

1. THE SENTENCING COMMISSION

Q. What year was the commission established? Has the commission essentially retained its original form or has it changed substantially or been abolished?

The Virginia Criminal Sentencing Commission was created in 1994,¹ and has retained its original form.²

Q. Membership: who appoints them, for what terms, with what required qualifications?

The Virginia Criminal Sentencing Commission is composed of seventeen members. Appointment power is vested with the judicial, executive, and legislative branches of the Commonwealth of Virginia. The composition of the commission includes:

1. Six judges or justices, who may be judges of a circuit court who regularly hear criminal cases or judges or justices of the Supreme Court or the Court of Appeals, to be appointed by the Chief Justice of the Supreme Court of Virginia;
2. One person who is not an active member of the judiciary, to be appointed as Chairman by the Chief Justice of the Supreme Court of Virginia for a term of four years subject to confirmation by the General Assembly;
3. The Chairman of the House Committee for Courts of Justice or his designee who shall be a member of the committee and two persons to be appointed by the Speaker of the House of Delegates;
4. The Chairman of the Senate Committee for Courts of Justice or his designee who shall be a member of the committee and one person to be appointed by the Senate Committee on Rules;
5. Four persons to be appointed by the Governor, at least one of whom shall be a representative of a crime victims' organization or a victim of crime as defined in subsection B of § 19.2-11.01; and
6. The Attorney General of Virginia or his designee for a term commensurate with his term of office.

All members must be citizens of Virginia. With the exception of legislative members, appointments to the commission are for a term of four years. Legislative members serve terms coincident with their terms of office. Members may not serve for more than two consecutive terms, with the exception of the Attorney General, who serves by virtue of office. The vice-chairman of the commission is appointed by the Chairman from among the other members of the commission and serves a term commensurate with the Chairman's.³

Q. Is the commission an independent agency, or is it located in or hosted by some other state agency?

The Commission is an agency of the Virginia Supreme Court, located within the judicial branch.⁴

¹ Va. Sentencing Guidelines, Introduction 1 (17th Ed. July 1, 2014).

² Compare 1998 Va. Acts 872.

³ Va. Code Ann. § 17.1-802 (2019).

⁴ Va. Code Ann. § 17.1-800 (2019).

Q. How many staff does the commission have? Are they dedicated to the commission, or shared with another agency?

The Commission currently has nine staff members. The Commission is permitted to appoint a director and determine her duties, and the director, with the Commission's approval, is allowed to employ and fix the duties of additional staff necessary to carry out the Commission's duties. All staff members are dedicated to the Commission.⁵

Q. What is the commission's current statutory mandate?

The Commission's enabling act provides that the Commission exists to ensure the imposition of appropriate and just criminal penalties and the efficient use of correctional resources. To this end, the Commission is tasked with establishing a system of discretionary guidelines which emphasize offender accountability, and achieve the goals of certainty, consistency, and adequacy of punishment while considering offense seriousness, individual offender traits, the potential deterrence effects of punishment, and the use of alternative sanctions.⁶

Q. Do statutes and/or guidelines identify management of prison and jail resources as a goal?

The Commission is tasked with monitoring felony sentence lengths, crime trends, correctional facility population trends, and correctional resources. It must also make recommendations regarding projected correctional facilities capacity and related correctional resource needs.⁷

Additionally, the Commission is required to prepare a fiscal impact statement reflecting the operating costs attributable to any bill which would result in a net increase in periods of imprisonment in state adult correctional facilities. The fiscal impact statement must detail any increases or decreases in offender population, as well as any necessary adjustments in guideline midpoints.⁸

Q. Are sentencing practices studied by means of annual or other regular data sets? If so, are those data sets made available to outside researchers?

Under state law, completed sentencing guidelines forms become part of the record of the case and are open for inspection.⁹ Commission staff reviews completed guidelines worksheets for completeness, accuracy, and departures from the guidelines, and provides an analysis of overall judicial compliance to the Commission on a semiannual basis. When copies of the completed forms are received by the Commission, the information is entered into a data system. Additionally, the Commission releases a study on judicial compliance and other sentencing data with each publicly available annual report.¹⁰

⁵ Va. Code Ann. § 17.1-804 (2019); *About Us*, Va. Criminal Sentencing Comm'n., <http://www.vcsc.virginia.gov/about.html> (last visited March 5, 2020).

⁶ Va. Code Ann. §§ 17.1-801, -803 (2019).

⁷ Va. Code Ann. § 17.1-803(8) (2019).

⁸ Va. Code Ann. § 30-19.1:4 (2019).

⁹ See Va. Code Ann. § 19.2-298.01(A) (2017).

¹⁰ See Va. Criminal Sentencing Comm'n., *2019 Annual Report 2* (Dec. 1, 2019), <http://www.vcsc.virginia.gov/2019Annualreportfinal.pdf>. For a complete analysis of judicial compliance with sentencing guidelines for Fiscal Year 2019 see *generally id.* at 11-47. For analysis and recommendations based on new sentencing data, see *id.* at 59-93.

