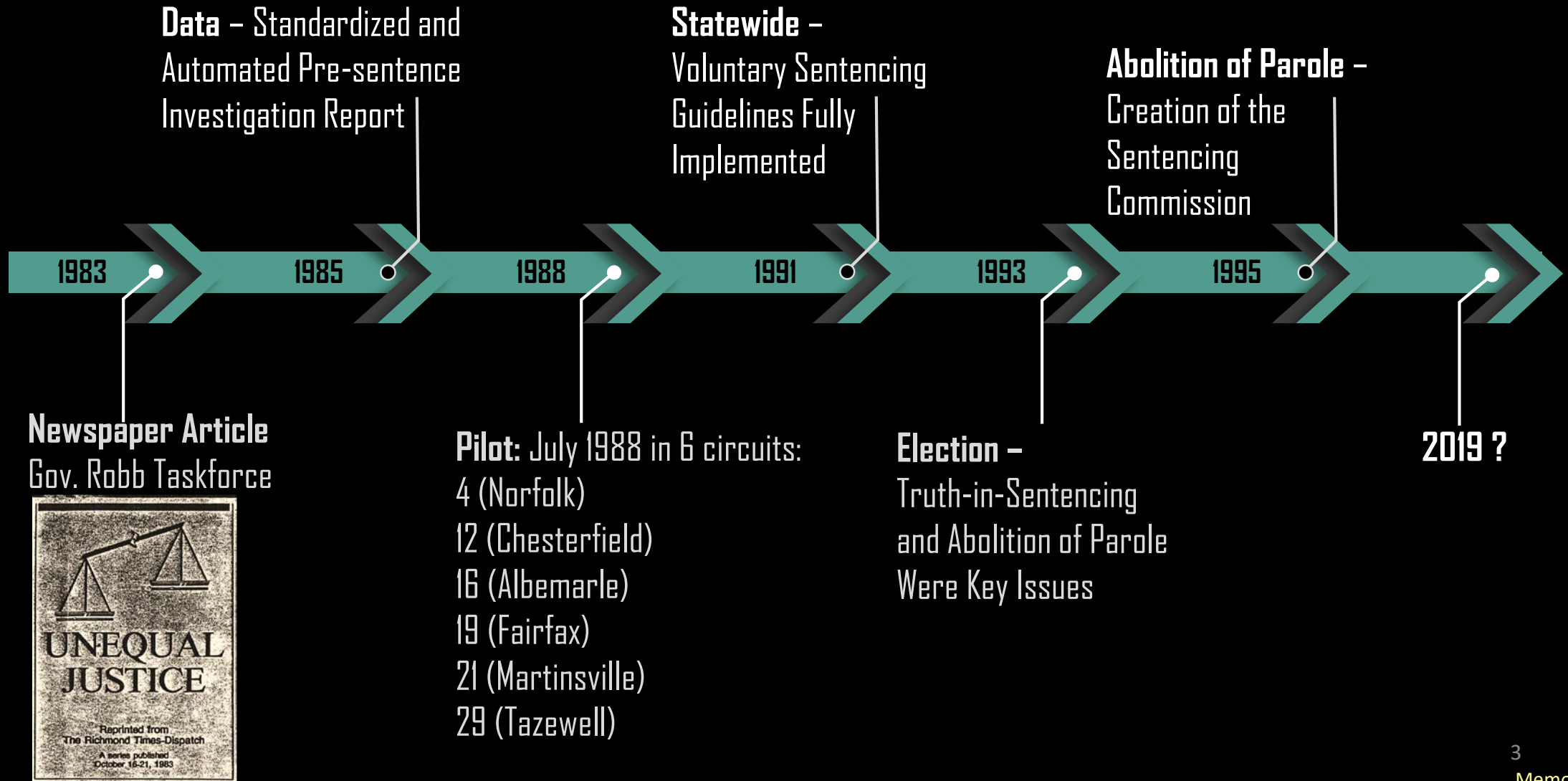


REVIEW OF DOCUMENT:
VIRGINIA'S SENTENCING GUIDELINES
AND
APPROACHES TO SCORING PRIOR RECORD OFFENSES

BACKGROUND

VCSC TIMELINE

History of the Development of Voluntary Sentencing Guidelines in Virginia



BACKGROUND

- THE DATA SOURCE FOR THIS ANALYSIS WAS THE PRE/POST-SENTENCE INVESTIGATION (PSI) REPORTING SYSTEM. SINCE 1985, THE STATE'S PROBATION OFFICERS, WHO PREPARE PSIS FOR THE COURT, HAVE BEEN INSTRUCTED TO RECORD PRIOR RECORD OFFENSES USING THE CURRENT VIRGINIA CRIME CODES (VCCs) THAT REFLECT THE **STATUTORY PENALTY STRUCTURE IN EFFECT AT THE TIME THE REPORT WAS PREPARED** (VIRGINIA DEPARTMENT OF CORRECTIONS, 1992, P. 4).
- ANALYZING THE PSI DATA TO DEVELOP THE GUIDELINES, THE CURRENT PENALTY STRUCTURE OF AN OFFENSE WAS USED AS A **PROXY FOR THE SERIOUSNESS OF THE ELEMENTS OF THE OFFENSE**. IN THIS WAY, THE SAME CRIME WAS GIVEN THE SAME WEIGHT ON THE GUIDELINES, NO MATTER WHEN OR WHERE COMMITTED.
- FOR THE DEVELOPMENT AND ADMINISTRATION OF THE NO-PAROLE/TRUTH-IN-SENTENCING GUIDELINES, THE COMMISSION ADOPTED THE **SAME RULES FOR SCORING PRIOR RECORD AS HAD BEEN DEVELOPED IN 1985**.

NATIONAL CENTER FOR STATE COURTS FINDINGS

After assessing the consistency and fairness of Virginia's Sentencing Guidelines, the authors concluded that the benefits of Virginia's approach were:

- 1) PREDICTABLE SENTENCING DECISIONS
- 2) OPPORTUNITIES FOR APPROPRIATE DISCRETION
- 3) NO MEASURABLE DISPARITIES
- 4) BENEFIT OF PERIODIC ASSESSMENT
- 5) BENEFIT OF REGULAR MONITORING
 - SOLIDIFY GAINS
 - POLICYMAKERS CAN REORIENT FUTURE RESOURCES



CHANGES IN PENALTIES

UNDER THE COMMISSION'S POLICY, THE SAME CRIME IS GIVEN THE SAME WEIGHT ON THE GUIDELINES, NO MATTER WHEN OR WHERE COMMITTED. THE PENALTY IS A PROXY FOR SERIOUSNESS.

- **HABITUAL OFFENDER – NO ENDANGERMENT (FELONY)**
 - 1993 REDUCED TO MISDEMEANOR, 90 DAYS & THEN INCREASED TO 12 MONTHS IN 2000
- **GRAND LARCENY \$200 - \$499 FELONY**
 - 2018 REDUCED TO MISDEMEANOR, 12 MONTHS
- **SIMPLE ASSAULT AGAINST LAW ENFORCEMENT (MISDEMEANOR)**
 - 1997 INCREASED TO FELONY (EXPANDED MULTIPLE TIMES)
- **SECOND DEGREE MURDER (FELONY - 20 YEAR MAXIMUM – CATEGORY II ENHANCEMENT)**
 - 1993 INCREASED PENALTY (FELONY - 40 YEAR MAXIMUM – CATEGORY I ENHANCEMENT)
- **POSSESSION CHILD PORN MISDEMEANOR**
 - 2003 INCREASED TO FELONY (5 MAXIMUM – CATEGORY II ENHANCEMENT – FIRST OFFENSE)

ONE OF THE PURPOSES OF SENTENCING GUIDELINES, DATING BACK TO 1985, HAS BEEN TO REDUCE UNWARRANTED SENTENCING DISPARITY.

