



## Integration of Offender Recidivism Risk Assessment into Virginia Sentencing

### Nature of Risk Assessment

- Criminal risk assessment estimates an individual's likelihood of repeat criminal behavior and classifies offenders based on their relative risk of such behavior.
- In practice, risk assessment is typically an informal process in the criminal justice system
  - Prosecutors when charging
  - Judges at sentencing
  - Probation officers in developing supervision plans



## Nature of Risk Assessment

- Empirically-based risk assessment, however, is a formal process using knowledge gained through observation of actual behavior within groups of individuals.
- In Virginia, risk assessment has become an increasingly formal process.
  - Nonviolent offender risk assessment
  - Sex offender risk assessment
- Risk assessment is a companion piece to the guidelines.



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## Nature of Risk Assessment

- The Commission's methodological approach to studying criminal behavior is identical to that used in other scientific fields such as medicine.
- In medical studies, individuals are studied in an attempt to identify the correlates of the development of diseases.
- Medical risks profiles do not perfectly fit every individual.
  - For example, some heavy smokers may never develop lung cancer.



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## Nature of Risk Assessment

- Groups are defined by having a number of factors in common that are statistically relevant to predicting the likelihood of repeat offending
- These groups exhibiting a high degree of re-offending are labeled high risk



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## Nature of Risk Assessment

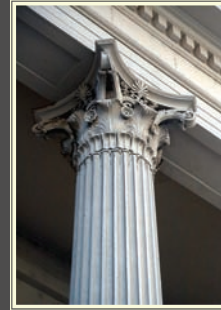
- No risk assessment research can ever predict a given outcome with 100% accuracy.
- The goal is to produce an instrument that is broadly accurate and provides useful additional information to decision makers.
- Individual factors by themselves do not place an offender in a high-risk group.
  - The presence or absence of certain combinations of factors determine the risk group of the offender.



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## Nonviolent Offender Risk Assessment



## Legislative Directive

- The Sentencing Commission shall:
  - Develop an offender risk assessment instrument predictive of a felon's relative risk to public safety to determine appropriate candidates for alternative sanctions
  - Apply the instrument to non-violent felons recommended for prison
  - Goal: Place 25% of these prison bound felons in alternative sanctions

- § 17.1-803 (5,6) of the *Code of Virginia*



## Empirical Study of Nonviolent Offender Recidivism

- The Commission studied 1,500 property and drug felons released from incarceration during 2-year period
- Over 200 unique factors relating to criminal record, substance abuse, education and employment history, family background, etc., were examined.
  - Pre/Post-Sentence Investigation (PSI) database
  - Supplemental Data Collection



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## Empirical Study of Nonviolent Offender Recidivism

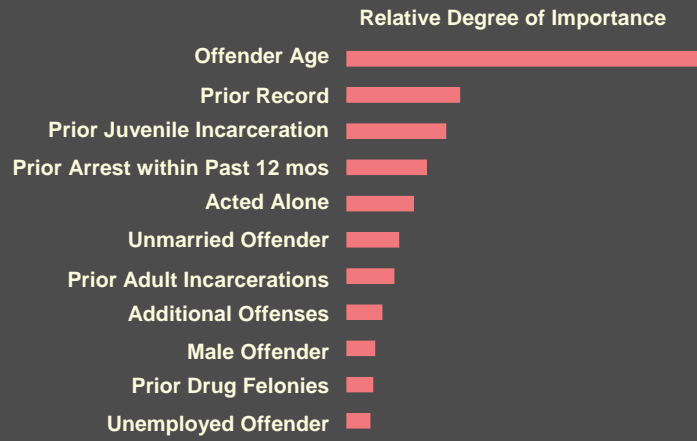
- Recidivism was defined as a reconviction for a felony within three years of release.
- A risk assessment worksheet was developed based on those factors that were statistically relevant in predicting recidivism.
- Pilot testing began Dec. 1997 and included six judicial circuits.