2. THE GUIDELINES

Q. When were the guidelines first implemented?

The Virginia sentencing guidelines became effective for felony offenses committed on or after January 1, 1995.¹¹

Q. In recent years, have they been modified at least once a year?

The Commission considers modifications to the guidelines on an annual basis by examining existing guidelines crimes as well as those crimes not yet covered by the guidelines. When determining whether existing guidelines need to be modified, the Commission solicits input from circuit court judges, prosecutors, and criminal justice professionals. In addition to this input, the Commission also examines guidelines compliance, departure patterns, and the reasons statements provided in each case sentenced under the guidelines.

As Virginia's guidelines are based on historical sentencing practices among its judges, crimes not yet covered by the guidelines may either be new crimes created by the legislature, crimes recently elevated by the legislature from misdemeanors to felonies, or older offenses that simply do not occur frequently enough for there to be sufficient data upon which to develop historically-based guideline ranges. If the Commission finds that there is sufficient historical sentencing data for a particular uncovered offense, it will add that offense to the guidelines system. If sufficient data does not yet exist, the Commission will leave the crime uncovered and reassess the offense during the next annual review.¹²

Q. Do the commission's recommended initial or modified guidelines require affirmative legislative approval, or do they take effect subject to legislative override?

The Commission submits proposed modifications to the General Assembly in its annual report. Unless otherwise provided by law, modifications become effective the following July 1st.¹³

Q. Do the sentencing guidelines only apply to felonies, or are some misdemeanors and other lesser offenses also covered? Are some felonies excluded (e.g., those subject to life and/or death penalty)?

The sentencing guidelines only apply to certain felonies; misdemeanors and minor offenses are not included.¹⁴ The guidelines currently cover approximately 95% of all felony cases in Virginia courts.¹⁵ Felonies that are not currently contained in the guidelines have either recently been created by the legislature, or otherwise typically do not occur frequently enough for there to be a sufficient number of cases to develop historically-based guidelines ranges.

Q. Is a grid used? Are there multiple grids? How many severity levels does the grid contain?

The Virginia sentencing guidelines do not utilize grids. Instead, Virginia uses a sentencing worksheet format. The guidelines are organized into seventeen offense groups. The relative importance given to

¹¹ Va. Code Ann. § 17.1-805 (2019).

¹² See Va. Criminal Sentencing Comm'n, *2019 Annual Report* 60 (Dec. 1, 2019).

¹³ Va. Criminal Sentencing Comm'n, *2019 Annual Report* 59 (Dec. 1, 2019); Va. Code Ann. § 17.1-806 (2019).

¹⁴ See Va. Code Ann. § 17.1-803(1) (2019).

¹⁵ See Va. Criminal Sentencing Comm'n, *2019 Annual Report* 60 (Dec. 1, 2019).

offense and offender factors varies among the offense groups, and the specific factors emphasized within any one particular offense group are determined on the basis of historical sentencing data for that crime category. Because the guideline scores and factors developed for each offense category were developed only on the basis of offenses within that category, cross-category comparison is not possible.

The seventeen offense groups are:

- Assault
- Burglary of a Dwelling
- Burglary of Other Structure
- Drugs/Schedule I or II
- Drugs/Other than Schedule I or II
- Fraud
- Murder/Homicide
- Kidnapping
- Larceny
- Robbery
- Rape
- Other Sexual Assault
- Other Sexual Assault/Obscenity
- Traffic/Felony
- Miscellaneous Felony Offenses/Person and Property
- Miscellaneous Felony Offenses/Other
- Weapon/Firearm¹⁶

Q. How is the presumptive sentence determined?

The first step in determining the presumptive sentence is ascertaining which offense category and corresponding worksheet is implicated. As an initial matter, the court must identify the sentencing event. A sentencing event consists of all offenses and associated counts that are pending sentencing before the same court at the same time. Once the sentencing event is identified, the Virginia Crime Code (VCC) for each offense within that event must be determined. The VCCs are used to identify the applicable offense category and calculate the number of guideline points.¹⁷

After the VCCs for all offenses have been identified, the primary offense must be selected. The primary offense is the most serious offense in the sentencing event based on the statutory maximum penalty assigned in statute. If multiple offenses have the same statutory maximum, the guidelines contain additional extensive procedures for determining which offense is the most serious. A probation revocation, post-release revocation, or suspended sentence revocation is never considered a primary offense, even if it has a statutory maximum penalty that exceeds the penalty for a new offense conviction in the sentencing event.¹⁸

¹⁶ Va. Sentencing Guidelines, General Instructions 8 (17th Ed. Dec. 1, 2014); *but see id.* at Introduction 4 (mentioning fifteen categories of offenses, and not separately listing “Miscellaneous/Person & Property” and “Other Sexual Assault/Obscenity.”

¹⁷ Va. Sentencing Guidelines, General Instructions 3 (17th Ed. Dec. 1, 2014).

¹⁸ *Id.* at 5-7.

Once the primary offense is selected, the appropriate sentencing worksheet may be identified by determining which of the offense categories corresponds to the primary offense VCC.¹⁹ From there, felony sentencing is a two-step process.