WITH THIS GOAL IN MIND, THE RESEARCH DESIGN ESTABLISHED: CONSISTENT DEFINITIONS FOR ELEMENTS OF THE OFFENSE (E.G., VICTIM INJURY) AND CREATED STANDARDIZED MEASURES FOR PRIOR RECORD.

1. ALTERNATIVE MEASURES OF PRIOR RECORD WERE CONSIDERED
 - RANKINGS WERE MARKEDLY DIFFERENT THAN STATUTORY PENALTIES
2. COMMISSION DECIDED TO RETAIN STATUTORY MAXIMUMS AS THE PROXY FOR THE SERIOUSNESS OF OFFENSES.
 - MEMBERS DID NOT WANT TO MAKE A POLICY DECISION (DECIDED THAT WAS THE FUNCTION OF THE GENERAL ASSEMBLY).
 - CURRENT VIRGINIA PENALTY STRUCTURE WAS A KNOWN SYSTEM FOR ASSIGNING POINTS FOR SERIOUSNESS OF OFFENSES.

PROPOSED ALTERNATIVE

UNDER THE PROPOSED ALTERNATIVE APPROACH, THE GUIDELINES PREPARER WOULD SCORE EACH PRIOR OFFENSE BASED ON THE PENALTY IN PLACE AT THE TIME AND IN THE STATE WHERE THE OFFENSE WAS COMMITTED.

- EACH OFFENSE WOULD BE SCORED BASED ON THE SERIOUSNESS LEVEL OF THE OFFENSE AS IT APPEARS ON THE DEFENDANT'S CRIMINAL HISTORY REPORT
- PROPONENTS SUGGESTED THAT THIS APPROACH WOULD BE MORE EFFICIENT AND REDUCE THE TIME NEEDED TO COMPLETE SENTENCING GUIDELINE FORMS FOR THE COURT
- THIS APPROACH WOULD ADDRESS THE CONCERNS OF COMMONWEALTH'S ATTORNEYS REGARDING THE SCORING OF PRIOR LARCENY CONVICTIONS FOLLOWING ENACTMENT OF 2018 LEGISLATION AND ANY FUTURE LEGISLATION IN VIRGINIA

THE PROPOSED ALTERNATIVE APPROACH (WEIGHTING EACH PRIOR OFFENSE BASED ON THE PENALTY IN PLACE AT THE TIME AND IN THE STATE WHERE THE OFFENSE WAS COMMITTED) MAY IMPACT SENTENCING GUIDELINES RECOMMENDATIONS FOR SOME DEFENDANTS

- **LOWER**

Example 1:
Possess Child Porn

- IF THE DEFENDANT HAS PRIOR CONVICTIONS FOR OFFENSES FOR WHICH THE GENERAL ASSEMBLY SUBSEQUENTLY INCREASED PENALTIES, THE PROPOSED APPROACH MAY RESULT IN A LOWER RECOMMENDED SENTENCE

Example 3:
Possess Cocaine

- IF THE DEFENDANT HAS A PRIOR CONVICTION IN ANOTHER STATE AND THAT STATE PUNISHES THE OFFENSE AT A LOWER LEVEL THAN VIRGINIA, THE PROPOSED APPROACH MAY RESULT IN A LOWER GUIDELINES RECOMMENDATION

Others:
2nd Degree Murder
Child Neglect

- **HIGHER**

Example 2:
Grand Larceny

- IF THE DEFENDANT HAS PRIOR CONVICTIONS FOR OFFENSES FOR WHICH THE GENERAL ASSEMBLY SUBSEQUENTLY DECREASED PENALTIES, THE PROPOSED APPROACH MAY RESULT IN A HIGHER RECOMMENDED SENTENCE

Others:
Handgun without a license

- A DEFENDANT WHO HAS A PRIOR CONVICTION IN ANOTHER STATE FOR A CRIME THAT IS PUNISHED AT A HIGHER LEVEL THAN IN VIRGINIA, THE PROPOSED APPROACH MAY RESULT IN A HIGHER GUIDELINES RECOMMENDATION

STAKEHOLDERS INPUT

COMMONWEALTH'S ATTORNEYS

- IN REGARD TO PRIOR LARCENY CONVICTIONS, PROSECUTORS ARE CONCERNED HOW PROOF IS GOING TO TAKE PLACE; THE STANDARD OF PROOF, THE ADMISSIBILITY OR INADMISSIBILITY OF HEARSAY, OR THE ABILITY OF THE DEFENDANT TO CONFRONT THAT "EVIDENCE" THAT PROVES THE ITEM STOLEN WAS \$500 OR MORE.
- MOST CRITICALLY, PROSECUTORS DO NOT HAVE THE MANPOWER OR TIME RESOURCES TO RESEARCH PRIOR CONVICTIONS FOR LARCENIES

Letter from Roy Evans,
Virginia Association of Commonwealth's Attorneys,
August 29, 2018.

PROBATION AND PAROLE

- OFFICERS MUST HAVE ACCESS TO LEGISLATIVE HISTORIES (OLD STATUTES) FOR NOT ONLY VIRGINIA BUT ALL OTHER STATES (DOC ADMINISTRATORS NOTED THAT MANY DEFENDANTS FOR WHOM THEY PREPARE SENTENCING GUIDELINES HAVE CONVICTIONS IN OTHER STATES);
- OFFICERS WOULD NEED TO BECOME FAMILIAR WITH THE PENALTY STRUCTURES FOR EVERY STATE, NOT JUST VIRGINIA.
- ADDITIONAL TIME AND POSITIONS WILL BE NEEDED TO FULLY INVESTIGATE PRIOR RECORD. SIMPLY LOOKING AT A CRIMINAL HISTORY "RAP SHEET" WOULD NOT PROVIDE OFFICERS WITH THE DETAILS NEEDED TO SCORE PRIOR CONVICTIONS BASED ON PENALTIES IN EACH STATE AND AT THE APPROPRIATE SERIOUSNESS LEVEL AT THE TIME THE OFFENSES WERE COMMITTED
- OFFICERS MAY BE REQUIRED TO TESTIFY IN COURT AS ATTORNEYS QUESTION THE INTERPRETATION OF OLDER STATUTES AND PENALTY STRUCTURES OF OTHER STATES.
- PROPOSED ALTERNATIVE APPROACH FOR SCORING PRIOR RECORD MAY REQUIRE PROSECUTORS TO DO THE LEGAL RESEARCH NECESSARY TO COMPLETE GUIDELINES.