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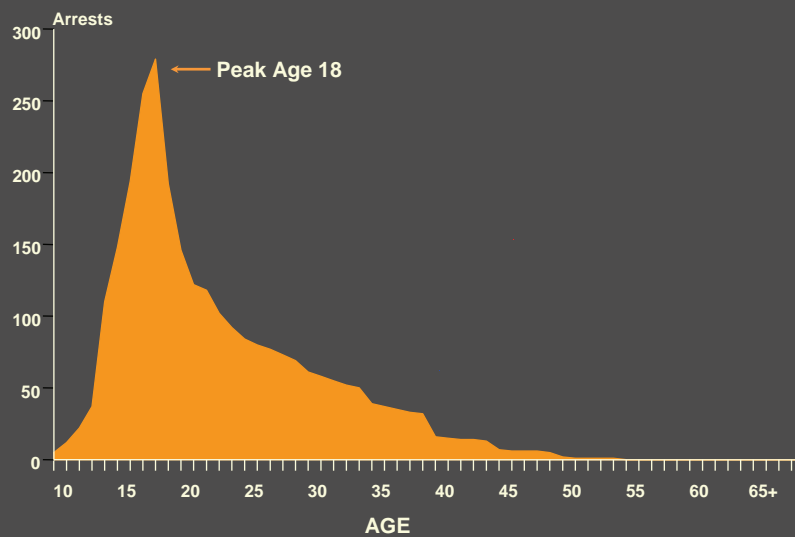
## Non-Violent Risk Assessment

### Significant Factors in Assessing Risk



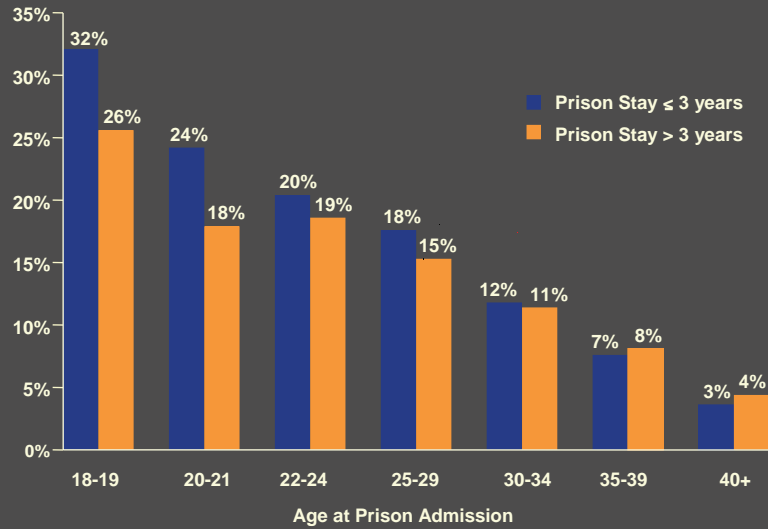
## Sentencing Reform

### Age Distribution for Robbery Arrests in Virginia



## Sentencing Reform

*Percentage of Violent Felons Returning to Prison for New Violent Crime within Three Years*



## Non-Violent Risk Assessment

◇ Offense Type	Select the offense type of the instant offense	
Drug.....	3	
Fraud.....	3	
Larceny.....	6	<input type="checkbox"/>
◇ Offender is Male	IF YES, add 3 →	<input type="checkbox"/>
◇ Additional Offense	IF YES, add 2 →	<input type="checkbox"/>

**Go to Cover Sheet and fill out Alternative Punishment Recommendations section.**

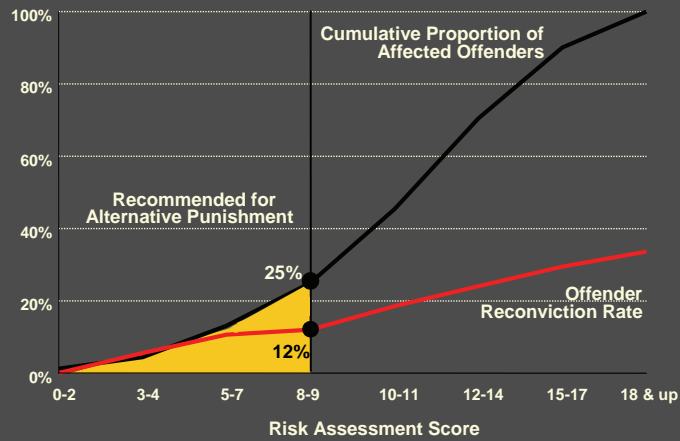
**If total is 9 or less, check Recommended for Alternative Punishment.**