The first step is to determine if the offender should receive a longer incarceration term. If the judge determines that the offender should not receive a longer incarceration term, then the second step is to determine if the offender should receive a shorter incarceration term or probation. If the judge determines that the offender *should* receive a longer incarceration term, then the second step is to decide how long the incarceration sentence should be.²⁰

Each worksheet may be composed of 2, 3, or 4 sections, labeled respectively A, B, C and D. Section A must be completed for every sentencing event. The point totals in Section A determine step 1 – that is, whether the offender should receive a longer incarceration term. Step 2 is to fill out either Section B or Section C, depending on the result of Section A. If the offender should receive a longer incarceration term, Section C is completed to determine that longer term. If the offender should not receive a longer incarceration term, Section B is completed to determine a sentence of either probation or incarceration up to six months.²¹ Section D is a nonviolent risk assessment tool that is completed only for certain drug and property crimes. If the guidelines worksheet contains Section D, that Section is always completed.²²

Section A scores a combination of offense and prior record characteristics, and the resulting score determines whether an offender will be subject to a sentence ranging from probation to less than six months' incarceration (Section B) or to a longer incarceration term (Section C). The first step on all Section A worksheets is to score the primary offense according to its severity. Additional counts may also be scored. The next step involves the calculation of prior criminal history, which can involve a general accounting of all prior convictions or a specific accounting of prior offenses that are similar in some way to the primary offense. The remainder of Section A varies across worksheets, with different factors emphasized for different offense categorizations. Common factors include those involving: the presence or use of weapons, victim characteristics, whether the offender was legally restrained at the time of the offense (e.g., probation or post incarceration supervision), and other characteristics specifically related to the gravity of the primary offense (i.e. the quantity of drugs present).²³

After scoring the Section A factors, the court is directed to complete either Section B or C. If Section B is completed, the offender is recommended for either no incarceration/probation or incarceration up to six months based upon the total score of Section B.²⁴

If Section C is completed, before scoring the primary offense the court must determine whether the offender's prior record includes a Category I or II felony. If it does, each count of the primary offense is scored with a multiplication factor. All remaining counts of the primary offense are then scored by giving points to each count, and not by counting the total maximum penalty available as is done under Sections A and B. Similarly, each additional offense is scored on Section C by assigning points to each additional offense, and not by totaling the maximum penalty available under each offense. The remainder of Section

¹⁹ *Id.* at 8.

²⁰ Va. Sentencing Guidelines, Introduction 4 (17th Ed. Dec. 1, 2014).

²¹ Va. Sentencing Guidelines, General Instructions 2 (17th Ed. Dec. 1, 2014).

²² Va. Sentencing Guidelines, General Instructions 48 (17th Ed. Dec. 1, 2014).

²³ *See generally id.* at 9–13, 14–22.

²⁴ Va. Sentencing Guidelines, General Instructions 2 (17th Ed. Dec. 1, 2014).

C requires calculating factors that mirror those in Section A. After completing all the factors in Section C, the total score provided can be converted into a recommended sentence range.²⁵

Recommended sentences may be increased for sexual offenders. The sex offender risk assessment measures the offender's risk to reoffend and must be completed whenever scoring the Rape or Other Sexual Assault worksheets. The assessment includes factors relating to the offender's age, employment status, education, relationship with the victim, prior criminal record, records of prior treatment, and a number of offense specific factors. If the offender is determined to be at relatively high risk to reoffend, the upper end of the guidelines sentence range is increased, and the offender is always recommended for a term of incarceration that includes prison.²⁶

Recommended sentences may be decreased for nonviolent offenders. The nonviolent risk assessment identifies incarceration-bound drug and property offenders for whom alternative sanctions may be appropriate, and must be completed when scoring the Larceny, Fraud, Drug Schedule I/II, or Drug/Other worksheets. The assessment includes factors relating to the offender's age, gender, prior criminal record, the recency of any prior record, and the existence of legal restraint at the time of offense. If the score provided by the completion of the nonviolent risk assessment is sufficient, the completed guidelines worksheet will reflect the guidelines sentence, as well as a recommendation that the offender receive alternative punishment. If the judge sentences an offender to either the original guidelines recommendation or an alternative punishment, the judge will be considered in compliance with the guidelines. The risk assessment tool does not recommend a specific type of alternative punishment; that decision is left to the judge.²⁷

Q. Is the choice among types of sentences regulated by a “disposition” or other prison in/out line? Are “out” sentences accompanied by suspended execution of prison or suspended imposition of sentence? By definitive preclusion or prison for those cases?