Conference call with Department of Corrections administrators, October 18, 2018

IMPACT ON ALL GUIDELINES PREPARERS

CURRENT: IF FELONY DESIGNATION IS AVAILABLE, P&P CAN DETERMINE THAT THE VALUE OF PROPERTY WAS \$500 OR MORE AND SCORE AS A 20 YEAR MAXIMUM -- MOST STATES HAVE A HIGHER THRESHOLD FOR FELONY LARCENY THAN VIRGINIA)

PROPOSED: EVEN IN CASES WHEN THE FELONY THRESHOLD IS \$500 OR MORE, P&P WOULD HAVE TO DETERMINE THE PENALTY STRUCTURE FOR LARCENY IN EACH STATE AT THE TIME OF THE OFFENSE BEFORE THEY COULD ASSIGN POINTS FOR THE BEHAVIOR

State	Felony Threshold
Alabama	\$500
Alaska	\$500
Arizona	\$1,000
Arkansas	\$500
California	\$950
Colorado	\$2,000
Connecticut	\$1,000
Delaware	\$1,500
Florida	\$300
Georgia	\$1,500
Hawaii	\$300
Idaho	\$1,000
Illinois	\$500
Indiana	\$750
Iowa	\$1,000
Kansas	\$1,000
Kentucky	\$500
Louisiana	\$500
Maine	\$1,000
Maryland	\$1,000
Massachusetts	\$250
Michigan	\$1,000
Minnesota	\$1,000
Mississippi	\$500
Missouri	\$500
Montana	\$1,500
Nebraska	\$500
Nevada	\$650
New Hampshire	\$1,000
New Jersey	\$200
New Mexico	\$500
New York	\$1,000
North Carolina	\$1,000
North Dakota	\$1,000
Ohio	\$1,000
Oklahoma	\$500
Oregon	\$1,000
Pennsylvania	\$2,000
Rhode Island	\$1,500
South Carolina	\$2,000
South Dakota	\$1,000
Tennessee	\$500
Texas	\$1,500
Utah	\$1,500
Vermont	\$900
Virginia	\$500
Washington	\$750
Washington, DC	\$1,000
West Virginia	\$1,000
Wisconsin	\$2,500
Wyoming	\$1,000

LEGISLATIVE

- ANY RECOMMENDATION MUST BE PRESENTED TO THE LEGISLATURE IN THE COMMISSION'S ANNUAL REPORT.

LEGISLATIVE



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Senator Mark D. Obenshain, *Chairman*

Delegate Robert B. Bell, *Vice-Chairman*

Executive Director
Kristen J. Howard

November 5, 2018

Judge Edward L. Hogshire, Chairman
Virginia Criminal Sentencing Commission
100 North Ninth Street, 5th Floor
Richmond, VA 23219

Dear Judge Hogshire:

I am writing in response to your recent request for input from the Virginia State Crime Commission regarding sentencing guidelines scoring due to the change in the felony larceny threshold. It is my understanding that this issue is currently before the Virginia Criminal Sentencing Commission and planned for discussion at the next meeting on Wednesday, November 7th.

The Crime Commission has previously studied felony larceny threshold, but not in regard to the sentencing guidelines and is willing to assist the Sentencing Commission with this matter. However, we would like the opportunity to review this issue in further detail so that the Crime Commission can provide meaningful input. If you, and your Commission, are able to defer this decision until a later date, we would be happy to cooperate in providing a response.

This topic could be added to the Crime Commission's next meeting agenda, which is scheduled for November 8th at 1:00 p.m. Please let me know if this is workable for your timeframe, or if the Crime Commission can assist in any other manner. We appreciate your consideration of the Crime Commission as you deliberate on this important matter.

Sincerely,

A handwritten signature in black ink, appearing to be "M. Obenshain", written over a faint circular stamp or watermark.

Mark D. Obenshain
Chairman

cc: Kristen Howard, Executive Director, Virginia State Crime Commission
Meredith Farrar-Owens, Director, Virginia Criminal Sentencing Commission

OTHER FACTORS

OTHER FACTORS

- FOR EACH PRIOR RECORD OFFENSE, PREPARERS MUST KNOW IF IT SHOULD BE SCORED AS A FELONY OR MISDEMEANOR.
- THEY MUST KNOW THE MAXIMUM PENALTY APPLICABLE TO THE OFFENSE.
- PRIOR CONVICTIONS/ADJUDICATIONS IS A FACTOR THAT APPEARS ON NEARLY EVERY WORKSHEET (EXAMPLE: WORKSHEET C)

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

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



CRIMINAL HISTORIES ARE NOT ALWAYS CLEAR

- WASHINGTON DC
 - PENALTY FOR THEFT I ?
 - PENALTY FOR UNIFORM CONTROLLED SUBSTANCE ACT?
 - POSSESSION OF COCAINE – SCORE AS MISDEMEANOR

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Arrest Case Number      354099
Arresting Agency        DC001017A US ATTORNEY WASHINGTON
Subject's Name          H [REDACTED]
Charge                  1
                        Charge Literal ROBBERY POCKET BOOK SNATCH
                        Severity        Unknown
-----
Court Disposition       (Cycle 005)
Court Case Number
Final Disposition Date  1985-12-19
Court Agency
Charge                  1
                        Charge Literal ROBBERY POCKET BOOK SNATCH
                        Disposition   ( 1985-12-19;  ISS PROB 2Y)
Charge                  2
                        Charge Literal THEFT I
                        Disposition   ( 1985-12-19;  100 HRS COMM SERV)
===== Cycle 006 =====
Earliest Event Date     1989-07-14
-----
Arrest Date             1989-07-14
Arrest Case Number
Arresting Agency        DC001017A US ATTORNEY WASHINGTON
Subject's Name          [REDACTED]
Charge                  1
                        Charge Literal UNIFORM CONTROLLED SUBST ACT POSSESSION OF COC
                        Severity        Unknown
-----
Court Disposition       (Cycle 006)
Court Case Number
Court Agency
Charge                  1
                        Charge Literal POSSESSION COCAINE
                        Disposition   ( 08-09-89,DEFENDANT PLEAD GUILTY,SENTE
                                                DAYS IN JAIL,PROBATION FOR 1 YEAR)
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CRIMINAL HISTORIES ARE NOT ALWAYS CLEAR

- KENTUCKY
 - PENALTY FOR BURGLARY 2ND FORCED? (10 YEAR MAX)
 - PENALTY FOR CRIMINAL MISCHIEF 1ST PRIVATE? (FELONY)
 - WANTON ENDANGERMENT 2ND DEGREE ? (MISDEMEANOR)

5-ARRESTED OR RECEIVED 1991/01/06 SID-
AGENCY-METRO CORR SRV-DEPT LOUISVILLE (KY056023C)
AGENCY CASE-

FINGERPRINT INFORMATION

BSI/
PRINT DATE/
NAME USED-
CHARGE 1-BURGLARY 2ND FORCED RESIDENCE

COURT-()

CHARGE-BURGLARY 2ND DEGREE AM CT I
SENTENCE-
P/G, 60D C/D 2Y, CTS/C

6-ARRESTED OR RECEIVED 1992/05/21 SID-
AGENCY-METRO CORR SRV-DEPT LOUISVILLE (KY056023C)
AGENCY CASE-

FINGERPRINT INFORMATION

BSI/
PRINT DATE/
NAME USED-
CHARGE 1-CRIMINAL MISCHIEF 1ST PRIVATE

COURT-()

CHARGE-CRIMINAL MISCHIEF 1ST DEGREE AMENDED WANTON ENDANGERMENT
2ND DEGREE
SENTENCE-
PRISON TERM-CONTACT CONTRIBUTOR FOR DETAILS/ 06/19/1992 12
JAIL



CRIMINAL HISTORIES ARE NOT ALWAYS CLEAR

- PENNSYLVANIA
 - VIOLATION CONTROLLED SUBSTANCES, DRUGS, DEVICES AND COSMETIC ACT (WHICH FELONY AND WHICH MISDEMEANOR?)
 - PENALTIES RANGE FROM 1 YEAR TO 15 YEARS
- VS.
- VIRGINIA FINE TO LIFE