**If total is 10 or more, check Do NOT Recommend for Alternative Punishment.**

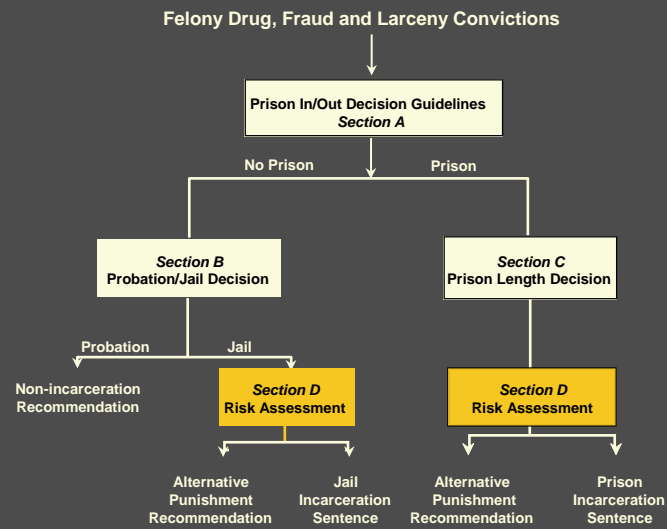
If total is 9 or less, check Recommended for Alternative Punishment.  
If total is 10 or more, check Do NOT Recommend for Alternative Punishment.

## Non-Violent Risk Assessment

### Offender Reconviction Rates and Cumulative Proportion of Affected Offenders



## Non-Violent Risk Assessment





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## *Non-Violent Risk Assessment*

### **Risk Assessment Instrument Pilot Test**

- Six Circuits  
Circuit 5 (Cities of Franklin and Suffolk and the counties of Southampton and Isle of Wight), Circuit 14 (Henrico), Circuit 19 (Fairfax), and Circuit 22 (city of Danville and counties of Franklin and Pittsylvania) effective Dec, 1997
- Circuit 4 (Norfolk) and Circuit 7 (Newport News) effective April, 1999

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## *Non-Violent Risk Assessment*

Independent Evaluation by National Center for State Courts

- Interviews with judges, prosecutors, defense attorneys, and probation officers
- Statistical validation study of risk assessment instrument via recidivism analysis of diverted felons
- Concluded that the risk assessment instrument is an effective tool for predicting recidivism
- Recommended that the risk assessment instrument be refined and retested with more recent felony cases and expanded to all jurisdictions

## ***Non-Violent Risk Assessment***

### *National Center for State Courts Evaluation:*

- Conducted a cost-benefit analysis of the risk assessment instrument
- Benefits of reduced prison (363 felons diverted) and jail (192 felons diverted) populations saved an estimated \$8.7 million dollars
- Cost of alternative sanctions was \$6.2 million. An additional \$1 million in costs incurred when offenders became recidivists.
- Net benefit in pilot sites of \$1.5 million
- If expanded statewide, estimated net benefit of \$3.7 to \$4.5 million in reduced costs.

## **Non-Violent Risk Assessment**

- National Center for State Courts Evaluation:
- Benefits of risk assessment as related to diversion
  - Risk assessment formalizes the diversion process—judges say instrument makes them more cognizant of diversion possibilities
  - Risk assessment insures that diversion into programs minimizes the “net-widening” effect
  - Costs saved through diversion can be more predictable when risk assessment is in place
  - Offenders who score above the threshold (higher risks of recidivism or potentially dangerous) are given closer scrutiny concerning diversion