Because Virginia utilizes a worksheet system, there is no visible disposition line (as would appear on a sentencing grid). However, the ordering and use of the worksheets functions in much the same manner. The results of completion of Section A of each worksheet determine whether an offender may receive a sentence ranging from probation to 6 months of incarceration, or a sentence of no less than 7 months' incarceration. If an offender's score is below a certain threshold, the court moves to Section B and the offender will only be exposed to the lesser range of sentences (probation to 6 months' incarceration). If an offender's score is above that threshold, the court moves to Section C and the offender is exposed to a more severe range of sentences.²⁸

If a court determines that an offender should receive probation, it may either suspend imposition of the underlying sentence, or pronounce a sentence and then suspend it. If an offender violates the terms of probation placed on him/her by the court, the court may revoke probation and either impose the suspended sentence, resentence the suspended sentence, or otherwise modify the terms of the original sentence. The Commission has created Probation Violation Guidelines to help guide a court through the revocation process when the violation does not involve a new criminal offense.²⁹

²⁵ See, e.g., Va. Sentencing Guidelines, Assault Worksheet (2019) http://www.vcsc.virginia.gov/worksheets_2019/Assault.pdf.

²⁶ Va. Sentencing Guidelines, General Instructions 41–46 (17th Ed. Dec. 1, 2014).

²⁷ Va. Sentencing Guidelines, General Instructions 47–51 (17th Ed. Dec. 1, 2014).

²⁸ Va. Sentencing Guidelines, General Instructions 2 (17th Ed. Dec. 1, 2014).

²⁹ Va. Code Ann. §§ 19.2-298, -303 (2019); see also Va. Criminal Sentencing Comm'n, *Sentencing Revocation Report and Probation Violation Guidelines*, http://www.vcsc.virginia.gov/Worksheets_2018/PVGbooklet.pdf.

Q. Are there border boxes or other categories permitting multiple sentence types?

If an offender is sentenced using a guidelines worksheet that contains a Section D nonviolent risk assessment, it is possible for him/her to receive a dual recommendation under the guidelines. Under a dual recommendation, the guidelines worksheet provides the appropriate guidelines sentence, but also recommends that the offender be considered for alternative forms of punishment. To receive a dual recommendation, offenders must score well on the nonviolent risk assessment, which considers age, gender, prior criminal record, the recency of any prior record, and the presence of legal restraint at the time of offense.³⁰

Q. Are the guidelines purely advisory, or are they legally binding?

Compliance with Virginia sentencing guidelines is voluntary; a judge may use the guidelines as a reference but is free to impose a sentence outside of the guidelines.³¹ Completion of the appropriate worksheet prior to felony sentencing is mandatory, and if a judge decides to depart from the recommended sentence a reason must be provided, but failure to do so is not grounds for appeal.³²

3. DEPARTURES AND SIMILAR ADJUSTMENTS TO GENERALLY-RECOMMENDED SENTENCES

Q. What is the overall/general standard for departure?

Judges are not required to comply with Virginia's sentencing recommendations. Departure from a recommended sentence is always at the discretion of the sentencing judge.³³ Therefore, there is no articulated standard for departure in the guidelines or in statute. However, if a court departs from a recommended sentence, the court must provide a written explanation of the departure. The case record and written reason for departure are forwarded to the Virginia Sentencing Commission for review.³⁴ The Commission strongly encourages judges to write reasons that are specific enough for the Commission to be able to analyze the departure and make future changes to the guidelines as necessary, though these reasons may also be rather brief.³⁵

Q. Are there lists of aggravating and mitigating circumstances permitting departure? If so, are such lists non-exclusive? Is there a list of prohibited factors?

As compliance with sentencing recommendations is voluntary, there are no lists of aggravating or mitigating circumstances permitting departure.

³⁰ Va. Sentencing Guidelines, General Instructions 47–51 (17th Ed. Dec. 1, 2014); *see, e.g.*, Va. Sentencing Guidelines, Larceny Worksheet (17th Ed. Dec. 1, 2014).

³¹ Va. Sentencing Guidelines, Introduction 3 (17th Ed. Dec. 1, 2014).

³² Va. Code Ann. § 19.2-298.01(A), (F) (2019).

³³ Va. Sentencing Guidelines, Introduction 3 (17th Ed. Dec. 1, 2014).

³⁴ Va. Code Ann. § 19.2-298.01(E) (2019).

³⁵ Va. Sentencing Guidelines, General Instructions 1–2 (2014); *id.* at Introduction 3.

Q. Do the guidelines expressly address mitigations based on a guilty plea, acceptance of responsibility, and/or providing assistance to law enforcement?

If an offender pleads guilty or accepts a plea agreement, the responsibility for completing the appropriate sentencing worksheet can shift from a probation officer to the Commonwealth's attorney upon the agreement of the court, the accused, and the Commonwealth's attorney.³⁶ The guidelines note, however, that irrespective of who prepares the worksheet, factor bargaining (an agreement that results in a guidelines calculation contrary to the established rules) is not allowed.³⁷

The guidelines recommendations are the same regardless of the defendant's plea or assistance to the Commonwealth in other cases.

