



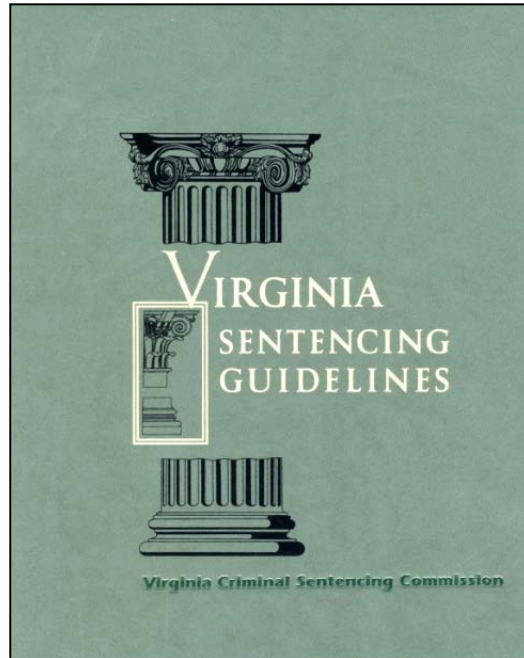
**VIRGINIA CRIMINAL
SENTENCING COMMISSION**

Planning for Full Reanalysis of Sentencing Guidelines by Offense Group

March 28, 2022



Historical Nature of Virginia's Sentencing Guidelines



One goal of Virginia's Sentencing Guidelines has been to reduce **unwarranted sentencing disparity** and increase consistency and predictability in sentencing.

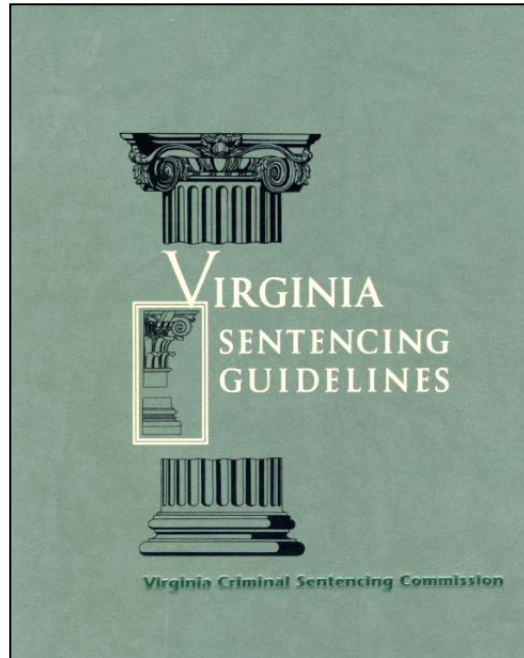
Unlike most states, Virginia's Guidelines are based on analysis of historical sentencing data.

- In fact, § 17.1-803 requires the Commission to take into account historical sentencing practices.

In essence, the Guidelines are designed to provide judges with a benchmark of the typical (or average) case outcome given the defendant's current offenses and prior record.



Exception to Historical Nature of Virginia's Guidelines



There is **ONE** exception to the historical basis of Virginia's Guidelines.

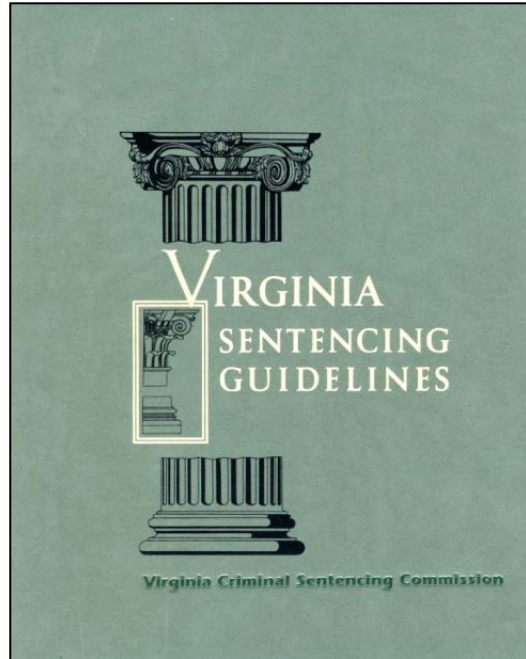
Per § 17.1-805, the Guidelines must include **enhancements** to increase sentence recommendations for defendants who have been convicted of violent felony offenses (as defined in that section).