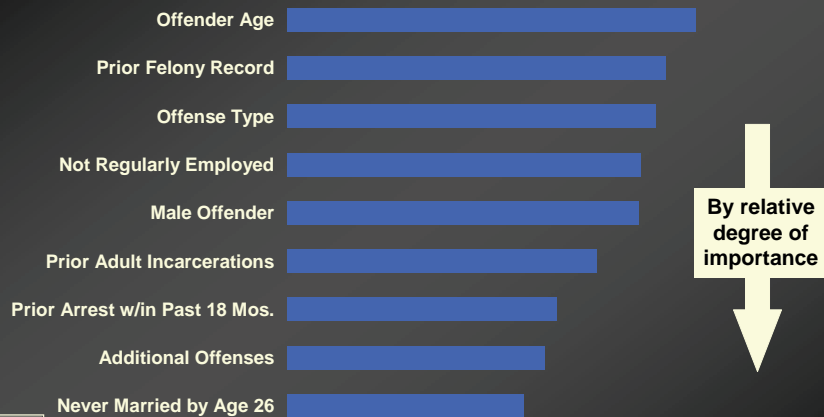
## Refined Risk Assessment Instrument

- In 2001, the Sentencing Commission completed additional study to refine the risk assessment tool.
- New recidivism study sample of 1996 nonviolent felons.
- Offenders recommended for diversion under the refined risk assessment model had a recidivism rate of 12%.
- Offenders not recommended for diversion under the refined model had a recidivism rate of 38%.
- A score threshold selected so that 25% of prison bound offenders will be recommended for alternative sanctions.



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## Significant Factors in Assessing Risk for Nonviolent Offenders



Source: Nonviolent Offender Risk Assessment Validation Study, Virginia Criminal Sentencing Commission (2001)

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Nonviolent Risk Assessment Instrument for Larceny, Fraud and Drug Offenders

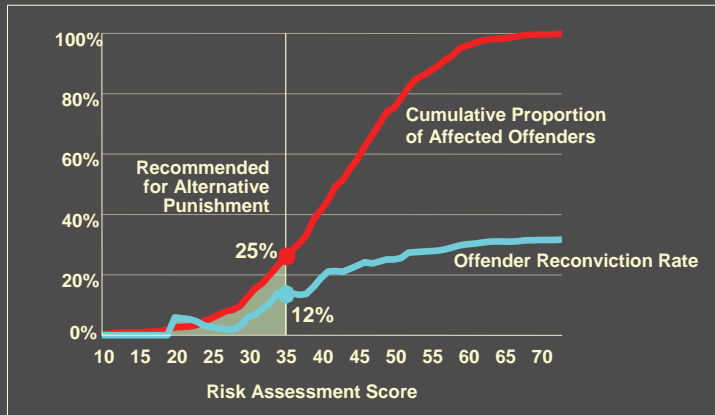
- ◆ **Offense Type** *Select the offense type of the instant offense*
  - Drug.....3
  - Fraud.....3
  - Larceny.....11
- ◆ **Offender** *Score factors A-D and enter total score*
  - A. Offender is a male.....8
  - B. Offender's age at time of offense
    - Younger than 30 years.....13
    - 30 - 40 years.....8
    - 41 - 46 years.....1
    - Older than 46 years.....0
  - C. Offender not regularly employed.....9
  - D. Offender at least 26 years of age & never married.....6
- ◆ **Additional Offense**..... **IF YES, add 5**
- ◆ **Arrest or Confinement Within Past 18 Months** (prior to offense). **IF YES, add 6**
- ◆ **Prior Felony Convictions and Adjudications** *Select the combination of prior adult and juvenile felony convictions that characterize the offender's prior record*
  - Any Adult Felony Convictions or Adjudications.....3
  - Any Juvenile Felony Convictions or Adjudications.....6
  - Adult and Juvenile Felony Convictions or Adjudications.....9
- ◆ **Prior Adult Incarceration**

Go to Cover Sheet and fill out Alternative Punishment Recommendations section. If total is 35 or less, check Recommended for Alternative Punishment. If total is 36 or more, check Do NOT Recommend for Alternative Punishment.

Nonviolent Risk Assessment Instrument for Larceny, Fraud and Drug Offenders

- ◆ **Offender** *Score factors A-D and enter total score*
  - A. Offender is a male.....8
  - B. Offender's age at time of offense
    - Younger than 30 years.....13
    - 30 - 40 years.....8
    - 41 - 46 years.....1
    - Older than 46 years.....0
  - C. Offender not regularly employed.....9
  - D. Offender at least 26 years of age & never married.....6

## Reconviction Rates and Cumulative Proportion of Affected Offenders under Risk Assessment



## Statewide Implementation

- In 2001, the Sentencing Commission recommended that the risk assessment program be expanded statewide.
  - Legislature accepted the recommendation.
  - Statewide implementation began July 1, 2002.