Q. Are there limits on the degree of durational (length-of-custody) departure?

Statutory mandates are controlling and supersede Virginia's sentencing recommendations. While the court may depart from sentencing recommendations at its discretion, it cannot impose a sentence above a statutory maximum or below the statutory minimum.³⁸

Q. Are there limits on the availability of dispositional departure (executed-prison vs. stayed sentence)?

The only limits on dispositional departure are statutorily imposed. If a sentencing event includes a conviction for an offense with a mandatory minimum sentence, any guidelines recommendation must reflect the statutory mandates.³⁹

4. PRISON RELEASE DISCRETION

Q. Does the jurisdiction utilize parole release discretion or has it been abolished for all or most offenders?

With the adoption of truth-in-sentencing reforms and the creation of the Virginia Criminal Sentencing Commission, parole was abolished for felony crimes committed after January 1, 1995, the initial implementation date of sentencing reforms. For such offenses, there is no discretionary parole release and offenders must serve at least 85% of the effective sentence (imposed sentence less any suspended time) ordered by the court.⁴⁰

Q. Does the state have a "truth in sentencing" law, limiting the extent of early release?

Under Virginia's "truth in sentencing" law, an offender may reduce their term of confinement through earned sentence credits, but only up to a maximum of 15% of the total sentence. Therefore, under

³⁶ Va. Code Ann. § 19.2-298.01(C) (2017).

³⁷ Va. Sentencing Guidelines, General Instructions 1 (17th Ed. Dec. 1, 2014).

³⁸ Va. Sentencing Guidelines, General Instructions 39 (17th Ed. Dec. 1, 2014).

³⁹ Va. Sentencing Guidelines, General Instructions 39 (17th Ed. Dec. 1, 2014).

⁴⁰ Va. Sentencing Guidelines, Introduction 2 (17th Ed. Dec. 1, 2014); see 1994 Special Session II Va. Acts 1; see also Va. Parole Bd., *About the Parole Board*, <https://vpb.virginia.gov/about-the-parole-board/> (last visited March 13, 2020).

Virginia’s “truth in sentencing” law, an offender will serve a minimum of 85% of the pronounced sentence of confinement.⁴¹

Q. Do recommended and imposed sentences under the guidelines set the minimum time to serve in prison, the maximum, both the minimum and maximum, a target/recommended/expected prison duration, or some other combination of these parameters?

The sentences recommended by the guidelines are “effective time” sentences, which are meant to represent “the incarcerative time an offender receives after suspended time is subtracted from imposed time.” If a judge wishes to suspend any part of a sentence, he/she may increase the sentence recommended by the guidelines by the amount of time he/she wishes to suspend.⁴² The guidelines are meant to provide a final sanction for a case, encompassing all sentenced offenses, and reflect actual time served less no more than a 15% reduction for earned sentence credit.⁴³

Q. Is the period of post-prison supervision independent of any unserved prison term?

In nearly all felony cases, the court orders the offender to serve a period of supervision following his or her release from incarceration. For offenders who violate the conditions of community supervision, the court may re-impose all or part of the sentence originally suspended.

Upon an individual’s conviction of any felony, the court may (or, if the court does not suspend at least six months of the defendant’s sentence, the court must) impose a sentence of post-release incarceration (that is suspended) and an accompanying period of supervision. The period of post-release supervision must range between six months to three years, to be left to the discretion of the sentencing court. Any post-release sentence imposed by the court is suspended until the offender’s release from confinement, at which point the term of post-release supervision becomes active. If post-release supervision has been imposed for more than one felony conviction, the court may order multiple periods to run concurrently.⁴⁴

Q. What good-time credits do prisoners earn? Is program participation considered?

Every person convicted of a felony and sentenced to a term of incarceration is eligible to earn sentence credits. An incarcerated individual can earn up to four and a half sentence credits for each 30 days served in confinement, and each sentencing credit earned deducts one day from the individual’s term of incarceration. Sentence credits are in part earned through full participation and cooperation with programs an inmate is assigned.⁴⁵ Programs are assigned based upon an evaluation of each individual and may include career and technical education, work activities and employment, academic activities, counseling, alcohol and substance abuse treatment, and such related activities as may be necessary to assist prisoners in the successful transition to free society and gainful employment.⁴⁶

Q. Are prisoners subject to exceptional, “second-look” releasing mechanisms?

⁴¹ Va. Sentencing Guidelines, Introduction 2 (17th Ed. Dec. 1, 2014).

⁴² Va. Sentencing Guidelines, Introduction 5 (17th Ed. Dec. 1, 2014).

⁴³ Va. Sentencing Guidelines, Introduction 2 (17th Ed. Dec. 1, 2014).

⁴⁴ Va. Code Ann. § 19.2-295.2 (2019).

⁴⁵ Va. Code Ann. § 53.1-202.2(A) (2019); 53.1-202.3 (2019).

⁴⁶ Va. Code Ann. § 53.1-32.1(A) (2019).

The power to grant pardons and commute capital punishment rests with the governor.⁴⁷ The Virginia Parole Board has the ability to independently investigate sentences and present recommendations for pardons or clemency to the governor, with or without the governor's request, if it believes such action is in the best interest of the Commonwealth of Virginia.⁴⁸

Virginia also has a geriatric release provision. Any person serving a sentence for a felony offense, other than a Class 1 felony, who is sixty-five or older and has served at least five years of the sentence imposed, or who is sixty or older and has served at least ten years of the sentence imposed may petition the Parole Board for conditional release.⁴⁹

5. RELATIONSHIP TO CRIMINAL LAWS

Q. Did the guidelines replace some or all previous statutory maxima?

Statutory sentencing mandates operate independently of the guidelines and supersede recommendations provided by the guidelines. Upon the completion of the appropriate worksheet, if the recommended maximum sentence exceeds the statutory maximum, the preparer should disregard the recommended maximum and instead utilize the statutory maximum as the upper range of sentencing possibilities.⁵⁰

Q. Are guidelines built on top of (i.e., equal to or more severe than) any remaining mandatory minima, or are they set independently and over-ridden whenever a mandatory applies?