§ 17.1-805 specifies enhancements of 100%, 125%, 300% or 500% percent depending on the nature of the defendant's current and prior convictions for violent felonies.

- These percent enhancements are not based on empirical analysis of sentencing data.
- They have been in the Code since 1995.



Full Reanalysis of Sentencing Guidelines by Offense Group



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

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

The approach will be holistic and comprehensive.

OBJECTIVE

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

RATIONALE FOR FULL REANALYSIS

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

Recent changes in felony larceny threshold (2018, 2020)

Recent legislation to create classes of robbery (2021)





Sentencing Guidelines Case Details Worksheet

SWIFT/DCN: _____

1. Defendant's Name: _____

2. Defendant Information: Gender: _____ Race: _____ Ethnicity: _____ Age: _____ Handicapped: _____

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

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

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 _____

9. Number of Codefendants: _____

10. Legal Status at Offense (check all that apply):

- | | | | |
|---|---|--|--|
| <input type="checkbox"/> Escaped | <input type="checkbox"/> Inmate | <input type="checkbox"/> Mandatory Parole | <input type="checkbox"/> Discretionary Parole |
| <input type="checkbox"/> Geriatric Release - § 53.1-40.01 | <input type="checkbox"/> Post Release - §19.2-295.2 | <input type="checkbox"/> Probation | <input type="checkbox"/> Bond |
| <input type="checkbox"/> Recognizance | <input type="checkbox"/> Community Program | <input type="checkbox"/> Pre-Trial Supervision | <input type="checkbox"/> Good Behavior |
| <input type="checkbox"/> Juvenile Probation | <input type="checkbox"/> Juvenile Parole | <input type="checkbox"/> Summons | <input type="checkbox"/> Other _____ <input type="checkbox"/> None |

11. Weapon Use: None Possessed Used to Injure Used to Threaten (Includes by voice, note, text, etc.)

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

14. Value of Property Taken/Damaged: Highest value for one item \$ _____ Total value of all items \$ _____

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 _____

18. Victim Information: Gender: _____ Race: _____ Ethnicity: _____ Age: _____ Handicapped: _____

19. Type of Primary Drug: _____ Quantity: _____ Unit: _____

20. Number of Felony Juvenile Adjudications: Person _____ Property _____ Drug _____ Other _____

On July 1, 2021, the Commission implemented the Case Details Worksheet (CDW) as part of the Guidelines, which will provide critical details for each sentencing event.

These data will be invaluable as the Commission proceeds with reanalysis of the Guidelines.

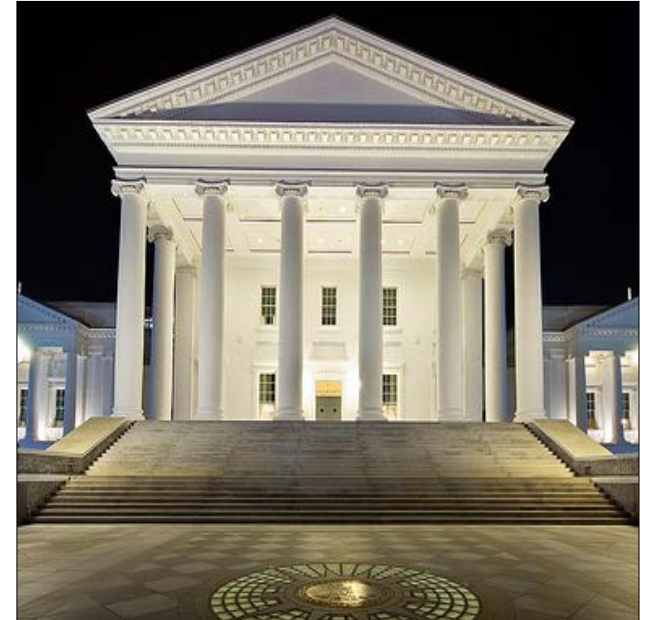


Requested Legislation

In its **2021 Annual Report**, the Commission informed the General Assembly that it would seek legislation to clarify the Commission's authority to recommend revisions to the Guidelines based on historical sentencing data, specifically in regards to the **size of midpoint enhancements**.

- Senator Edwards and Delegate Adams agreed to patron the bills (SB 423 and HB 1320).

