



**VIRGINIA CRIMINAL  
SENTENCING COMMISSION**

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# Possible Recommendations for Guidelines Revisions & Legislative Proposals

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**June 7, 2021**





**VIRGINIA CRIMINAL  
SENTENCING COMMISSION**

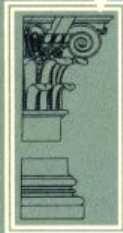
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**Possible Recommendation  
for Guidelines Revisions:  
Full Re-Analysis of  
All Offense Groups**

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**VIRGINIA  
SENTENCING  
GUIDELINES**



# Impetus for Sentencing Guidelines in Virginia

- In 1983, a task force released findings of a small-scale study that suggested evidence of sentencing disparities.
- Virginia's Chief Justice formed judicial committee to examine the issue.
- The pre-sentence investigation (PSI) report was standardized and automated, creating a comprehensive database on sentencing (1985).
- In 1987, broader study of historical sentencing decisions revealed evidence of unwarranted sentencing disparity.
- Based on the findings, circuit court judges supported the development and testing of sentencing guidelines.
- Chief Justice appointed a judicial committee to develop a blueprint for a sentencing guidelines system.



# Elements of Virginia's First Sentencing Guidelines



**Voluntary compliance**

**Historically grounded in past  
sentencing practices**

**Offense-specific guidelines**

**Rejection of grid-type guidelines  
approach**

**Sentencing ranges broader than  
in other systems**

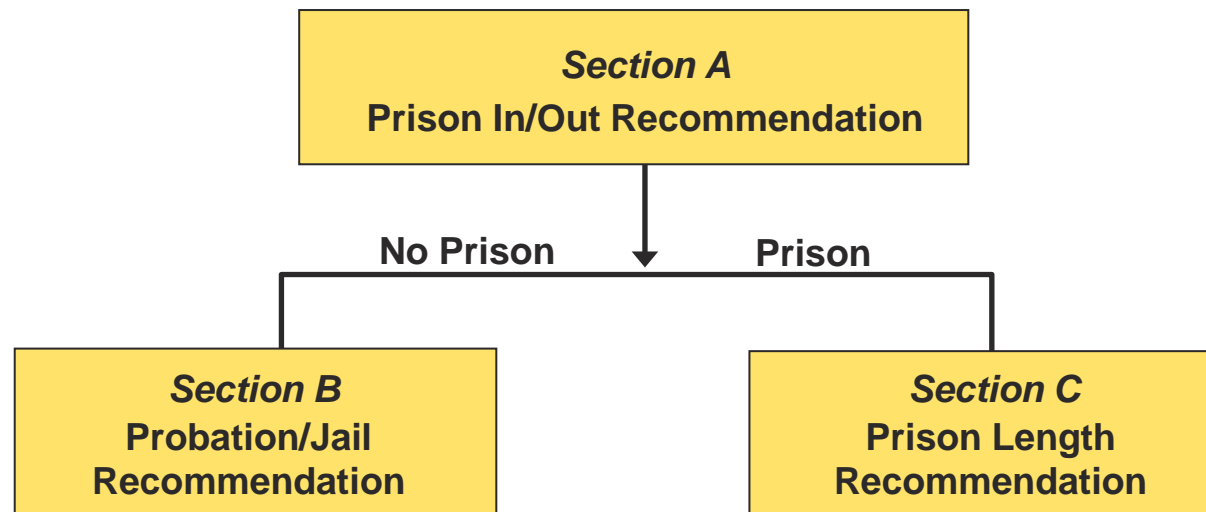
**After pilot testing, voluntary guidelines were  
implemented statewide in January 1991.**



# Structure of Virginia's Sentencing Guidelines

**Analysis of sentencing practices in Virginia found that judges often consider different factors, or weigh the factors differently, depending on the offense and type of decision being made.**

