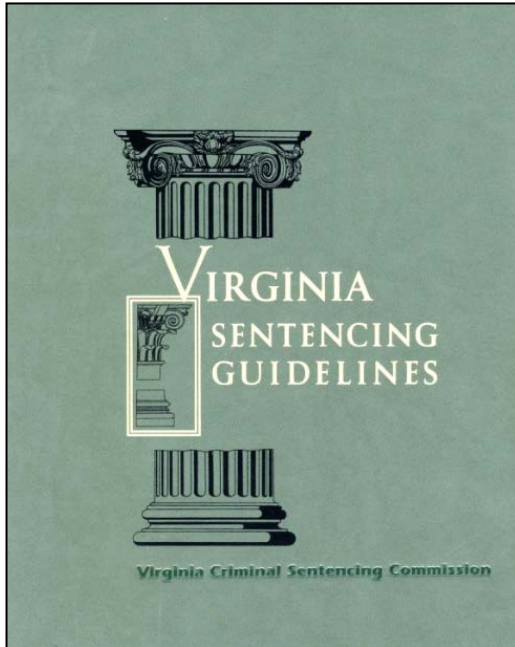


A bronze statue of Lady Justice, the personification of the goddess of justice. She is depicted from the waist up, wearing a classical-style dress with a sash. Her right arm is raised, holding a pair of scales of justice. Her left arm is extended downwards, holding a sword. The background is a clear, light blue sky. The statue is the central focus of the image, with a dark grey semi-transparent box overlaid on the lower half containing text.

SCORING PRIOR RECORD ON VIRGINIA'S SENTENCING GUIDELINES

Virginia Criminal Sentencing Commission

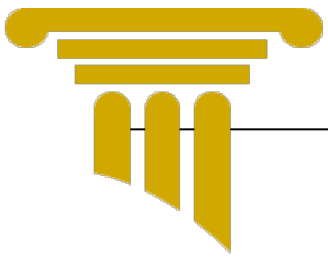
Virginia's Sentencing Guidelines



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

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

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

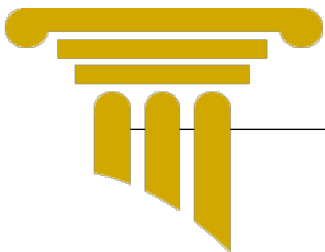


Instructions for Scoring a Defendant's Prior Record

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

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

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



◆ 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

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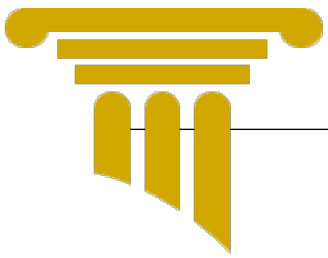
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Rationale for Scoring Prior Record Based on Current Penalty Structure

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

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

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



Alternative Approaches to Scoring Prior Record

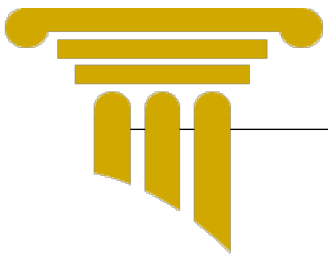
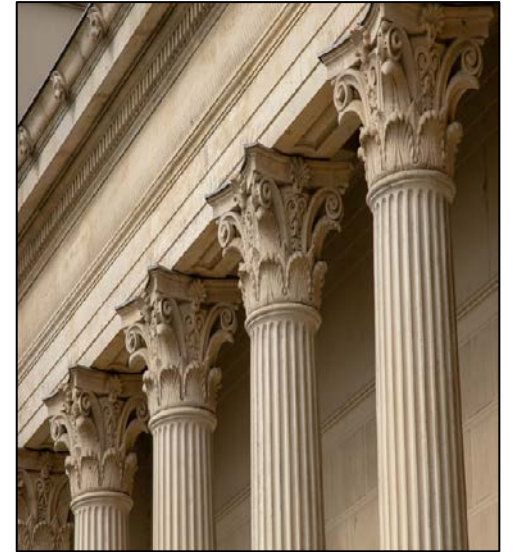
Since 1995, two alternative approaches to scoring prior record have been suggested.