During the 2022 General Assembly, both bills passed out of their respective houses unanimously without amendment.



2022 SESSION

ENROLLED

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

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

4 [S 423]

5 Approved

6

7 **Be it enacted by the General Assembly of Virginia:**

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

9 **§ 17.1-805.1. Discretionary sentencing guideline midpoints for certain defendants.**

10 *The Commission shall adopt discretionary felony sentencing guidelines that may increase the*
11 *midpoint of the recommended sentencing range based on the defendant's record of convictions for*
12 *violent felony offenses, as defined in subsection C of § 17.1-805.*

13 *For guidelines that become effective on or after July 1, 2022, the Commission may increase the*
14 *midpoint of the recommended sentencing range for such defendants as set forth in subsection A of*
15 *§ 17.1-805 or the Commission may recommend increases in the midpoint to the degree indicated by*
16 *historical data for felony offenses sentenced in the Commonwealth. Any recommendations adopted by the*
17 *Commission to modify the sentencing guidelines midpoints shall be contained in the annual report*
18 *required under § 17.1-803 and shall become effective in accordance with § 17.1-806.*

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

ENROLLED

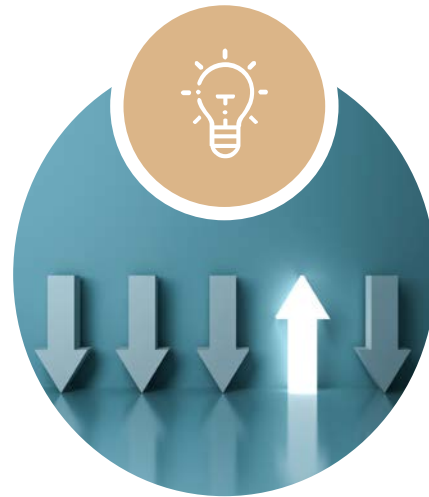
SB423ER



Full Reanalysis of Sentencing Guidelines by Offense Group

Commission staff have begun planning for the full reanalysis of all Guidelines.

The planning takes into account a number of challenges, including recent statutory changes.



Changes in Earned Sentence Credits for Certain Felons House Bill 5148 (2020 General Assembly, Special Session I)



During the 2020 Special Session I, the General Assembly passed legislation to **increase rates earned sentence credits** for certain inmates, effective July 1, 2022 (HB 5148).

The calculation of new earned sentence credits will **apply retroactively** to the entire sentence of any inmate in a state facility participating in the earned sentence credit system on that date.

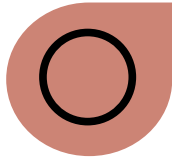
- Some inmates will be immediately eligible for release on July 1, 2022.

Currently, felons must serve a minimum of 85% of the active sentence ordered by the court.

- Under the new law, affected inmates must serve **no less than 65%**.



Changes in Earned Sentence Credits for Certain Felons House Bill 5148 (2020 General Assembly, Special Session I)

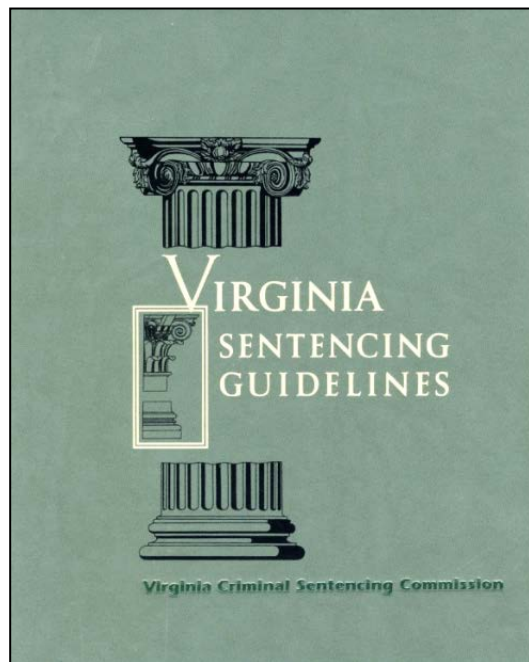


As passed, HB 5148 specifies that felons serving time for the following offenses must continue to serve a minimum of 85%:

- Class 1 felony;
- 1st or 2nd degree murder, solicitation to commit murder, lynching;
- Certain acts of terrorism or treason;
- Felony kidnapping;
- Malicious wounding
- Robbery or carjacking;
- Felony sexual assault (Article 7 of Chapter 4 of Title 18.2);
- Burglary with intent to murder, rape or rob (§ 18.2-90);
- Felony stalking (§ 18.2-60.3);
- Felony violation of protective order (§§ 16.1-253.2, 18.2-60.4);
- Felony prostitution, sex trafficking (Article 3 of Chapter 8 of Title 18.2);
- Use of machine gun or sawed-off shotgun in crime;
- Indecent liberties, certain felony crimes against children (Article 4 of Chapter 8 of Title 18.2 (except for § 18.2-362 or 18.2-371.1);
- Child pornography offenses (except 1st offense possession) or online solicitation of minors (Article 5 of Chapter 8 of Title 18.2);
- Permit minor to perform in sexually explicit material (§ 40.1-100.2), cruelty and injuries to children (§ 40.1-103);
- Torture of animals;
- Trespass on school property – intent to abduct child;
- Escape from custody as a sexually violent predator;
- Second of subsequent convictions (in any combination) for:
Voluntary manslaughter, mob-related felonies, unlawful wounding, aiding terrorism, burglary (§§ 18.2-89, 18.2-92), certain arsons, animal fighting, 1st offense possession of child pornography, felony failure to pay wages; or burn cross, or display noose/ swastika to intimidate, paramilitary activities, food adulteration.

Individuals serving time for felony offenses not listed qualify for the higher rates of sentence credits.

Full Reanalysis of Sentencing Guidelines by Offense Group



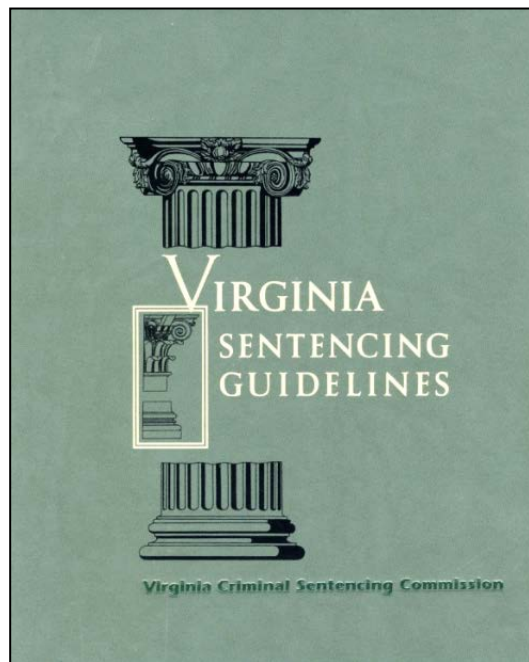
EARNED SENTENCE CREDITS AND OTHER RECENT STATUTORY CHANGES

The Commission will need time to collect sentencing data on cases impacted by the new credit system, as well as felonies affected by recent legislative changes (e.g., larceny).

Staff proposes to focus first on offenses not impacted by recent statutory changes.



Full Reanalysis of Sentencing Guidelines by Offense Group



RISK ASSESSMENT

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. This may require a new risk assessment study.



If risk assessment tools are taken out of the Guidelines, legislation will be 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