**Virginia's Sentencing Guidelines are structured to reflect the judicial decision-making process.**



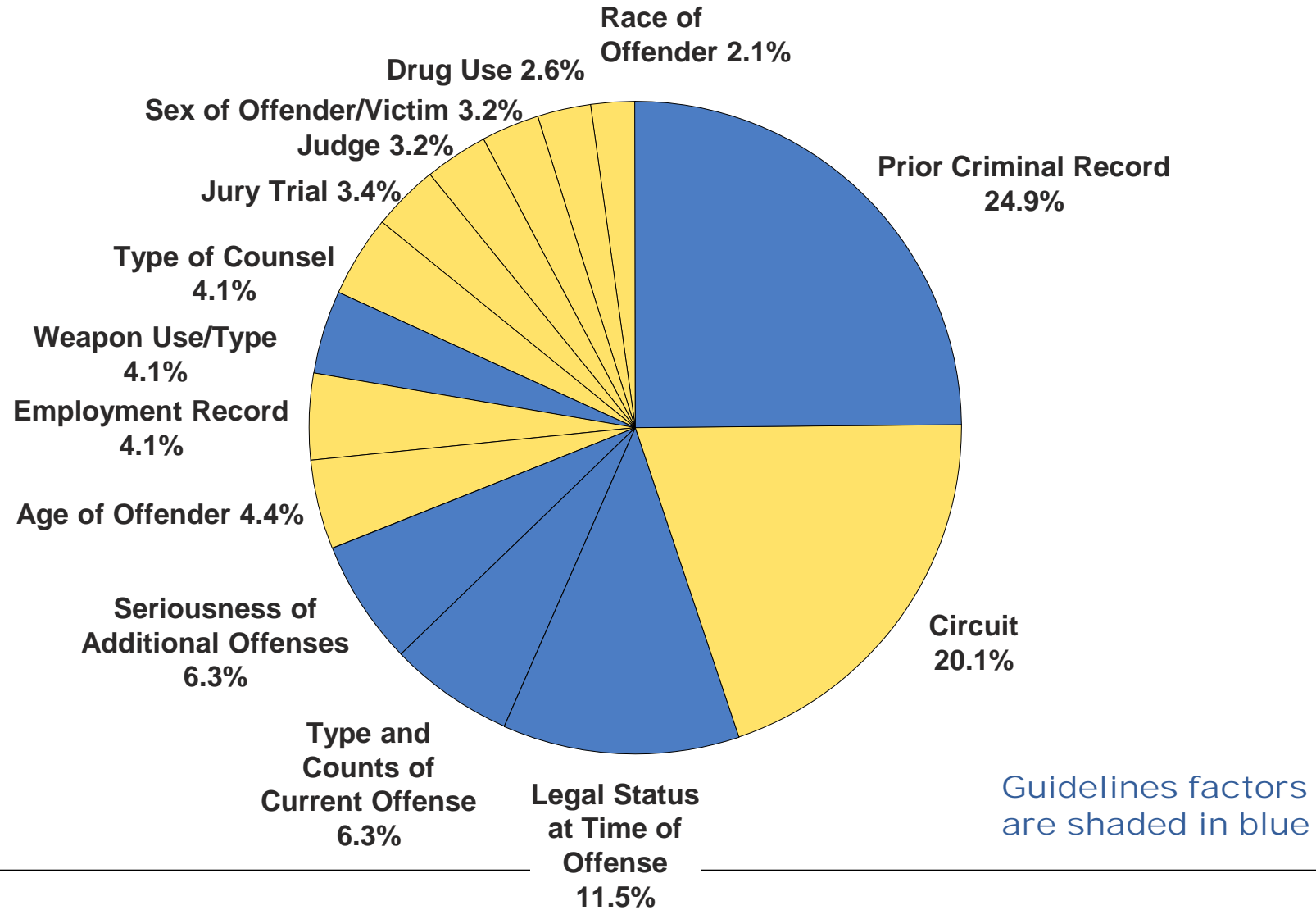
# Methodology Used to Create Historically-Based Sentencing Guidelines

## PRE-1995

- **Analyzed historical data to identify all significant factors that influenced past sentencing decisions.**
- **Identified inappropriate factors to eliminate their influence on future sentencing decisions (e.g., race).**
- **Created guidelines forms that captured the remaining significant factors and their relative importance.**
- **Prison recommendation (in/out decision) was tied to the historical incarceration rate.**
- **Prison sentence length recommendations were tied to the middle 50% of historical sentences, eliminating the extreme sentence at the high and low end.**