1) Ranking system

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

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

Commission decided to retain the existing approach, concluding that overall sentencing policy is set by the legislature through the current statutory penalties it prescribes.



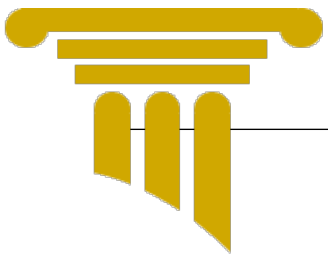
Alternative Approaches to Scoring Prior Record



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

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

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



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

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

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

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

- The change would impact Guidelines recommendations for some offenders.



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



Alternative approach may increase sentencing disparity.

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

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

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

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

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

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

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

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



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



Rap sheets often lack sufficient detail

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

Lack of familiarity with statutes / legislative history in other states

Need list of violent offenses (§ 17.1-805) including dates when offenses were defined as violent by the General Assembly

=====

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

=====

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

Court Decisions Related to Virginia's Sentencing Guidelines



Virginia's Guidelines are merely tools to assist the judge in fixing an appropriate punishment within the range defined by the legislature.



The discretionary Guidelines are procedural tools.



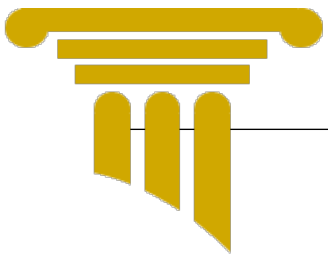
Because they are discretionary, there is no due process violation when a court applies the Guidelines in effect at the time of sentencing, even if they are more punitive than the Guidelines in effect when the offense was committed.



Revision of the Guidelines is left to the discretion of the Sentencing Commission.

Possible Options

- 1) Retain the existing, research-oriented, policy for scoring prior record.
- 2) Make a normative decision to adopt an alternative approach to scoring prior record (this option must be presented as a recommendation in the *Annual Report*).
- 3) Make a normative decision to score only larceny/property offenses affected by the dollar threshold change using the seriousness of the offense when it was committed (Minnesota).
- 4) Direct staff to collect data, study the potential impact of the proposed change.
- 5) Define some other measure to weigh prior record convictions (will require a new research study designed for this purpose).



Drug/Other Section A

Offender Name: _____

◆ **Primary Offense**

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

Score
▼

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

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

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

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

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

◆ **Conviction in Current Event Requiring Mandatory Minimum Term (6 mos or more)** ————— If YES, add 9 →

◆ **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	

◆ **Prior Incarcerations/Commitments** ————— If YES, add 2 →

◆ **Prior Felony Drug Convictions/Adjudications**

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

◆ **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	4	

Total Score ————— If total is 10 or less, go to Section B. If total is 11 or more, go to Section C. →

Drug/Other/ Section A



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

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

0	
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◆ **Additional Offenses** Total the maximum penalties for additional offenses, including counts

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

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

0	
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◆ **Conviction in Current Event Requiring Mandatory Minimum Term (6 mos or more)** ————— If YES, add 9

0	
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Prior Convictions/Adjudications/Violations

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

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

0	
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◆ **Prior Incarcerations/Commitments** ————— If YES, add 2

0	
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◆ **Prior Felony Drug Convictions/Adjudications** (Do not count probation or suspended sentence violations)

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

0	
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Issues to Consider in Your Discussion

§ 1-239

Repeal not to affect liabilities; mitigation of punishment. — No new act of the General Assembly shall be construed to repeal a former law, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture, or punishment so incurred, or any right accrued, or claim arising before the new act of the General Assembly takes effect; except that the proceedings thereafter held shall conform, so far as practicable, to the laws in force at the time of such proceedings; and if any penalty, forfeiture, or punishment be mitigated by any provision of the new act of the General Assembly, such provision may, with the consent of the party affected, be applied to any judgment pronounced after the new act of the General Assembly takes effect. (Code 1919, § 6, § 1-16; 2005, c. 839.)