## Use of Nonviolent Offender Risk Assessment

- Completed in larceny, fraud and drug cases for offenders who are recommended for incarceration by the sentencing guidelines who also meet the eligibility criteria
  - Excludes those with a current or prior violent felony conviction and those who sell 1 oz. or more of cocaine
- For offenders who score 35 or less, the sentencing guidelines cover sheet indicates a dual recommendation
  - Traditional incarceration
  - Alternative punishment



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## Use of Nonviolent Offender Risk Assessment

- As with the sentencing guidelines, compliance with the risk assessment recommendation is discretionary
- If a judge follows either sentencing recommendation, he or she is considered in compliance with the guidelines



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## Legislative Directive - Budget Language (2003)

- Chapter 1042 (Item 40) of the 2003 Acts of Assembly directs the Commission to:
  - Identify offenders not currently recommended for alternative punishment options by the assessment instrument who nonetheless pose little risk to public safety
  - Determine, with due regard for public safety, the feasibility of adjusting the assessment instrument to recommend additional low-risk nonviolent offenders for alternative punishment
  - Provide findings to the 2004 Session of the General Assembly



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## Offender Risk Assessment Scores

	Score	Percent of Offenders	Reconviction Rate for offenders scoring at or below point value
Old Risk Assessment Threshold →	35	2.5%	12.4%
	36	2.7%	13.9%
New Risk Assessment Threshold →	37	2.2%	13.4%
	38	2.7%	13.6%
	39	5.4%	16.0%
	40	3.0%	18.8%
	More than 40	58.7%	

By moving the threshold to 38 points, an estimated 511 offenders per year would be recommended for alternative punishment, without a significant increase in the rate of recidivism among the recommended group.

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## Nonviolent Offender Risk Instrument – Examining the Score Threshold

- The Sentencing Commission concluded that the threshold could be raised from 35 to 38 points without significant risk to public safety.
- Raising the threshold will result in additional offenders being recommended for alternative sanctions.
- Following approval by the legislature, the change became effective July 1, 2004.



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**Nonviolent Risk Assessment** → **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

C. Are any prior record offenses violent (Category III listed in Table A of the Guidelines Manual)?  Yes  No

D. Are any of the offenses at sentencing violent (Category III listed in Table A of the Guidelines Manual)?  Yes  No

If answered YES to ANY, go to "Nonviolent Risk Assessment Recommendations" on cover sheet and check Not Applicable. If answered NO to ALL, complete remainder of Section D worksheet.

◆ **Offense Type** *Select the type of primary offense*

Drug ..... 3

Fraud ..... 3

Larceny ..... 11

◆ **Additional Offense(s)** ..... If YES, add 5 →  0

◆ **Offender** Score factors A to D and enter the total score

A. Offender is a male ..... 6  +

B. Offender's age at time of offense

    Younger than 30 years ..... 13

    30 - 40 years ..... 6

    41 - 49 years ..... 4

    Older than 49 years ..... 0

C. Offender not regularly employed ..... 9  +

D. Offender at least 26 years of age & never married ..... 6  +

Enter Total Score

◆ **Arrest or Confinement Within Past 18 Months** (prior to instant offenses) ..... If YES, add 6 →  0

◆ **Prior Felony Convictions and Adjudications** *Select the combination of adult and juvenile felony convictions/adjudications that characterizes the offender's prior record*