# Relative Importance of all Significant Factors for Burglary Prison/Non-Prison Sentences (1988 - 1992)



# Sentencing guidelines forms captured statistically significant legal factors and their relative importance.

Work Sheet **A** **BURGLARY - PRISON IN/OUT DECISION** Work Sheet **A**

**Type of primary offense: Add Score**

A. possession of burglarious tools (any number of counts) ..... 0	Score	D. dwelling at night with intent to commit larceny with deadly weapon (any number of counts) ..... 6	Score
B. occupied dwelling with intent to commit a misdemeanor without deadly weapon (any number of counts) ..... 0		E. dwelling with intent to commit larceny with deadly weapon (any number of counts) ..... 4	
C. dwelling or other structure with intent to commit larceny etc. without deadly weapon; other structure with intent to commit larceny etc. with deadly weapon; dwelling at night without deadly weapon 1 count ..... 2 2 counts ..... 4 3 or more counts ..... 6		F. occupied dwelling with intent to commit misdemeanor with deadly weapon; burglary of a bank (any number of counts) ..... 8	
		G. dwelling or other structure with intent to murder, rape or rob with or without a deadly weapon (any number of counts) ..... 13	

**Additional offenses: (including counts) Add Score**

**at conviction, with maximum penalties totaling:**

less than 5 ..... 0	
5 - 14 ..... 1	
15 - 27 ..... 2	
28 - 43 ..... 3	
44 or more ..... 4	

**Mandatory firearm conviction for current event: If yes, Add 3**

**Type of weapon used: Add**

A. none ..... 0	C. knife ..... 1
B. simulated weapon or other than listed below ..... 2	D. firearm ..... 3

**Prior adult convictions, with maximum penalties totaling: Add**

less than 2 ..... 0	
2 - 8 ..... 1	
9 - 19 ..... 2	
20 - 31 ..... 3	
32 - 41 ..... 4	
42 or more ..... 5	

**Prior adult felony property convictions (felonies only): Number Add Score**

1 ..... 1	
2 - 5 ..... 2	
6 - 10 ..... 3	
11 or more ..... 4	

**Prior adult misdemeanor convictions: Number Add Score**

1 ..... 1	
2 - 4 ..... 2	
5 - 6 ..... 3	
7 - 9 ..... 4	
10 or more ..... 5	

**Prior adult incarcerations: If yes, Add 3**

**Prior adult revocations of parole, supervised probation or CDI: If yes, Add 1**

**Prior juvenile record: If yes, Add 2**

**Prior juvenile property record: Number Add Score**

1 - 2 ..... 1	
3 - 11 ..... 2	
12 or more ..... 3	

**Legally restrained at time of offense: Add Score**

A. none ..... 0	C. parole, supervised probation or CDI ..... 7
B. other than parole, supervised probation or CDI ..... 3	

**TOTAL SCORE =**

***If total is 12 or less, go to work sheet "B."  
If total is 13 or more, go to work sheet "C."***

**Prison recommendation threshold was drawn so that the guidelines recommended the same proportion of offenders to prison as historically went to prison**

***If total is 12 or less, go to work sheet "B."  
If total is 13 or more, go to work sheet "C."***



# Sentencing Reform Legislation (1994)

## Elements of 1994 Legislation:

**Abolish parole**

**Establish truth-in-sentencing  
(minimum 85% time served)**

**Target violent felons for longer  
terms of incarceration**

**Keep the average time served  
the same for nonviolent felons**

**Redirect lowest-risk nonviolent  
felons to less costly sanctions**

**Expand alternative punishment  
options for nonviolent felons**

**Reduce sentencing disparities**

**Create a sentencing commission to  
oversee voluntary guidelines system**

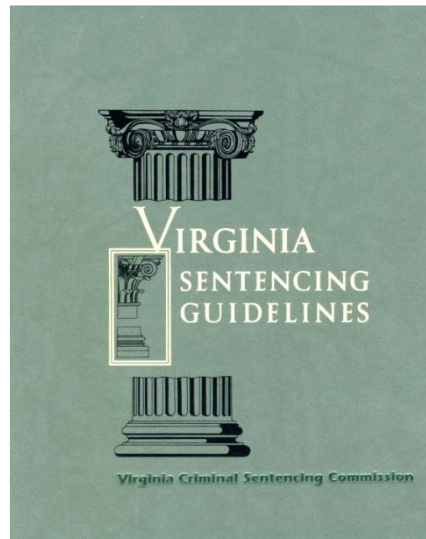
**These provisions took effect  
for felonies committed on or  
after January 1, 1995.**



# Elements of the Sentencing Guidelines

## § 17.1-803 and § 17.1-805

- **The Commission must develop guidelines that take into account **historical sentencing practices**.**
  - In essence, guidelines provide a benchmark for the typical, or average, case.
- **By Code, guidelines must include specific enhancements to **increase recommendations for violent offenders**.**
  - Guidelines base recommendation is increased depending on the offender's current & prior convictions for violent felonies.
  - By statute, “violent offender” is based on the entire criminal history, including juvenile delinquency adjudications; burglaries are defined as violent crimes.
  - Approximately **1 in 5 felons** receives a guidelines enhancement.