The guidelines are subordinate to statutory mandatory minima. If a sentencing event includes a conviction for an offense with a mandatory minimum sentence, the guidelines recommendation must reflect the statutory requirements.⁵¹

Q. Are some "mandatory" minima subject to case-specific "departure" or other exception?

Statutory mandates are controlling and override recommendations provided by the guidelines. While a sentencing court can depart from the recommended guidelines, they are bound to statutory requirements. There are no available grounds for case-specific departure from a mandatory minimum. If a minimum recommended guidelines sentence is below the floor set by a mandatory minimum, the recommendation must be modified to reflect the required statutory minimum.⁵²

6. CRIMINAL HISTORY SCORING

Q. What are the major components of the criminal history score?

⁴⁷ Va. Code Ann. § 53.1-229 (2019).

⁴⁸ Va. Code Ann. § 53.1-231 (2019).

⁴⁹ Va. Code Ann. § 53.1-40.01 (2019).

⁵⁰ Va. Sentencing Guidelines, General Instructions 39 (17th Ed. Dec. 1, 2014).

⁵¹ Va. Sentencing Guidelines, General Instructions 39 (17th Ed. Dec. 1, 2014).

⁵² Va. Sentencing Guidelines, General Instructions 39 (17th Ed. Dec. 1, 2014).

Virginia utilizes offense-specific sentencing guidelines, so there is not one consistent set of variables that are used to determine an offender's criminal history score. Rather, within each of seventeen offense groups, the guidelines factors used are those that proved to be consistently important in determining historical sentences for that crime category and the type of decision made (prison in/out, probation/jail, etc.).⁵³

For each offense group, there is a section of the worksheet in which prior record factors are considered. Some of the variables that may be included as prior record factors are prior convictions or adjudications, prior incarceration/commitments, and prior juvenile record.⁵⁴ When scoring prior convictions or adjudications, the court considers only the five most recent prior sentencing events, with adult felonies being considered first over adult misdemeanors and juvenile adjudications. Only one offense with the highest maximum penalty from each sentencing event may be scored.⁵⁵

When scoring the prior history for Sections A and B, the court totals the statutory maximum penalties for each prior offense; for Section C, the court instead assigns points to each prior offense separately before totaling them. When scoring prior incarcerations or commitments, the court scores only those sentences of active incarceration in jail, prison, or a juvenile institution.⁵⁶ When scoring prior juvenile records, the court must be mindful that the adjudication may be subject to the state's juvenile expungement provision.⁵⁷

In addition to these broad categories, within some offense groups, an offender must be scored on specific prior record factors. When this is the case, the court is not limited to the five most recent sentencing events, and is not restricted from counting a single offense or count from a particular sentencing event.⁵⁸

An example of these specific factors can be found on the Assault worksheet. Section C of the worksheet asks the court to consider prior felony convictions/adjudications against a person, while Section B asks about prior misdemeanor convictions/adjudications.⁵⁹ Other examples of specific prior record factors found across the sentencing worksheets ask about, *inter alia*, felony and misdemeanor property convictions, prior parole revocations, and prior criminal traffic misdemeanor convictions.⁶⁰

One additional factor that is often considered to be part of the criminal history score and that is included on some, but not all, sentencing worksheets in the Virginia guidelines is the concept of "legal restraint." This factor accounts for whether the offender was under some sort of supervision status within the criminal justice system when the offense was committed. Some examples of statuses that might be scored within this factor are parole, probation, electronic monitoring, and work release.⁶¹

Q. Does the jurisdiction utilize "decay"/washout rules, that is, do old convictions count less or drop out? Which older convictions decay, when, and how?

⁵³ Va. Sentencing Guidelines, Introduction 4 (17th Ed. Dec. 1, 2014).

⁵⁴ See generally Va. Sentencing Guidelines, General Instructions 23-36 (17th Ed. Dec. 1, 2014).

⁵⁵ Va. Sentencing Guidelines, General Instructions 27-28 (17th Ed. Dec. 1, 2014).

⁵⁶ Va. Sentencing Guidelines, General Instructions 28-29 (17th Ed. Dec. 1, 2014).

⁵⁷ Va. Sentencing Guidelines, General Instructions 29 (17th Ed. Dec. 1, 2014).

⁵⁸ Va. Sentencing Guidelines, General Instructions 29 (17th Ed. Dec. 1, 2014).

⁵⁹ See Va. Sentencing Guidelines, Assault Worksheet 4-5 (17th Ed. Dec. 1, 2014).