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-----
Court Disposition      (Cycle 001)
Final Disposition Date 2002-11-07
Court Agency           [REDACTED]
Subject's Name         [REDACTED]
Charge                 1
    Charge Number      1
Charge Tracking Number H667823-2
    Charge Literal      VIO CS/DRUG/DEV AND COSMETIC ACT
    Charge Description  VIO CS/DRUG/DEV AND COSMETIC ACT (CS13A30
                        Pennsylvania)
    State Offense Code  CS13A30
    Counts              1
    Severity            FELONY
    Inchoate Charge     Disposition Guilty

Charge                 2
    Charge Number      H667823-2
Charge Tracking Number VIO CS/DRUG/DEV AND COSMETIC ACT
    Charge Literal      VIO CS/DRUG/DEV AND COSMETIC ACT (CS13A32
                        Pennsylvania)
    Charge Description  CS13A32
    State Offense Code  1
    Counts              MISDEMEANOR
    Severity            MISDEMEANOR
    Inchoate Charge     (Other 2002-11-13; FINAL CHARGE CS13A16) 3
    Disposition
```

OTHER FACTORS

1. PROPOSAL WILL REQUIRE MORE LEGAL AND LEGISLATIVE RESEARCH BY ATTORNEYS FOR THE COMMONWEALTH AND PROBATION & PAROLE
2. HISTORICAL DATA WILL NO LONGER BE VALID FOR ANALYSIS REQUIRED BY § 17.1-803. DATA COLLECTION WOULD BE NECESSARY TO CAPTURE INFORMATION USING ANY NEW MEASURE OF PRIOR RECORD SELECTED BY THE COMMISSION.
3. PROPOSAL MAY INCREASE DISPARITY BECAUSE RECOMMENDATIONS WILL DEPEND ON WHEN AND WHERE THE PRIOR CRIMINAL BEHAVIOR OCCURRED.

OTHER FACTORS

4. EXTENSIVE STATEWIDE TRAINING OF GUIDELINES USERS WOULD BE REQUIRED. NEW WORKSHEETS WOULD NEED TO BE DEVELOPED TO ALLOW THE SCORING OF PENALTY STRUCTURES OF OTHER STATES. DATABASES THAT CAPTURE PRIOR RECORD WITHIN VCSC AND FOR OTHER AGENCIES WOULD NEED TO BE MODIFIED.
5. VCSC WOULD NEED TO ADD A STAFF ATTORNEY POSITION.
6. PROPOSED CHANGE IS NOT BASED ON DATA ANALYSIS. ADOPTING THE PROPOSAL WOULD BE THE FIRST PRESCRIPTIVE POLICY DECISION MADE BY THE COMMISSION. DATA THAT REFLECT JUDICIAL SENTENCING PATTERNS WOULD NOT BE USED TO MAKE THIS POLICY SHIFT. THIS ACTION WOULD OPEN THE DOOR TO MORE PRESCRIPTIVE CHANGES IN THE FUTURE.

OTHER STATES



MARYLAND

THE MARYLAND STATE COMMISSION ON CRIMINAL SENTENCING POLICY SPECIFIES THAT "THE SENTENCING GUIDELINES AND SENTENCING GUIDELINES OFFENSE TABLE IN EFFECT AT THE TIME OF THE INSTANT [CURRENT] SENTENCING SHALL BE USED TO DETERMINE THE CORRECT SERIOUSNESS CATEGORY FOR EACH ADJUDICATION INCLUDED IN THE CALCULATION OF THE PRIOR ADULT CRIMINAL RECORD"



NORTH CAROLINA

ACCORDING TO THE NORTH CAROLINA SENTENCING AND POLICY ADVISORY COUNCIL, THE DIRECTIVE FOR SCORING PRIOR RECORD ON THE STATE'S SENTENCING GUIDELINES IS PROVIDED IN STATUTE.

SPECIFICALLY, G.S. 15A-1340.14 GOVERNS PRIOR CONVICTIONS. SUBSECTION (C) REQUIRES THE COURT, WHEN DETERMINING THE PENALTY LEVEL OF A PRIOR OFFENSE, TO USE THE CLASSIFICATION OF THE PRIOR OFFENSE ASSIGNED AT THE TIME THE OFFENDER COMMITTED THE CRIME THAT IS NOW BEFORE THE COURT.



MINNESOTA

PREPARERS ARE INSTRUCTED TO FIND THE SEVERITY LEVEL THAT IS CURRENTLY ASSIGNED TO THE PRIOR FELONY OFFENSE

CERTAIN EXCEPTIONS TO THIS CLASSIFICATION RULE EXIST. FOR EXAMPLE, IN MINNESOTA, THE MONETARY THRESHOLD FOR THEFT OFFENSES WAS MODIFIED BY THE STATE'S LEGISLATURE IN 2007 AND GUIDELINE USERS ARE INSTRUCTED TO APPLY THE SEVERITY LEVEL ASSIGNED TO THE THEFT AT THE TIME THE DEFENDANT WAS SENTENCED FOR THAT PRIOR CRIME.

When establishing and modifying the Guidelines, the (Minnesota) Commission's primary consideration is public safety. Other considerations are current sentencing and release practices, correctional resources—including, but not limited to, the capacities of local and state correctional facilities—and the long-term negative impact of crime on the community. (MSGC Report to the Legislature, Page 1)



APPENDIX D:
SENTENCING COMMISSIONS ACROSS THE NATION
ROBINIA INSTITUTE OF CRIMINAL LAW AND CRIMINAL JUSTICE

DUE PROCESS / EX POST FACTO

DUE PROCESS / EX POST FACTO ISSUES

VIRGINIA COURTS HAVE NOT YET ADDRESSED THE EX POST FACTO CLAUSE IN THE CONTEXT OF VIRGINIA'S SENTENCING GUIDELINES. VIRGINIA COURTS HAVE CONSIDERED THE APPLICATION OF THE EX POST FACTO CLAUSE IN THE ANALOGOUS CONTEXT OF THE USE OF PRIOR CONVICTIONS FOR PURPOSES OF APPLYING ENHANCED PENALTY PROVISIONS UNDER RECIDIVIST STATUTES. VIRGINIA COURTS HAVE CONSISTENTLY HELD THAT RECIDIVIST STATUTES DO NOT VIOLATE THE EX POST FACTO CLAUSE.

THE EXISTING POLICY FOR SCORING PRIOR RECORD OFFENSES ON VIRGINIA'S SENTENCING GUIDELINES (WEIGHTING EACH OFFENSE BASED ON THE CURRENT STATUTORY MAXIMUM PENALTY SET BY THE GENERAL ASSEMBLY) DOES NOT RAISE DUE PROCESS OR EX POST FACTO ISSUES FOR THE COMMONWEALTH. IT CAN REASONABLY BE CONCLUDED THAT NO DUE PROCESS ISSUE ARISES FROM THE COMMISSION'S EXISTING POLICY.

DUE PROCESS / EX POST FACTO ISSUES

BY WAY OF BACKGROUND, BECAUSE THE GUIDELINES ARE VOLUNTARY, MOST DECISIONS ARE SHIELDED FROM APPELLATE REVIEW. PER LUTTRELL V. COM., 592 S.E.2D 752, 754 (2004) (DISCUSSING BELCHER V. COM.), APPELLATE REVIEW IS LIMITED TO DETERMINING WHETHER THE SENTENCE GIVEN IS WITHIN THE RANGE ESTABLISHED BY THE LEGISLATURE. SEE ALSO, HUNT V. COMMONWEALTH, 488 S.E.2D 672, 677 (1997). ADDITIONALLY, IT IS WELL ESTABLISHED THAT THE MOST UP-TO-DATE VERSION OF THE SENTENCING GUIDELINES CAN BE APPLIED AT THE TIME OF SENTENCING WITHOUT VIOLATING THE EX POST FACTO CLAUSE (EVEN IF "THE GUIDELINES... WERE NOT ENACTED BY THE LEGISLATURE AND WERE REVISED BY SENTENCING COMMISSION WITHOUT LEGISLATIVE APPROVAL."). LUTTRELL.