# Methodology Used to Create Historically-Based Sentencing Guidelines (§ 17.1-805)

## FOR TRUTH-IN-SENTENCING/NO-PAROLE SYSTEM

- Started with historical time served
- **Used 1988-1992 time-served distribution for similarly situated offenders**
- Increased historical time served by 13.4% (anticipated reduction in time served for good conduct credit)
- Eliminated highest 25% and lowest 25% of time-served values
- Midpoint of the guidelines range was set at the median time-served for the middle 50% of cases
- This served as base recommendation

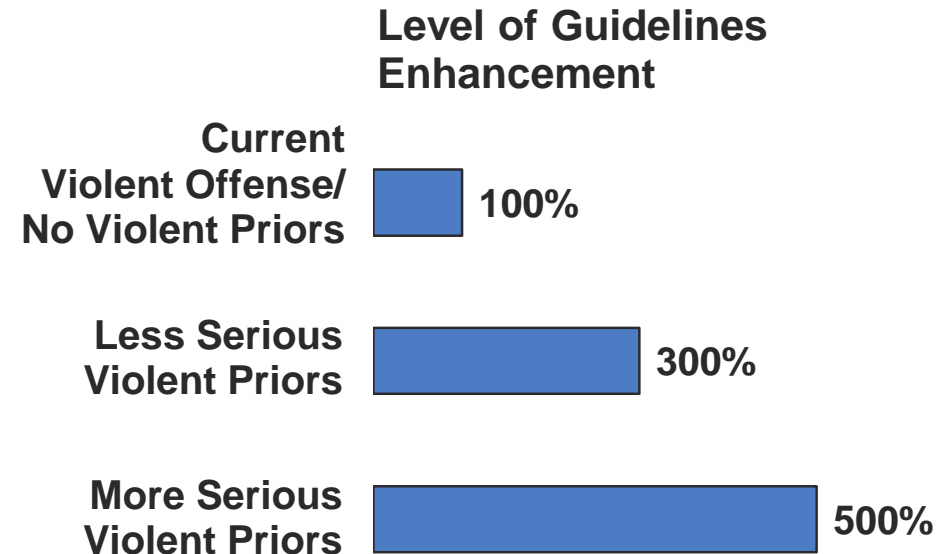


# Guidelines Enhancements for Violent Offenders

## § 17.1-805

**Midpoint enhancements (required by § 17.1-805) are built into the guidelines to increase the sentence recommendations for violent offenders, particularly repeat violent offenders.**

**Per § 17.1-805, the guidelines base recommendation for violent offenders was increased between 100% and 500%, depending on the offender's current and prior felony convictions.**



# Elements of the Sentencing Guidelines

## § 17.1-803 and § 17.1-805

- **As directed by the 1994 legislation, the Commission developed a risk assessment instrument to identify the lowest-risk nonviolent felons for alternative sanctions.**
  - Instrument was developed based on a study of Virginia felons.
  - **Factors found to be statistically significant** in the model (**correlated with recidivism**) were incorporated into a worksheet.
  - After pilot testing and refining, risk assessment was implemented statewide in 2002.
  - Following a new study of more recent felony cases, revised risk assessment instruments became effective July 1, 2013.



# Use of Risk Assessment for Nonviolent Offenders

- The risk assessment is completed in larceny, fraud and drug cases for offenders who are recommended for incarceration by the sentencing guidelines.
- Offenders must also meet the eligibility criteria (e.g., offenders with current or prior violent felony convictions are excluded from risk assessment).
- For offenders who **score low enough** on the risk scale, the sentencing guidelines cover sheet indicates a dual recommendation:
  - **Traditional incarceration or**
  - **Alternative sanction**
- Compliance with the risk assessment recommendation is discretionary.