⁶⁰ See Va. Sentencing Guidelines, General Instructions 29-38 (17th Ed. Dec. 1, 2014).

⁶¹ Va. Sentencing Guidelines, General Instructions 37 (17th Ed. Dec. 1, 2014).

Under Virginia sentencing guidelines, an individual's complete criminal history includes all juvenile, adult, and criminal traffic convictions or adjudications and probation or suspended sentence violations. Older convictions do not wash out.⁶²

However, the usage of an individual's criminal history will vary based on the worksheet being used for the instant offense. Some worksheets will take into account only the five most recent prior record events.⁶³ Other worksheets will award points for every similar offense that the individual has previously been convicted of, regardless of when the offense occurred in time.⁶⁴

Q. Do the Guidelines include any other significant limitations on how criminal history can be used (e.g., limits on eligibility for high-history categories; adjustments for older offenders)?

The Guidelines only allow the scoring of the five most recent and serious sentencing events for the general prior record score, and limit consideration of each event to the most serious offense.⁶⁵ Additionally, each offense worksheet emphasizes certain aspects of the criminal history and excludes consideration of others.⁶⁶

7. MULTIPLE CURRENT OFFENSES

Q. Are consecutive sentences limited? If so, how (e.g. prohibited, permissive, or mandatory in certain cases; limits on total duration; use of a multiple-counts enhancement formula)?

Consecutive sentences are not limited, as multiple offenses are presumed to run consecutively. If a person is convicted of two or more offenses, and sentenced to confinement, the sentences are not to run concurrently unless expressly ordered by the court.⁶⁷ If a person has been convicted of multiple crimes that require mandatory minimum sentences, the guidelines recommendation must reflect consecutive mandatory minimum sentences.⁶⁸

When a worksheet is prepared, multiple offenses are grouped into a sentencing event. A sentencing event consists of all offenses, and their associated counts, that are pending sentencing before the same court at the same time.⁶⁹ Multiple offenses within one sentencing event increase an individual's point total on the worksheet, thus increasing the likelihood of incarceration or increasing the range of confinement time.⁷⁰

Q. In consecutive sentencing, how is the offender's criminal history taken into account?

⁶² Va. Sentencing Guidelines, General Instructions 27 (17th Ed. Dec. 1, 2014).

⁶³ See, e.g., Va. Sentencing Guidelines, Assault Worksheet 3 (17th Ed. Dec. 1, 2014).

⁶⁴ See, e.g., Va. Sentencing Guidelines, Burglar/Other Worksheet 3 (17th Ed. Dec. 1, 2014) (points are awarded for prior felony property convictions, regardless of when the prior offense occurred).

⁶⁵ Va. Sentencing Guidelines, General Instructions 27–28 (17th Ed. Dec. 1, 2014).

⁶⁶ Va. Sentencing Guidelines, Introduction 4 (17th Ed. Dec. 1, 2014).

⁶⁷ Va. Code Ann. § 19.2-308 (2019).

⁶⁸ Va. Sentencing Guidelines, General Instructions 40 (17th Ed. Dec. 1, 2014).

⁶⁹ Va. Sentencing Guidelines, General Instructions 3 (17th Ed. Dec. 1, 2014).

⁷⁰ See, e.g., Va. Sentencing Guidelines, Burglar/Other Worksheet 3 (17th Ed. Dec. 1, 2014) (step 2 of the worksheet adds points for remaining primary offense counts; step 3 of the worksheet adds points by totaling the maximum penalties, in years, of all additional offenses in the sentencing event).

An offender's criminal history has no bearing on whether consecutive sentencing is utilized, as consecutive sentences are presumed.⁷¹ When completing a worksheet for a sentencing event, multiple offenses and criminal history score comprise two separate aspects of the worksheet; each section has the potential to independently award an offender additional points.⁷²

8. ENFORCEMENT MECHANISMS (LOCATION ON THE “ADVISORY”-TO-“MANDATORY” CONTINUUM)

Q. Are recommended sentences enforced by prosecution and defense sentence appeals?

Judicial compliance with recommended sentences is voluntary. A sentencing court is required to review the appropriate worksheet for the instant offense, but is allowed to depart from the recommended sentence at its discretion.⁷³ An individual convicted of a crime may appeal the final conviction; however, the failure of a sentencing court to adhere to the statutory requirement of completing the appropriate worksheet is not reviewable upon appeal.⁷⁴ The prosecution may only appeal a felony conviction if a mandatory sentence is not followed.⁷⁵

Q. Are other enforcement methods used (e.g., required reasons for departure; published judge-specific departure rates; narrow permitted sentencing alternatives and/or ranges)?

If a sentencing court decides to depart from the recommended sentence, a written explanation must be filed with the record of the case. The written explanation of the departure must then be forwarded to the Virginia Criminal Sentencing Commission for analysis.⁷⁶ While any reason is acceptable for departure, the written explanation must contain enough detail to be of use to the Commission.⁷⁷

Generally, the Commission does not publish judge-specific departure rates, but it does publish departure rates by judicial circuit in its annual report.⁷⁸ Because the sentencing guidelines are public information, judge-specific departure rates can be requested.⁷⁹

Virginia's judges are elected by the state legislature for set terms of six years.⁸⁰ At the end of the term, a judge is interviewed by the House and Senate Committees for Courts of Justice prior to standing for reelection.⁸¹ Each year, the joint committee requests compliance and departure rates for the judges who will be interviewed for re-appointment.⁸²

⁷¹ See Va. Code Ann. § 19.2-308 (2019).