REGARDING THE QUESTION OF DUE PROCESS VIOLATIONS, THE COURT IN LUTTRELL STATED THAT IT DISAGREED WITH LUTTRELL'S CONTENTION THAT THE TRIAL JUDGE VIOLATED HIS RIGHT TO DUE PROCESS BY APPLYING THE GUIDELINES IN EFFECT AT THE TIME OF SENTENCING. THE COURT NOTED THAT IT WAS BOUND BY THE DECISION IN BELCHER (WHICH DOES NOT DIRECTLY ADDRESS THE ISSUE OF DUE PROCESS) THAT THE COURT'S REVIEW OF THE APPLICATION OF GUIDELINES IS "LIMITED TO ASCERTAINING WHETHER THE SENTENCE FALLS WITHIN THE RANGE SET BY THE LEGISLATURE." BELCHER V. COMMONWEALTH, 435 S.E.2D 160, 161 (1993) (INTERNAL QUOTATIONS REMOVED). THE COURT THEN WENT ON TO DISTINGUISH A CASE FROM FLORIDA IN WHICH THE GUIDELINES WERE APPROVED BY THE LEGISLATURE AND REQUIRED JUDGES TO JUSTIFY DEPARTURE FROM THE GUIDELINES WITH "CLEAR AND CONVINCING REASONS."

Caroline Kessler
J.D. Candidate, Class of 2019
University of Virginia School of Law
Executive Editor, Virginia Law Review

COURT DECISIONS

HUDSON v. COMMONWEALTH, 10 VA. App. 158, 161, 390 S.E.2D 509, 511 (1990) – IN REGARDS TO THE VIRGINIA SENTENCING GUIDELINES PILOT PROGRAM, THE COURT OF APPEALS RULED THAT THE GUIDELINES ARE NOT BINDING ON THE TRIAL JUDGE; RATHER, THE GUIDELINES ARE MERELY A "TOOL" TO ASSIST THE JUDGE IN FIXING AN APPROPRIATE PUNISHMENT. THE GUIDELINES ARE ANOTHER FACTOR THAT CAN BE CONSIDERED AND THE JUDGE CAN USE AS HE OR SHE SEES FIT. ULTIMATELY, THE COURT CONCLUDED "IF THE SENTENCE IS WITHIN THE RANGE SET BY THE LEGISLATURE, AN APPELLATE COURT WILL NOT INTERFERE WITH THE JUDGMENT."

BELCHER v. COMMONWEALTH, 17 VA. App. 44, 45, 435 S.E.2D 160, 161 (1993) – THE COURT RULED THAT THE TRIAL JUDGE DID NOT ERR BY USING GUIDELINES IN EFFECT AT THE TIME OF SENTENCING, RATHER THAN IN EFFECT AT THE TIME THE CRIME WAS COMMITTED, EVEN THOUGH THE NEW GUIDELINES RECOMMENDED A HARSHER RANGE OF PUNISHMENT. THE COURT AFFIRMED BELCHER'S CONVICTION, NOTING THAT APPLICATION OF THE GUIDELINES IS VOLUNTARY AND THE TRIAL JUDGE HAD SET THE SENTENCE WITHIN THE RANGE ESTABLISHED BY THE LEGISLATURE. SEE ALSO HUNT V. COMMONWEALTH, 25 VA. App. 395, 404-05, 488 S.E.2D 672, 677 (1997).

JETT v. COMMONWEALTH, 34 VA. App. 252, 257, 540 S.E.2D 511, 513 (2001) – IN THIS CASE, THE COURT CONCLUDED THAT "THE LEGISLATURE ACTED WITHIN ITS AUTHORITY WHEN IT CREATED THE SENTENCING GUIDELINES AND PROVIDED THAT THOSE GUIDELINES WOULD BE DISCRETIONARY AND NOT MANDATORY. IT CONFIRMED THE DISCRETIONARY ASPECT OF THE GUIDELINES BY LEAVING THEIR IMPLEMENTATION SOLELY WITHIN THE DISCRETION OF THE TRIAL COURTS AND BY EXCLUDING DECISIONS RELATING TO THE APPLICATION OF THE GUIDELINES FROM APPELLATE REVIEW. THIS STRUCTURAL DETERMINATION DENIED JETT NO SUBSTANTIVE OR PROCEDURAL RIGHT THAT HE WAS ENTITLED UNDER THE LAW TO ENJOY."

LUTTRELL v. COMMONWEALTH, 592 S.E.2D 752, 754 (2004) – THE COURT DISAGREED WITH THE CONTENTION THAT THE TRIAL JUDGE VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS BY APPLYING THE GUIDELINES IN EFFECT AT THE TIME OF SENTENCING. THE COURT STATED THAT "THE VIRGINIA DISCRETIONARY SENTENCING GUIDELINES PROVIDE ONLY FLEXIBLE GUIDEPOSTS FOR THE TRIAL JUDGE TO CONSIDER IN DETERMINING THE APPROPRIATE SENTENCE WITHIN THE RANGE OF PUNISHMENT DEFINED BY THE LEGISLATURE." IN ACCORDANCE WITH THE GENERAL PRINCIPLES CONCERNING REVIEW OF SENTENCES IN VIRGINIA, THE COURT DETERMINED THAT ITS "REVIEW OF THE SENTENCING DETERMINATION ... IS LIMITED TO ASCERTAINING WHETHER THE SENTENCE FALLS WITHIN THE RANGE SET BY THE LEGISLATURE." IN ADDITION, THE COURT FOUND THAT THE TRIAL JUDGE'S CONSIDERATION OF THE RISK ASSESSMENT INSTRUMENT AS A FACTOR IN APPLYING THE GUIDELINES PROVIDED NO BASIS FOR REVIEW OF LUTTRELL'S SENTENCE ON APPEAL.

APPENDIX C: OTHER EXAMPLES



Arrest Date 1989-07-14
Arrest Case Number
Arresting Agency DC001017A US ATTORNEY WASHINGTON
Subject's Name [REDACTED]
Charge 1
Charge Literal UNIFORM CONTROLLED SUBST ACT POSSESSION OF COC
Severity Unknown

Court Disposition (Cycle 006)
Court Case Number
Court Agency
Charge 1
Charge Literal POSSESSION COCAINE
Disposition (08-09-89,DEFENDANT PLEAD GUILTY,SENTENCED 90
DAYS IN JAIL,PROBATION FOR 1 YEAR)

- OFFENSE: POSSESSION OF SCHEDULE I/II
- CURRENT POLICY: 10 YEAR MAXIMUM
- PROPOSED: 180 DAYS



Arrest Date	1991-02-11
Arrest Case Number	66518
Arresting Agency	NC0340200 WINSTON-SALEM PD
Subject's Name	CONNER,ARTHUR BERNARD
Offender Id Number	E03558N
Charge	01
Charge Literal	ATTEMPTED ARMED ROBBERY
Inchoate Charge	Attempt

- OFFENSE: ATTEMPTED ROBBERY
- CURRENT POLICY: 10 YEAR MAXIMUM
- PROPOSED: SCORED THE SAME AS COMPLETED ACT CLASS D OR CLASS G
 - D: 51 TO 64 MONTHS
 - G: 10 TO 13 MONTHS

* The penalty structure in place in 1991 would have to be researched



- OFFENSE: BREAK AND ENTER MOTOR VEHICLE
- CURRENT POLICY: 1 YEAR
- PROPOSED: FELONY 24 MONTHS

Arrest Date 2004-12-07
Arresting Agency NC0600000 MECKLENBURG CO SO - CHARLOTTE
Subject's Name [REDACTED]
Offender Id Number TL3254R
Charge 01
Charge Literal BREAK/ENTER MOTOR VEHICLE - \$200 & UP
Statute (14 -056.000000 NC)
Severity Felony
Charge 02
Charge Literal ATTEMPTED LARCENY OF MOTOR VEHICLE - FELONY
Statute (14 -072.000A00 NC)
Severity Felony

Booking Case Number
Booking Agency NC0600000 MECKLENBURG CO SO - CHARLOTTE

Court Disposition (Cycle 003)
Court Case Number 2004CRS255524
Final Disposition Date 2005-09-30
Court Agency NC060035J MECKLENBURG CO SUP COURT - CHARL
Charge Literal BREAK OR ENTER A MOTOR VEHICLE
Statute (14-56 NC)
NCIC Offense Code 2305
Severity Felony
Disposition (2005-09-30; Trial By Judge; Verdict: Guilty)
Court Comment Plea: Guilty

Court Disposition (Cycle 003)
Court Case Number 2004CRS255523
Final Disposition Date 2005-03-24
Court Agency NC060035J MECKLENBURG CO SUP COURT - CHARL
Charge Literal LARCENY OF MOTOR VEHICLE (F)
Statute (14-72 (A) NC)
NCIC Offense Code 2399



Sentencing	(Cycle 004)
Sentencing Agency	NC034035J FORSYTH CO SUP CRT-WINSTON-SALEM
Court Case Number	1992CRS045237
Charge Literal	BREAKING AND OR ENTERING (F)
Statute	(14-54(A) NC)
NCIC Offense Code	2299
Severity	Felony
Disposition	(1993-04-27; Trial By Judge; Verdict: Guilty)
Sentence	Special Condition: DART PROG, RESTITUTION IS A COND OF W/R
Sentence	Confinement: 8Y

- OFFENSE: BREAK AND ENTER
- CURRENT POLICY: 20 YEAR
CATEGORY II
ENHANCEMENT
- PROPOSED: CLASS D FELONY
80 MONTHS
CLASS G FELONY