Adult felony convictions only ..... 3

Juvenile felony convictions or adjudications only ..... 6

Both adult and juvenile felony convictions/adjudications ..... 9

◆ **Prior Adult Incarcerations**

Number: 1-2 ..... 3

          3-4 ..... 6

          5 or more ..... 9

**Total Score**

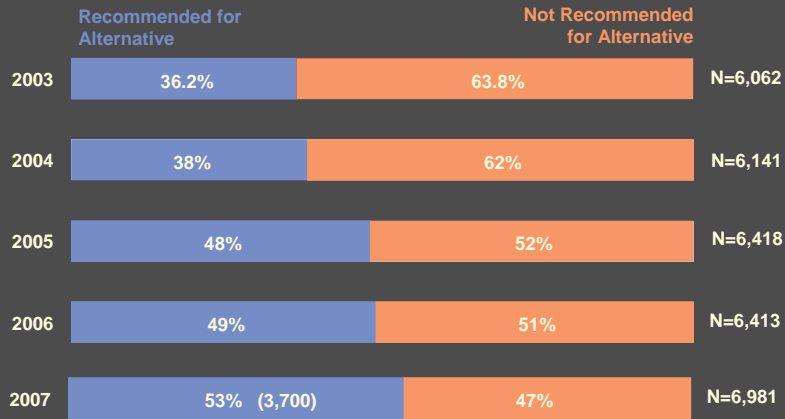
35 or less, check Recommended for Alternative Punishment.

36 or more, check NOT Recommended for Alternative Punishment.

Go to Cover Sheet and fill out Nonviolent Risk Assessment Recommendations.



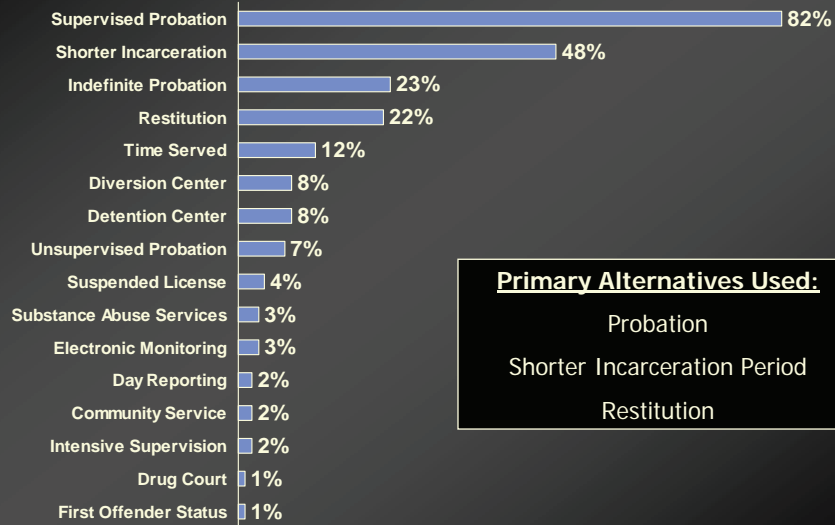
**Virginia Nonviolent Risk Assessment**  
(as applied to those recommended for jail or prison incarceration)



**Sentencing Guidelines Compliance Rates for Non-Violent Offenders Screened with Risk Assessment FY2007**

	Mitigation	Compliance		Aggravation	Number of Cases	Percentage of Combined Compliance
		Traditional Range	Alternative Range			
Drug	6%	60%	24%	10%	3,991	84%
Fraud	7%	51%	37%	5%	1,184	88%
Larceny	8%	74%	9%	9%	1,806	83%
Overall	7%	62%	22%	9%	6,981	84%

### Less Restrictive Sanctions Utilized under Risk Assessment



**Primary Alternatives Used:**

- Probation
- Shorter Incarceration Period
- Restitution

### National Center for State Courts Evaluation of Virginia's risk assessment instrument

Concluded that our risk assessment component accurately distinguished nonviolent felons less likely to recidivate from those more likely

“Virginia's risk assessment instrument provides an objective, reliable, transparent, and more accurate alternative to assessing an offender's potential for recidivism than the traditional reliance on judicial intuition or perceptual short hand”

“This is a workable tool for managing prison populations. It allows states the flexibility to determine how many offenders they would like to divert while balancing concerns of public safety”

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## 2008 Appropriations Act, Item 387 (D) Directive to the Department of Corrections

D. The Department of Corrections shall report on the potential costs and benefits of steps which would be required to divert up to 50 percent of prison-bound, nonviolent offenders who have scored no more than 38 points on the risk assessment instrument of the Virginia Criminal Sentencing Commission.

The department shall consult with the Commission on developing appropriate steps to secure the input of the Judicial Department in conducting this report.