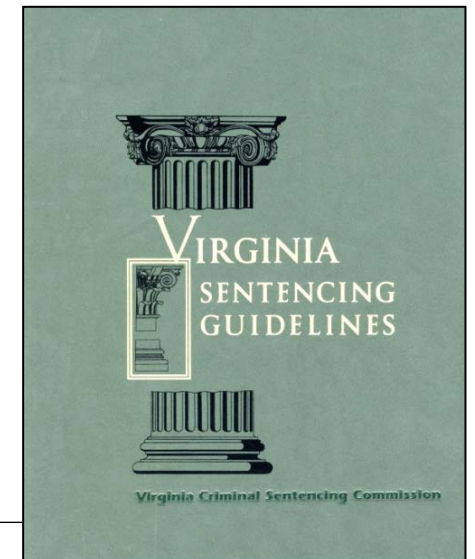
TRAFFIC

WEAPONS

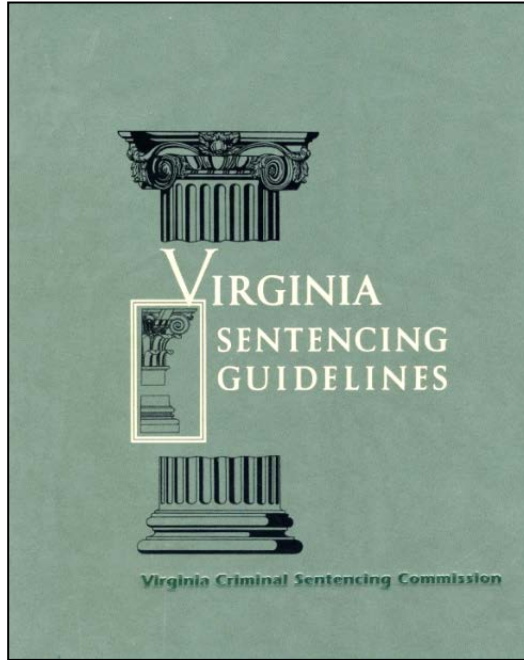
MISCELLANEOUS

▶ **PERSON/PROPERTY**

▶ **OTHER**



Full Reanalysis of Sentencing Guidelines by Offense Group



STAFF PROPOSAL

Staff proposes to begin the reanalysis with offense groups that are unaffected by recent statutory changes.

Potential offense groups for first round of reanalysis:

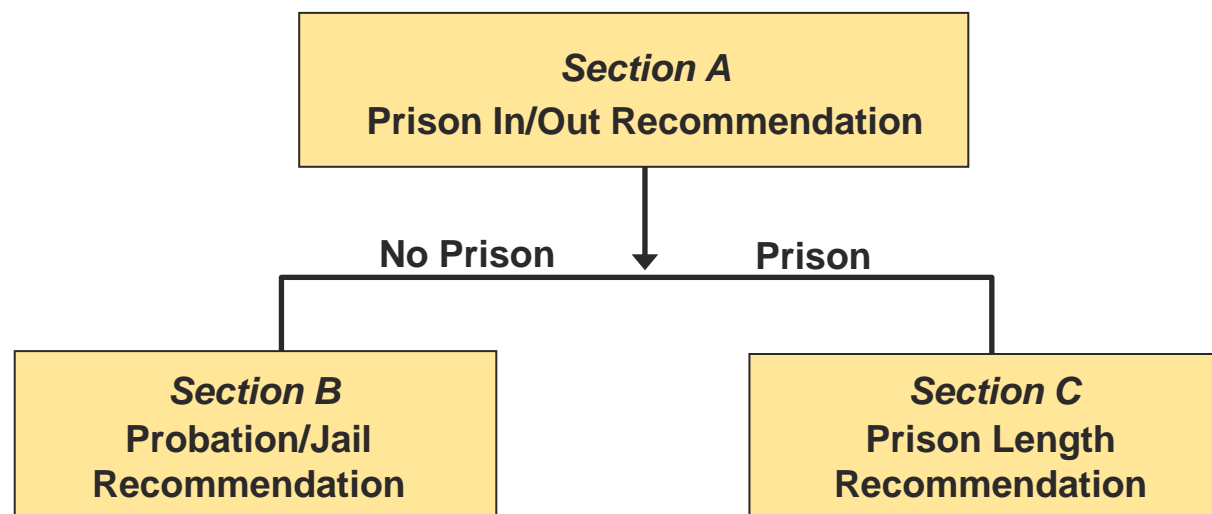
- **Rape, forcible sodomy and object sexual penetration**
- **Other sexual assault (including aggravated sexual battery and indecent liberties)**
- **Kidnapping**
- **Robbery (only one fiscal year of data)**
- **Murder (does not include manslaughter)**



Structure of Virginia's Sentencing Guidelines

Prior 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.



Staff will conduct new analysis to determine if the current structure of the Guidelines best reflects recent judicial decision-making, or if another structure would more closely align with the decision-making process.



Methodology Used to Create Historically-Based Sentencing Guidelines



Analyze historical data to identify all significant factors that influenced past sentencing decisions.



When developing sentencing models, two analysts work independently of each other. After evaluation, the models are reconciled to develop one final model.



Identify inappropriate factors to eliminate their influence on future sentencing decisions (e.g., socio-economic factors).



Create guidelines forms that capture the remaining significant factors and their relative importance in the statistical model.



Prison recommendation (in/out decision) is tied to the historical incarceration rate.