31 MONTHS

CATEGORY II
ENHANCEMENT
NEVER CATEGORY I

Note: The penalty structure for burglary may have been different in 1993



Court Disposition	(Cycle 001)
Court Case Number	15050060
Final Disposition Date	2015-08-25
Court Agency	NY038321J Richfield Town Court
Charge Tracking Number	67139407Z
Statute	Driving While Ability Impaired By The Consumption of Alcohol (1192 SUB 01)
State Offense Code	VTL 1192 SUB 01
Counts	1
Severity	Infraction
Inchoate Charge	Completed
Disposition	(2015-08-25; Convicted Upon Plea Of Guilty)

- OFFENSE: DRIVING WHILE ABILITY IMPAIRED
- CURRENT POLICY: 1 YEAR
- PROPOSED: VIOLATION OF VTL § 1192(A) NOT CONSIDERED A MISDEMEANOR OR FELONY



PD ROANOKE CITY VA 01/02/2015 FINGERPRINTED PHOTO:Y
ORI:VA1230000

08/14/2014 CHARGED WITH
#001 FELONY 18.2-47

OTN:770GM1400018519

ABDUCTION & KIDNAPPING
ROANOKE

08/10/2014

ROANOKE CIRCUIT CT
ORI:VA123015J
CCN:770CR1500030600

Page 13 of 17

- OFFENSE: KIDNAPPING § 18.2-47 CLASS 5 OR CLASS 6 FELONY
- CURRENT POLICY: ERR ON BEHALF OF DEFENDANT - SCORE AT LOWEST LEVEL
- PROPOSED: SAME RULE



- OFFENSES: FELONY MURDER
- CURRENT POLICY: 40 YEAR MAXIMUM CATEGORY I ENHANCEMENT
- PROPOSED: 20 YEAR MAXIMUM CATEGORY II ENHANCEMENT

Illustrates trade off –
As proposed preparers would score unknown felony larceny at 20 year maximum and would score the violent offense of felony murder at the penalty in place at the time of the offense – 20 years.

SO MIDDLESEX CO VA 03/14/1987 FINGERPRINTED
ORI:VA0590000

CHARGED WITH
#001 FELONY
MURDER
MIDDLESEX CO 03/13/1987

MIDDLESEX CIRCUIT 03/28/1988 GUILTY
ORI:VA059015J ==> FELONY
CCN:NOT RECORDED MURDER
DCN:D185042 0087/1821 0195/3046

SO MIDDLESEX CO VA 08/02/1992 FINGERPRINTED
ORI:VA0590000 OCA:9206172028

CHARGED WITH
#001 FELONY
LARCENY
ESSEX CO 06/17/1992

ESSEX CO CIR CT
ORI:VA028015J
CCN:NOT RECORDED
DCN:F065261 0822/0026 1294/1199

SO MIDDLESEX CO VA 08/02/1992 FINGERPRINTED
ORI:VA0590000 OCA:9206172028

CHARGED WITH
#002 FELONY
UTTER WITH INTENT TO DEFRAUD
ESSEX CO 06/17/1992

ESSEX CO CIR CT 12/09/1992 GUILTY
ORI:VA028015J ==> FELONY
CCN:NOT RECORDED UTTERING
DCN:F065262 0822/0028 1493/1461

SO MIDDLESEX CO VA 08/02/1992 FINGERPRINTED

CASE EXAMPLE

CURRENT POLICY VS. PROPOSED POLICY

CASE EXAMPLE: CURRENT POLICY VS. PROPOSED POLICY

Current Offenses: Two Counts of Aggravated Sexual Battery, Victim Under Age 13
§ 18.2-67.3

Prior Record: Possession of child porn, subsequent offense -
Reduced to first offense, § 18.2-374.1:1 (Class 1 Misdemeanor), (2000)

Guidelines Recommendation :

Current Policy: **Midpoint: 7 YEARS, 11 MONTHS**
Range: 3 YEARS, 3 MONTHS TO 10 YEARS, 2 MONTHS
Risk Assessment: N/A

Proposed Policy: **Midpoint: 4 YEARS, 8 MONTHS**
Range: 2 YEARS, 1 MONTH TO 6 YEARS, 6 MONTHS
Risk Assessment: N/A

S19002888302

Sentencing Guidelines Cover Sheet

Complete this form ONLY for applicable felonies sentenced on or after July 1, 2017

Scheduled Sentencing Date:

10/31/18

◆ OFFENDER

First: _____ Middle: _____ Last: CASE EXAMPLE Suffix: _____

Date of Birth: SSN: _____
Month Day Year

CCRE: _____ CORIS Offender ID: _____ PSI #: _____

◆ COURT

Judicial Circuit: City/County: _____ FIPS Code: 810
For Office Use Only

Sentencing Judge's Name: _____

Preparer Name: _____ Commonwealth's Attorney Probation Officer

Prosecuting Commonwealth's Attorney: _____ Defense Attorney: _____

◆ CONVICTIONS

Offense	Counts	VCC	Offense Date
Primary Offense			Month Day Year
AGGRAVATED SEXUAL BATTERY - VICTIM UNDER AGE 13	2	RAP 1121 F9	11 01 98
Additional Offenses			

Primary Offense Code Section § 18.2-67.3(A,1)

Docket Number _____

◆ METHOD OF ADJUDICATION

Jury Trial Sentence Set by Jury: Life Juvenile Fine Only
Years Months Days

◆ SENTENCING GUIDELINES RECOMMENDATIONS

Section B

- Probation/No Incarceration
- Incarceration 1 Day to 3 Months
- Incarceration 3 to 6 Months

Mandatory Minimum _____
yyy/mm/dd

Section C

- Incarceration (Enter Midpoint and Range Below)

Range Midpoint 7 11 0
Years Months Days

Sentence Range 3 3 0 TO 10 2 0
Years Months Days

Recommendation Adjusted for Mandatory Minimum

Non Guidelines Offense
(Primary offense is a non guidelines offense)

CURRENT



Other Sexual Assault Section C

Offender Name: Case Example,

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

A. All attempted or conspired sexual assault (1 count).....	(24)	(12)	(6)
B. Completed sexual assault other than listed below (1 count)	36	18	9
C. Non-forcible sodomy, parent/grandparent to child/grandchild age 13 - 17			
1 count	36	18	9
D. Indecent liberties with child			
1 count	24	12	6
2 counts	40	20	10
3 counts	104	52	26
E. Non-forcible carnal knowledge of child age 13 - 14 (statutory rape)			
1 count	36	18	9
F. Incest with own child/grandchild (1 count).....	104	52	26
G. Incest with own child/grandchild age 13 - 17 (1 count)	104	52	26
H. Aggravated sexual battery			
1 count	90	60	34
2 counts	132	88	50
3 counts	288	192	108
I. Aggravated sexual battery, parent/grandparent to child/grandchild age 13-17			
1 count	84	56	32
2 counts	90	60	34
3 counts	180	120	68

Score

88

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

Maximum Penalty 5.....	5
(years) 10	10
20	19
30	29
40 or more	39

0

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

Maximum Penalty Less than 1.....	0
(years) 1	1
2	2
3	3
4	4
5	5
10	10
20	19
30	29
40 or more	39

0

Weapon Used, Brandished, Feigned or Threatened If YES, add 4

0

Victim Injury

Threatened or emotional.....	6
Physical, serious or life threatening	9

6

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

Maximum Penalty Less than 2.....	0
(years) 2, 3, 4, 5	1
10	3
20	6
30	9
40 or more	12

1

Prior Felony Sexual Assault Convictions/Adjudications

Number of Counts: 1.....	8
2	15
3 or more.....	23

0

On Post-Incarceration Supervision If YES, add 5

0

Total Score

95

See Other Sexual Assault Section C Recommendation Table for guidelines sentence range.