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

Offender Name: \_\_\_\_\_

### ► Ineligibility Conditions

- 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

## Use of Risk Assessment for Sex Offenders


- In 1999, the General Assembly directed the Commission to develop a sex offender risk assessment tool, **based on the risk of re-offending**, and integrate it into the guidelines.
- The Commission studied felony sex offenders released from incarceration (or given probation) and **identified factors correlated with recidivism**.
- Sex offenders who score above the specified threshold will always be recommended for prison AND the upper end of the recommended sentence range is increased as follows:

Risk Assessment Score	Adjustment to Guidelines Range
Up to 27	No change
28 to 33	Increase upper end of range by 50%
34 to 43	Increase upper end of range by 100%
44 or more	Increase upper end of range by 300%

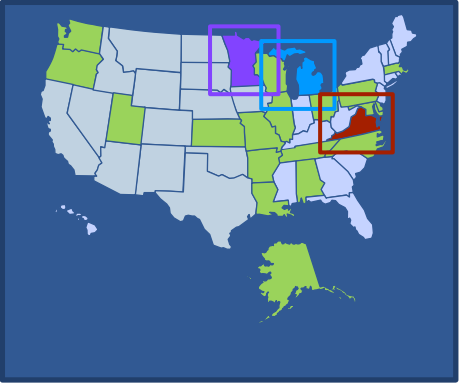
**Important:**  
Midpoint recommendation and low end of the range remain unchanged.



Research suggests that unwarranted sentencing disparities have been reduced.

 **NCSC**  
National Center for State Courts

Assessing Consistency  
And Fairness in Sentencing:  
*A Comparative Study in Three States*



■ ■ ■ States with Sentencing Guidelines Systems

## Findings

**Guidelines effectively limit undesirable sentencing disparity by reducing the role of factors that should not play a role in the sentencing decision.**

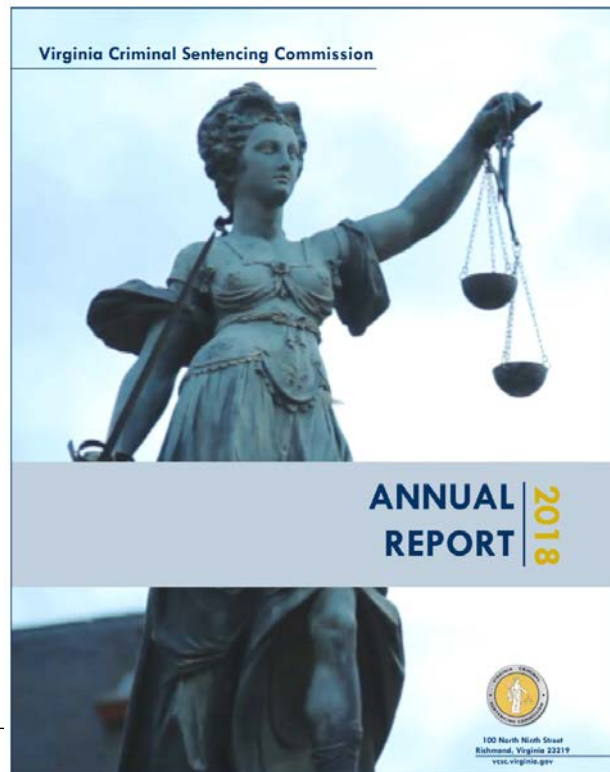
**There is no evidence that guidelines must be mandatory in order to have an impact on undesirable racial, gender, age, or geographical disparities.**

**For the offenses studied, Virginia showed no substantively significant discrimination in sentencing outcomes.**



# Revisions to the Sentencing Guidelines § 17.1-806

**Modifications recommended by the Commission must be presented in an annual report and submitted to the Governor, Chief Justice, and the Legislature each December 1.**



**Legislative session provides an opportunity for lawmakers to accept or reject the Commission's recommendations.**

**The recommendations, unless otherwise provided by law, become effective the following July 1 (§ 17.1-806).**

# Sentencing Guidelines Revisions

- **Prior to 1995, re-analysis occurred each year.**
  - **Guidelines were “benchmarked” to the most recent 5 years of sentencing data.**
  - **Based on the re-analysis, the guidelines recommendation for some defendants would increase while the recommendation for others would decrease.**
- **Since 1995, Commission’s approach to guidelines revisions each year has focused on specific offenses.**
  - **Commission has maintained 100%, 300% and 500% enhancements specified in § 17.1-805.**