Prison sentence length recommendations are tied to the middle 50% of historical sentences, eliminating the extreme sentences at the high and low end.

Sentencing guidelines forms are designed to capture statistically significant legal factors and their relative importance.

Burglary/Dwelling Section A Offender Name: _____

◆ **Primary Offense**

A. Occupied dwelling with intent to commit a misdemeanor without deadly weapon (1 count)	1
B. Dwelling with intent to commit larceny, etc. without deadly weapon; Dwelling at night without deadly weapon	
1 count.....	3
2 counts.....	5
3 counts.....	7
C. Dwelling at night with intent to commit larceny with deadly weapon (1 count).....	7
D. Dwelling with intent to commit larceny, etc. with deadly weapon (1 count).....	5
E. Occupied dwelling with intent to commit misdemeanor with deadly weapon (1 count).....	9
F. Dwelling with intent to commit murder, rape, robbery or arson with or without a deadly weapon (1 count).....	14

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

Years: 5 - 14	1
15 - 27	2
28 - 43	3
44 or more.....	4

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

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

◆ **Conviction in Current Event Requiring Mandatory Minimum Term (6 mos or more) If YES, add 13** →

◆ **Weapon Used**

None.....	0
Simulated weapon or other than listed below.....	2
Knife.....	2
Firearm.....	4

◆ **Prior Convictions/Adjudications**

Years: Less than 2.....	0
2 - 8	1
9 - 19	2

◆ **Prior Adult Felony Property Convictions**

Number: 1.....	1
of Counts 2 - 5.....	2
6 - 10.....	3
11 or more.....	4

◆ **Prior Juvenile Property Adjudications**

Number: 1 - 2.....	1
of Counts 3 - 11.....	2
12 or more.....	3

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

Number: 1.....	1
of Counts 2 - 4.....	2
5 - 6.....	3
7 - 9.....	4
10 or more.....	5

◆ **Prior Incarcerations/Commitments** If YES, add 3 →

◆ **Prior Revocations of Parole/Post-Release, Supervised Probation or CCCA** If YES, add 1 →

◆ **Prior Juvenile Record** If YES, add 2 →

◆ **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.....	7

◆ **Type of Additional Offense(s)**

Additional offense with VCC prefix of MUR.....	10
Additional offense of malicious wounding (§ 18.2-51) or aggravated malicious wounding (§ 18.2-51.2).....	10
All others.....	0

Total Score _____

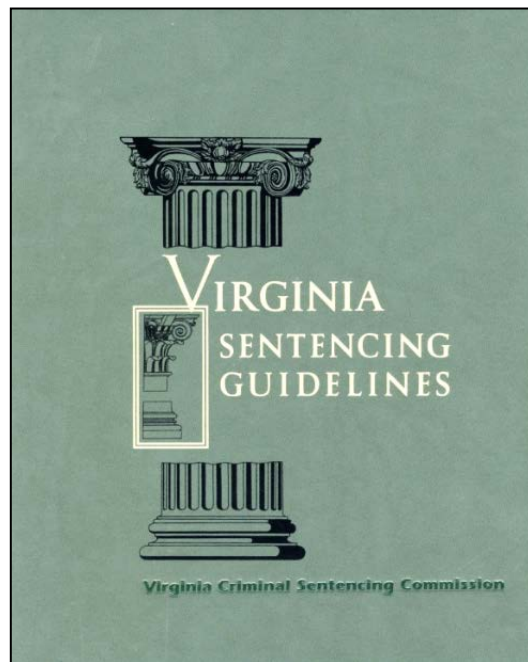
If total is 13 or less, go to Section B. If total is 14 or more, go to Section C.

If total is 13 or less, go to Section B. If total is 14 or more, go to Section C.

Prison recommendation threshold is drawn so that the Guidelines recommend the same proportion of offenders to prison as historically went to prison.



Full Reanalysis of Sentencing Guidelines by Offense Group



2022 WORK PLAN

With the Commission's approval, staff will begin the process of assessing available data.

If sufficient data are available, staff will begin analysis on select offense groups.

If analysis proceeds according to plan, staff could present preliminary models at the September 2022 meeting and final models with proposed recommendations at the November 2022 meeting.



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).



**VIRGINIA CRIMINAL
SENTENCING COMMISSION**

Questions and Discussion



**VIRGINIA
SENTENCING
GUIDELINES**