If necessary, on the cover sheet also enter the adjusted high end of the guidelines sentence range based on Risk Level: 1 2 3 or a

Other Sexual Assault/Section C

S19002888301

Sentencing Guidelines Cover Sheet

Complete this form ONLY for applicable felonies sentenced on or after July 1, 2017

Scheduled Sentencing Date:

10/31/18

◆ OFFENDER

First: _____ Middle: _____ Last: CASE EXAMPLE Suffix: _____

Date of Birth: SSN: _____
Month Day Year

CCRE: _____ CORIS Offender ID: _____ PSI #: _____

◆ COURT

Judicial Circuit: City/County: _____ FIPS Code: 810
For Office Use Only

Sentencing Judge's Name: _____

Preparer Name: _____ Commonwealth's Attorney Probation Officer

Prosecuting Commonwealth's Attorney: _____ Defense Attorney: _____

◆ CONVICTIONS

Offense	Counts	VCC	Offense Date
Primary Offense			Month Day Year
AGGRAVATED SEXUAL BATTERY - VICTIM UNDER AGE 13	2	RAP 1121 F9	11 01 98
Additional Offenses			

Primary Offense Code Section § 18.2-67.3(A,1) Docket Number _____

◆ METHOD OF ADJUDICATION

Jury Trial Sentence Set by Jury: Life Juvenile Fine Only
Years Months Days

Bench Trial Guilty Plea Alford Plea/Nolo contendere

◆ SENTENCING GUIDELINES RECOMMENDATIONS

Section B Section C

◆ SENTENCING GUIDELINES RECOMMENDATIONS

Section B

- Probation/No Incarceration
- Incarceration 1 Day to 3 Months
- Incarceration 3 to 6 Months

Mandatory Minimum _____

Section C

Incarceration (Enter Midpoint and Range Below)

Range Midpoint 4 8 0
Years Months Days

Sentence Range 2 1 0 TO 6 6 0
Years Months Days

Non Guidelines Offense
(Primary offense is a non guidelines offense)

PROPOSED



Other Sexual Assault Section C

Offender Name: Case Example,

Primary Offense table with columns for Category I, Category II, and Other. Rows include offenses like 'All attempted or conspired sexual assault', 'Completed sexual assault', etc., with corresponding scores.

Score 50

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

Table for Primary Offense Remaining Counts with rows for Maximum Penalty (years) from 5 to 40 or more.

0

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

Table for Additional Offenses with rows for Maximum Penalty (years) from Less than 1 to 40 or more.

0

Weapon Used, Brandished, Feigned or Threatened If YES, add 4

0

Victim Injury

Table for Victim Injury with rows for Threatened or emotional and Physical, serious or life threatening.

6

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

Table for Prior Convictions/Adjudications with rows for Maximum Penalty (years) from Less than 2 to 40 or more.

0

Prior Felony Sexual Assault Convictions/Adjudications

Table for Prior Felony Sexual Assault Convictions/Adjudications with rows for Number of Counts: 1, 2, 3 or more.

0

On Post-Incarceration Supervision If YES, add 5

0

Total Score

56

See Other Sexual Assault Section C Recommendation Table for guidelines sentence range.

If necessary, on the cover sheet also enter the adjusted high end of the guidelines sentence range based on Risk Level: 1 2 3 or n/a

Other Sexual Assault/Section C



WILL THERE BE CHANGES TO THE
GUIDELINES RECOMMENDATIONS?

The legislative change may have an impact on the guidelines and result in increases in the number of departures

Under the current rules there is the potential that for four prior larceny convictions (involving less than \$500):

- Points for Prior Convictions could decrease by a net of 3 points
- No points would be assigned for Prior Felony Larcenies
- One point would be added for Prior Misdemeanors

For a reduction of 6 points

Larceny Section A

Offender Name: _____

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

A. Attempted or conspired larceny (1 count).....	(1)	
B. Statutory maximum penalty equals 5 years		
1 count.....	1	
2 counts.....	4	
3 counts.....	6	
C. Statutory maximum penalty equals 10 years (1 count).....	3	
D. Grand larceny auto		
1 count.....	5	
2 counts.....	7	
3 counts.....	10	
E. Grand larceny from person		
1 count.....	4	
2 counts.....	11	
F. Grand larceny of a firearm (1 count).....	1	
G. Failure of bailee to return animal, aircraft, vehicle or boat (1 count).....	4	
H. Larceny of bank notes, checks or any book of accounts; Any other larceny offense with maximum penalty of 20 years		
1 count.....	2	
2 - 3 counts.....	4	
4 counts.....	6	

Score

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

Years: 5 - 11.....	1	34 - 44.....	4
12 - 22.....	2	45 or more.....	5
23 - 33.....	3		

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

Years: Less than 1.....	0	23 - 33.....	3
1 - 11.....	1	34 - 44.....	4
12 - 22.....	2	45 or more.....	5

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

Years: Less than 2.....	0	21 - 36.....	3
2 - 11.....	1	37 or more.....	4
12 - 20.....	2		

◆ **Prior Felony Larceny Convictions/Adjudications**

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

◆ **Other Prior Felony Property Convictions/Adjudications**

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

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

Number of Counts: 1.....	1		
2 or more.....	2		

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

Number of Counts: 1 - 4.....	1		
5 - 8.....	2		
9 or more.....	3		

◆ **Prior Incarcerations/Commitments** _____ If YES, add 5 →

◆ **Prior Juvenile Record** _____ If YES, add 1 →

◆ **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.....	2		

Score

2018 General Assembly (HB 484 and SB 994)

§ 19.2-305.1. Restitution for property damage or loss; community service. —

Modifications to the code may result in more offenders scored as legally restrained until restitution is paid

There may be occasions when the legislative change results in a higher recommendation

Larceny (Non-Embezzlement)
 Probation 32.6%
 Jail 44%

Larceny Fraud Study,
 2015 VCSC Annual Report



Larceny Section B

Offender Name: _____

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