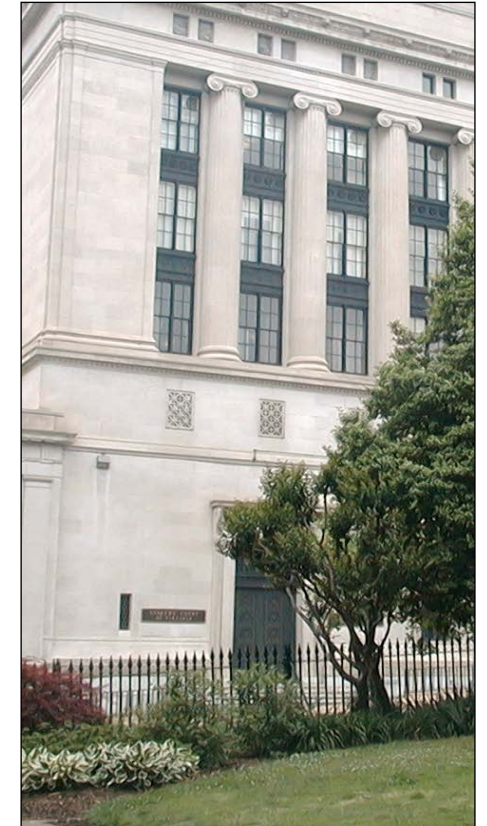
# Rationale for Full Re-Analysis of All Offense Groups

- **Areas of the guidelines that could be refined to better reflect current sentencing practices**
  - **For example: Midpoint enhancement cases**
- **Recent changes in felony larceny threshold (2018, 2020)**
- **Recent legislation to create classifications of robbery (2021)**
- **Holistic approach rather than piecemeal approach**



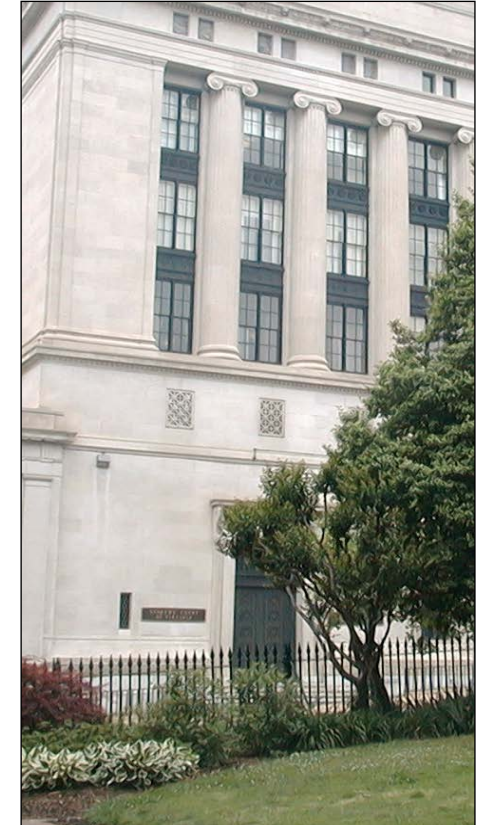
# Full Re-Analysis of All Offense Groups

- **Re-analysis would be a large-scale, multi-year project.**
  - **Case Details Worksheet will be incorporated into the Guidelines starting July 1, 2021.**
  - **Legislation to increase earned sentence credits for nonviolent felons will take effect on July 1, 2022.**
    - **Minimum time served of 65% for nonviolent felons.**
    - **Commission staff will monitor any changes in sentencing patterns that evolve thereafter.**
- **Re-analysis could begin with violent offenses that will remain under the 85% minimum time served requirement.**



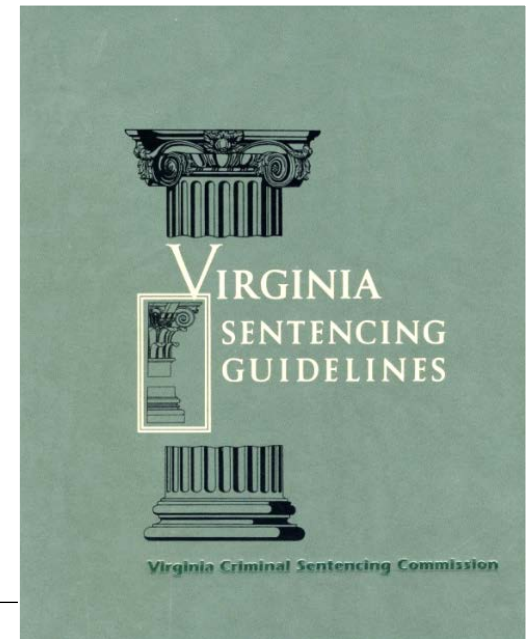
# Full Re-Analysis of All Offense Groups