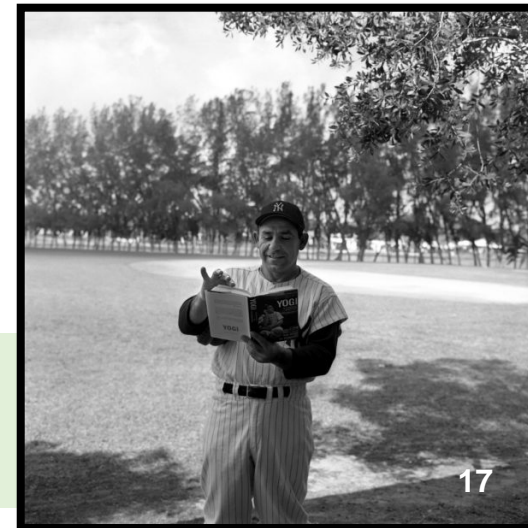
This statute was used to establish Guidelines rules for scoring instant offenses and original offenses on the probation violation Guidelines.

Issues to Consider in Your Discussion

“It’s deja vu all over again”

- 1990s – Ranking considered, but the VCSC voted to accept penalty approved by General Assembly as the standard for measuring prior conduct
- 2018 – Change in larceny threshold revived the issue, VCSC expressed interest in moving forward for reanalysis to adjust to the change
- 2024 – Hannah v. Commonwealth is argued impacts scoring prior conduct and overrides 30 years of case law specific to sentencing guidelines

The main issue is how do you score the same conduct (based on convictions) the same way to reduce unwarranted disparity?



Issues to Consider in Your Discussion

No One Knows the Rules

- There is a difference in not knowing and not accepting a rule
 - There have been 27 editions of the Guidelines manual delivered to every attorney for the Commonwealth, every public defender, every probation officer, and every judge (If you don't have a copy, we have one for you)
 - There have been 344 seminars conducted since June of 2018, that address how to score prior conduct based on Virginia's current penalty structure
 - 3,000 plus text messages and emails were sent about the rule when the larceny threshold changed
 - Staff spends every day helping 20-40 preparers score prior conduct based on Virginia's current penalty structure

ignorantia juris non excusat



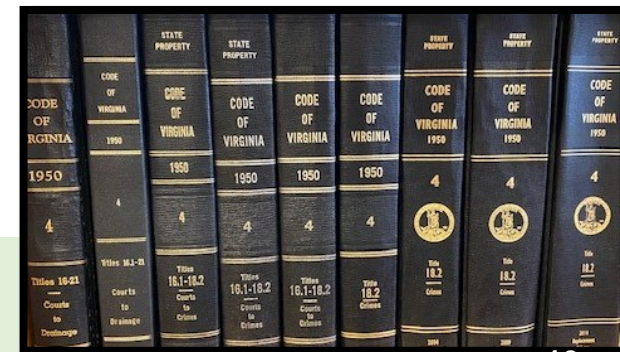
Issues to Consider in Your Discussion

How do you standardize the scores for prior conduct?

Examples:

- Assault on Law Enforcement
- Nonforcible Sodomy
- Marital Rape
- Synthetic Marijuana
- Child Pornography
- Protective Order (Weapon)
- Grand Larceny

What is a good source for statutes for other states, especially statutes that have been repealed or recodified?



Issues to Consider in Your Discussion

Summary

Does the VCSC need a formal opinion on scoring prior conduct on Guidelines?

What will be the new standard? It cannot be different based on when and where the crime was committed.

Are you willing to pause Guidelines until a new standard can be developed?

Staff would recommend no change.