A. Any attempted or conspired larceny (1 count).....	(1)
B. Maximum penalty equals 5 or 10 years	
1 count	3
2 counts.....	4
3 counts.....	7
C. Grand larceny auto	
1 count	3
2 counts.....	4
3 counts.....	7
D. Grand larceny from person (1 count)	6
E. Grand larceny of a firearm (1 count)	1
F. Failure of bailee to return animal, aircraft, vehicle or boat (1 count)	1
G. Larceny of bank notes, checks, etc. or any book of accounts	
1 count	3
2 counts.....	4
3 counts.....	7
H. Any other grand larceny offense with a maximum penalty of 20 years	
1 count	3
2 counts.....	4
3 counts.....	7

Score

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

Years: Less than 22	0	32 - 42	2
22 - 31	1	43 or more.....	3

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

Years: Less than 1	0
1 - 10	1
11 - 21	2
22 - 31	3
32 - 42	4
43 or more.....	5

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

Years: Less than 2	0
2 - 19	1
20 - 38	2
39 or more.....	3

3 or 0

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

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

0 or 4

◆ **Prior Incarcerations/Commitments** If YES, add 7 →

◆ **Legally Restrained at Time of Offense**

None.....	0
Other than parole/post-release, supervised probation or CCCA.....	4
Parole/post-release, supervised probation or CCCA.....	5

===== SCORE THE FOLLOWING FACTOR ONLY IF PRIMARY OFFENSE IS H: EMBEZZLEMENT (§ 18.2-111) =====

◆ **Amount of Embezzlement**

Amount: Less than \$15,000	0
\$15,000 or more.....	3

Total Score →

See Larceny Section B Recommendation Table to convert score to guidelines sentence. Then, go to Section D Nonviolent Risk Assessment and follow the instructions.

Under the current rules there is the potential that for four prior larceny convictions (involving less than \$500):

The legislative change may lower the midpoint recommendation on Section C by a maximum of 8 months (midpoint)

Example:

CURRENT *

Midpoint: 7M

Range: 0Y 7M – 1Y 0M

* Points for Legal Restraint May Now Apply

PROPOSED

Midpoint: 1Y 3M

Range: 0Y 9M – 1Y 11M

Larceny (Non-Embezzlement)

Prison 23%

Larceny Fraud Study,
2015 VCSC Annual Report

Larceny Section C

Offender Name: _____

Prior Record Classification: Category I Category II Other
(scores for attempted/conspired offenses are in parentheses)

◆ Primary Offense		
A. Attempted or conspired larceny (1 count)	(8).....(4).....(2)	
B. Statutory maximum penalty equals 5 or 10 years		
1 count	20.....10.....5	
2 counts	28.....14.....7	
3 counts	40.....20.....10	
C. Grand larceny auto		
1 count	32.....16.....8	
2 - 3 counts	56.....28.....14	
4 counts	72.....36.....18	
D. Grand larceny from person		
1 count	40.....20.....10	
2 counts	56.....28.....14	
3 counts	68.....34.....17	
E. Grand larceny of a firearm (1 count)	68.....34.....17	
F. Failure of bailee to return animal, aircraft, vehicle or boat (1 count)	28.....14.....7	
G. Larceny of bank notes, checks, etc. or any book of accounts		
1 - 2 counts	32.....16.....8	
3 counts	96.....48.....24	
H. Any other larceny offense with a maximum penalty of 20 years		
1 count	28.....14.....7	
2 counts	44.....22.....11	
3 counts	56.....28.....14	

Score: 0

◆ Primary Offense Remaining Counts	Assign points to each count of the primary not scored above and total the points	
Maximum Penalty:	5, 10.....1	
(years)	20.....2	

◆ Additional Offenses	Assign points to each additional offense (including counts) and total the points	
Maximum Penalty:	Less than 5.....0	
(years)	5, 10.....1	
	20.....2	
	30.....3	
	40 or more.....5	

✓◆ Prior Convictions/Adjudications	Assign points to the 5 most recent and serious prior record events and total the points	
Maximum Penalty:	Less than 10.....0	
(years)	10, 20.....1	
	30.....2	
	40 or more.....3	

0 4 or 0

✓◆ Prior Felony Larceny Convictions/Adjudications		
Number of Counts:	1.....1	
	2.....2	
	3.....3	
	4 or more.....4	

0 4 or 0

◆ Other Prior Felony Property Convictions/Adjudications		
Number of Counts:	1.....0	
	2 - 3.....1	
	4 or more.....2	

0 0

◆ Prior Felony Convictions/Adjudications Against Person		
Number of Counts:	1.....2	
	2.....4	
	3 or more.....6	

0 0

◆ Prior Felony Drug Convictions/Adjudications		
Number of Counts:	1 - 2.....1	
	3.....2	
	4 or more.....3	

0 0

◆ Prior Juvenile Record	If YES, add 3	
		0 0

◆ Legally Restrained at Time of Offense		
None	0	
Other than parole/post-release, supervised probation or CCCA.....	3	
Parole/post-release, supervised probation or CCCA.....	4	

0 0

SCORE THE FOLLOWING FACTOR ONLY IF PRIMARY OFFENSE IS H: EMBEZZLEMENT (§ 18.2-111)

◆ Amount of Embezzlement		
Amount:	Less than \$28,000.....0	
	\$28,000 - \$89,999.....24	
	\$90,000 or more.....30	

0

Total Score →

See Larceny Section C Recommendation Table for guidelines sentence range. Then, go to Section D Nonviolent Risk Assessment and follow the instructions.

Larceny/Section C

SUMMARY

After examining the existing and proposed approaches for scoring prior record on the guidelines, the Commission will have several options from which to choose. The Commission could elect to:

1. Retain the existing, research-oriented, policy for scoring prior record on the sentencing guidelines and allow the guidelines system to self-correct as designed;
2. Make a normative (prescriptive) policy decision to adopt the proposed alternative approach to scoring prior record (this option must be presented as a recommendation in the 2018 Annual Report to the legislature);
3. Direct staff to collect data, study the potential impact of the proposed change, and report findings in 2019;
4. Define some other measure or proxy to weight prior record convictions (this option will require a new research study that would be designed and conducted for this purpose); or
5. Postpone the decision regarding prior record scoring to allow additional policy makers and stakeholders to provide input on the current and proposed policies.



VIRGINIA

SIC SEMPER TYRANNIS