⁷² See, e.g., Va. Sentencing Guidelines, Assault Worksheet 3 (17th Ed. Dec. 1, 2014) (steps 2 and 3 award points for additional offenses in the instant sentencing event, while steps 6, 7, and 8 award points for criminal history; all steps are independent of each other, with each working to determine an offender's final worksheet score).

⁷³ See Va. Code Ann. § 19.2-298.01 (2019).

⁷⁴ See Va. Code Ann. § 17.1-406(A) (2019) (detailing when an individual may present an appeal to the Court of Appeals); see Va. Code Ann. § 19.2-298.01(F) (2019) (explained by *Woodard v. Com.*, 754 S.E.2d 309 (Va. 2014)).

⁷⁵ Va. Code Ann. § 19.2-398(C) (2019).

⁷⁶ Va. Code Ann. § 19.2-298.01(E) (2019).

⁷⁷ Va. Sentencing Guidelines, Introduction 3 (17th Ed. Dec. 1, 2014).

⁷⁸ See Va. Criminal Sentencing Comm'n, *2019 Annual Report* 18-19 (Dec. 1, 2019), <http://www.vcsc.virginia.gov/2019VCSCAnnualReport.pdf>.

⁷⁹ See Va. Freedom of Information Act, Va. Code Ann. § 2.2-3700 – 2.2-3714 (2019); Correspondence with Meredith Farrar-Owens, Director, Va. Criminal Sentencing Comm'n (Feb. 2, 2016).

⁸⁰ Va. Code Ann. § 16.1-69.9(1) (2019).

⁸¹ Va. Div. of Legislative Serv., *Judicial Selection Interviews*, <http://dls.virginia.gov/judicial.html?x=jit> (last visited March 14, 2020).

⁸² Correspondence with Meredith Farrar-Owens, Director, Va. Criminal Sentencing Comm'n (Feb. 2, 2016).

The Commission must also submit yearly reports to Virginia's Child Protection Accountability System, in order to determine the relationship between sentence departures and instances of child abuse. These reports must include information about offender convictions for twenty-two various crimes specified by the law.⁸³ The report must include: the name of the sentencing judge, the offense or offenses for which a sentence was imposed, the age and relationship of the victim and the offender, the locality in which the offense occurred, the sentence imposed and the actual time served, whether the sentence was a departure from the guidelines, and the reasons given for the departure.⁸⁴

Q. Are some deviations from the guidelines not deemed departures?

Sentences calculated on a worksheet that considers nonviolent risk assessments may result in a dual recommendation consisting of a recommendation for alternative punishment in addition to the normal recommended guidelines sentence. If a worksheet calculation returns a dual recommendation the sentencing court may choose either, and neither will be considered a departure from the guidelines.⁸⁵

The Commission measures judicial agreement with the sentencing guidelines using two classes of compliance: strict and general. Together, they comprise the overall compliance rate.

Strict compliance exists when a sentence involves the same type of sanction recommend by the guidelines (i.e. probation or incarceration) for a term of punishment recommended by the guidelines. A court is also in strict compliance if it sentences a non-violent offender to either a term of incarceration within the guidelines range or to an alternative punishment program, based on risk assessment results.⁸⁶

A court is in general compliance when imposing a sentence that is rounded up or down by up to 5% higher/lower than dictated by the guidelines. "For example, a judge would be considered in compliance with the guidelines if he or she sentenced an offender to a two-year sentence based on a guidelines recommendation that goes up to 1 year 11 months."⁸⁷

General compliance also exists where a judge gives credit for time served in lieu of a longer incarceration sentence. Finally, general compliance exists in cases where judges comply with statutorily-permitted diversion options for habitual traffic offenders.⁸⁸

Q. Do some deviations require especially strong justification? Or minimal justification?

Deviations require minimal justification. Adherence to the recommended sentence is strictly voluntary, so a court may impose a sentence above or below the recommendation at its discretion.⁸⁹

⁸³ Va. Code Ann. § 63.2-1530(b)(2), (4) (2019). These offenses are mostly sex crimes, particularly against children but also include some forms of abduction and child cruelty.

⁸⁴ *Id.*

⁸⁵ See, e.g., Va. Sentencing Guidelines, Larceny 10 (17th Ed. Dec. 1, 2014).

⁸⁶ See Va. Criminal Sentencing Comm'n, *2016 Annual Report* 14 (Dec. 1, 2016), <http://www.vcsc.virginia.gov/2016Annualreportfinal.pdf>.

⁸⁷ *Id.* at 15.

⁸⁸ *Id.*

⁸⁹ See Va. Code Ann. § 19.2-298.01 (2019).