- **Because the Commission’s risk assessment instruments have been integrated into the guidelines for nearly 20 years, historical data captures judicial sentencing under these tools.**
  - **The Commission will need to determine if the tools are still needed.**
  - **If they are not, legislation is needed to remove the 1994 requirement from § 17.1-803.**



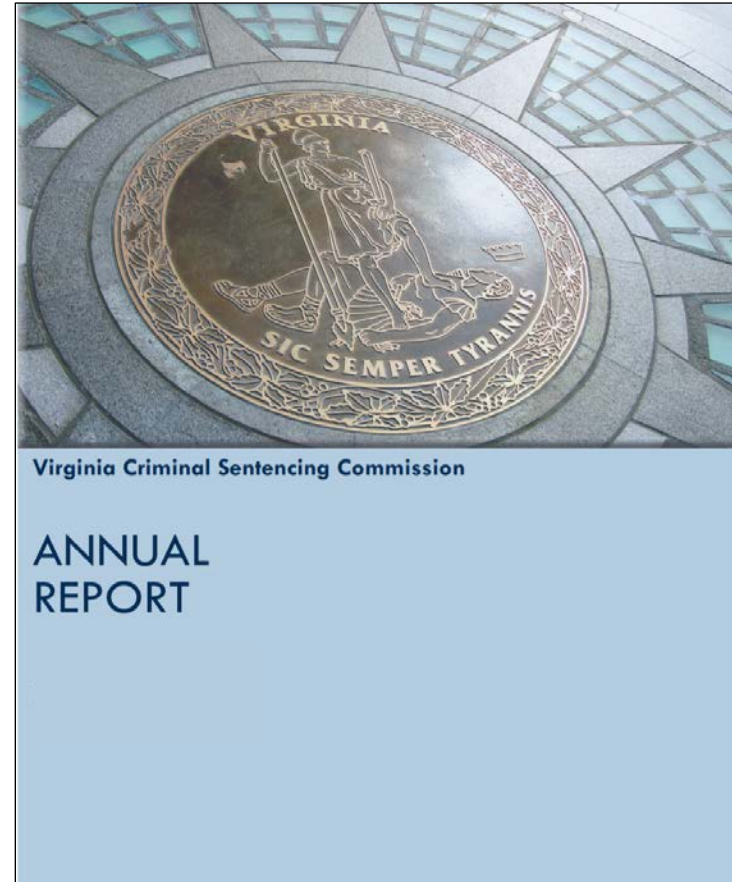
# Virginia Sentencing Guidelines Offense Groups

- **Assault**
- **Burglary of Dwelling**
- **Burglary Other Structure**
- **Drug / Schedule I/II**
- **Drug / Other**
- **Fraud**
- **Kidnapping**
- **Larceny**
- **Murder/Homicide**
- **Rape**
- **Other Sexual Assault**
  - Sexual Assault offenses
  - Obscenity offenses
- **Robbery**
- **Traffic**
- **Weapons**
- **Miscellaneous**
  - Person/Property
  - Other



# Full Re-Analysis of All Offense Groups

**A re-analysis proposal could be included in the Commission's *2021 Annual Report*.**





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**Possible Legislative Proposal:  
Revising Guidelines Midpoint  
Enhancements (§ 17.1-805)**

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# Sentencing Guidelines Midpoint Enhancements Specified in *Code*

## § 17.1-805. Adoption of initial discretionary sentencing guideline midpoints.

A. The Commission shall adopt an initial set of discretionary felony sentencing guidelines which shall become effective on January 1, 1995. The initial recommended sentencing range for each felony offense shall be determined first, by computing the actual time-served distribution for similarly situated offenders, in terms of their conviction offense and prior criminal history, released from incarceration during the base period of calendar years 1988 through 1992, increased by 13.4 percent, and second, by eliminating from this range the upper and lower quartiles. The midpoint of each initial recommended sentencing range shall be the median time served for the middle two quartiles and subject to the following additional enhancements:

### Example:

1. The midpoint of the *initial recommended sentencing range* for first degree murder, second degree murder, rape in violation of § 18.2-61, forcible sodomy, object sexual penetration, and aggravated sexual battery shall be further increased by (i) 125 percent in cases in which the defendant has no previous conviction of a violent felony offense; (ii) 300 percent in cases in which the defendant has previously been convicted of a violent felony offense punishable by a maximum punishment of less than 40 years; or (iii) 500 percent in cases in which the defendant has previously been convicted of a violent felony offense punishable by a maximum punishment of 40 years or more, except that the recommended sentence for a defendant convicted of first degree murder who has previously been convicted of a violent felony offense punishable by a maximum term of imprisonment of 40 years or more shall be imprisonment for life;

2. The midpoint of the initial recommended sentencing range for voluntary manslaughter, robbery, aggravated malicious wounding, malicious wounding, and 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 shall be further increased by (i) 100 percent in cases in which the defendant has no previous conviction of a violent felony offense, (ii) 300 percent in cases in which the defendant has previously been convicted of a violent felony offense punishable by a maximum term of imprisonment of less than 40 years, or (iii) 500 percent in cases in which the defendant has previously been convicted of a violent felony offense punishable by a maximum term of imprisonment of 40 years or more.



# Enhancements for Violent Offenders

## § 17.1-805

- **Changing or removing the specific percent enhancements in § 17.1-805 could be done through legislation.**
  - **This would clarify the power of the Commission to base enhancements on analysis of the data.**





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# **Possible Legislative Proposal: Codification of Probation Violation Guidelines**

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# Requirements for Sentencing Revocation Report (SRR) and Probation Violation Guidelines (PVG)

**Since July 1, 2010, the Appropriation Act has specified that a Sentencing Revocation Report and, if applicable, the Probation Violation Guidelines, must be presented to the court and reviewed by the judge for any violation hearing conducted pursuant to § 19.2-306.**

**See Item 41 of the Appropriation Act adopted by the 2021 General Assembly (Special Session I)**



**The SRR is the only standardized source of detailed violation information.**



# Chapter 552 of the Acts of Assembly 2021, Special Session I (Appropriation Act) Item 41

F.1. For any hearing conducted pursuant to § 19.2-306, Code of Virginia, the circuit court shall have presented to it a sentencing revocation report prepared on a form designated by the Virginia Criminal Sentencing Commission indicating the condition or conditions of the suspended sentence, good behavior, or probation supervision that the defendant has allegedly violated.

2. For any hearing conducted pursuant to § 19.2-306 in which the defendant is cited for violation of a condition or conditions other than a new criminal offense conviction, the court shall also have presented to it the applicable probation violation guideline worksheets established pursuant to Chapter 1042 of the Acts of Assembly 2003. The court shall review and consider the suitability of the discretionary probation violation guidelines. Before imposing sentence, the court shall state for the record that such review and consideration have been accomplished and shall make the completed worksheets a part of the record of the case and open for inspection. In hearings in which the court imposes a sentence that is either greater or less than that indicated by the discretionary probation violation guidelines, the court shall file with the record of the case a written explanation of such departure.

3. Following any hearing conducted pursuant to § 19.2-306 and the entry of a final order, the clerk of the circuit court in which the hearing was held shall cause a copy of such order or orders, the original sentencing revocation report, any applicable probation violation guideline worksheets prepared in the case, and a copy of any departure explanation prepared pursuant to subsection F.2., to be forwarded to the Virginia Criminal Sentencing Commission within 30 days.

4. The failure to follow any or all of the provisions specified in F.1. through F.3 or the failure to follow any or all of these provisions in the prescribed manner shall not be reviewable on appeal or the basis of any other post-hearing relief.



# Requirements for Sentencing Revocation Report (SRR) and Probation Violation Guidelines (PVG)

- **Current Appropriation language for the SRR/PVGs mirrors statutory language specifying the requirements for the felony sentencing guidelines.**
- **However, the current Appropriation language refers to the PVGs as being applicable only to technical violations.**
  - **Effective July 1, 2021, new PVGs now cover violations arising from new felony or misdemeanor convictions.**
  - **At a minimum, this language should be updated to reflect the expansion of the new PVGs.**
- **If desired, the Commission could recommend that language requiring the SRR/PVGs be added to the *Code* in the same manner as the requirements for felony sentencing guidelines.**





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## Questions and Discussion

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