Copies of the report shall be provided to the Chairman of the Senate Finance and House Appropriations Committees by September 1, 2008.

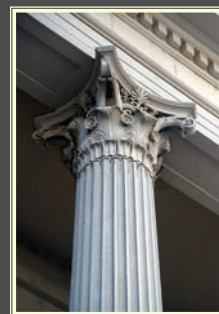
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Legal Challenges to Offender  
Risk Assessment Integration  
into Sentencing Guidelines

American Civil Liberties Union (ACLU)  
Urged Virginia Legislators to Block  
Implementation of Offender  
Risk Assessment (2001)



## ACLU – Statistical Correlations are not a Legitimate Basis for Assessing Criminal Penalties

- Basing sentence on the age, education, and employment history of an offender is scientifically unsound & contradicted by U.S. Sentencing Commission's study and policy manual
- Virginia is the first (and maybe only) to base criminal sentences on generalized, actuarial data
- Some statistical relationships could be preposterous showing that recidivism correlates with the food one consumes or the color of one's hair



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## United States Sentencing Commission Guidelines Manual (November 1, 2007)

### §5H1.1 Part H – Specific Offender Characteristics

- The Commission has determined that certain circumstances are **not ordinarily relevant** to the determination of whether a sentence should be outside the applicable guideline range.
- 28 U.S.C. §994(e) requires the Commission to assure that its guidelines and policy statements reflect the general inappropriateness of considering the defendant's education, vocational skills, employment record, and family ties and responsibilities in determining whether a term of imprisonment should be imposed or the length of a term of imprisonment.



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**Not ordinarily relevant** factors specified in §5H1.1 include:

- **Age**
- Age is not ordinarily relevant in determining whether a departure is warranted.
- Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home detention might be equally efficient as and less costly than incarceration.



**Not ordinarily relevant** factors specified in §5H1.1 include:

- **Education**
- Education is not ordinarily relevant in determining whether a departure is warranted, but the extent to which a defendant may have misused special training or education to facilitate criminal activity is an express guideline factor (§3B1.3 – Abuse of Position of Trust or Use of Special Skill)
- Education may be relevant in determining the conditions of probation or supervised release for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the appropriate type of community service



United States Sentencing Commission Guidelines Manual  
(November 1, 2007)

**Not ordinarily relevant** factors specified in §5H1.1 include:

- **Employment**
- Employment record is not ordinarily relevant in determining whether a departure is warranted
- Employment record may be relevant in determining the conditions of probation or supervised release (e.g., the appropriate hours of home detention)



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United States Sentencing Commission Guidelines Manual  
(November 1, 2007)

§5H1.10 Race, **Sex**, National Origin, Creed, Religion, and Socio-Economic Status

- These factors are **not relevant** in the determination of a sentence



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**ACLU ~ Risk Assessment Punishes Offenders  
Based Upon "Status" in Violation of the Cruel and  
Unusual Punishment Clause (Eighth Amendment)**

- Risk assessment grounds punishment decisions in individual characteristics utterly unrelated to the criminal conduct
- The right to be free from cruel and unusual punishment prohibits government from punishing people for who they are, instead of what they did



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**ACLU ~ Risk Assessment Violates the Due Process Requirement  
of Fundamental Fairness in Criminal Proceedings  
(Fourteenth Amendment)**

- Risk assessment classifies individuals on the basis of their affiliation with broad demographic groups disregarding the fact that individuals may deviate substantially from average group behavior
- A sentence is based not on the offender's record or crime, but on the characteristics of other offenders in other crimes



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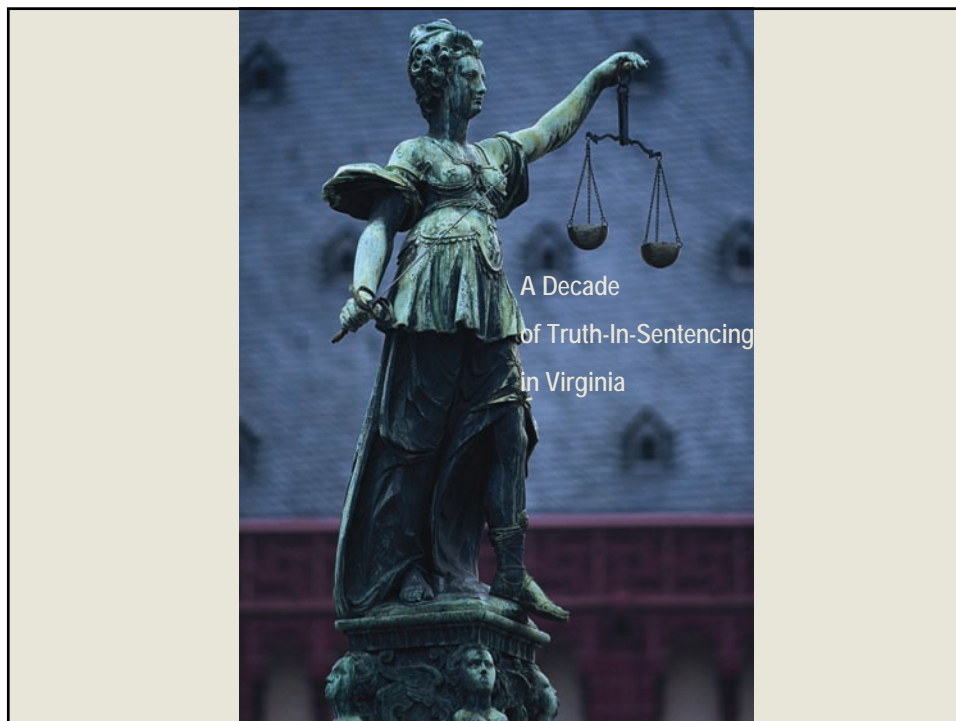
## Virginia's Court of Appeals has Repeatedly Refused to Interfere with Judicial Reference to Offender Risk Assessments

Virginia Court of Appeals (2004):

- "The discretionary sentencing guidelines are not binding on the trial judge; rather, the guidelines are merely a tool to assist the judge in fixing an appropriate punishment"
- "When a sentence falls within the statutory limits set by the legislature, this court will not interfere with the judgment"



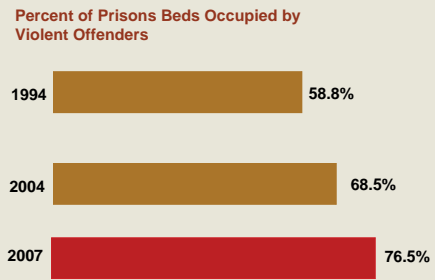
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## 4 A greater share of expensive prison beds are being used by violent felons

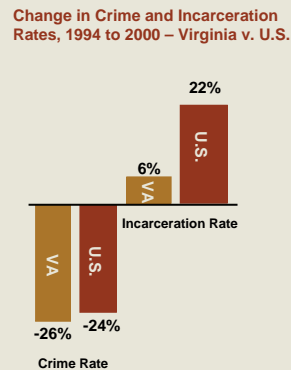
Reserving expensive prison beds for the most dangerous offenders was an important objective of the sentencing reforms. Due to the focused use of long incarceration terms for violent felons, it was expected that these criminals would queue up in the prison system. Indeed, after a decade of truth-in-sentencing, the composition of Virginia's prison population is undergoing a dramatic shift, with violent felons now comprising a significantly larger share of costly and limited prison space. This shift is expected to continue.



Effective Use of Prison Space

## 5 Many lower-risk felons are being punished through alternative sanctions in lieu of prison without compromising public safety

Virginia's sentencing system is unique in that risk assessment, based on the predicted likelihood of future dangerousness, is integrated into the sentencing guidelines. Safely punishing lower-risk nonviolent felons through alternative sanctions is freeing up scarce prison beds to house the more dangerous offenders. According to the Vera Institute of Justice, the 26% drop in Virginia's crime rate has exceeded the decline in crime nationally. At the same time, Virginia's incarceration rate has grown just 6%, well below the national growth rate, indicating greater discipline and benefit in the use of expensive prison beds as sanctions.



Risk Assessment Successful

## Three Year Re-Imprisonment Rates

Among the 38 states that report felon recidivism as re-imprisonment within three years of release, Virginia ranks in a tie for the sixth lowest recidivism rate.

