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## Blind Justice: Virginia's Jury Sentencing Scheme and Impermissible Burdens on a Defendant's Right to a Jury Trial

Mitchell E. McCloy

Washington and Lee University School of Law, [mccloy.m21@law.wlu.edu](mailto:mccloy.m21@law.wlu.edu)

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# Blind Justice: Virginia's Jury Sentencing Scheme and Impermissible Burdens on a Defendant's Right to a Jury Trial<sup>†</sup>

Mitchell E. McCloy\*

## *Abstract*

*This Note argues that Virginia's mandatory jury sentencing scheme, which bars juries from reviewing state sentencing guidelines, impermissibly burdens a defendant's Sixth Amendment right to a jury trial. By analyzing both judge and jury sentencing guidelines compliance rates from the past twenty-five years, this Note demonstrates that in Virginia, a defendant has a significantly higher chance of receiving a harsher sentence after a jury trial than after a bench trial or a guilty plea. Given that judges rarely modify jury sentences, the defendant is effectively left with a choice between two different sentences before plea negotiations can even begin.*

*Because it creates this disparity, Virginia's mandatory jury sentencing scheme is unconstitutional. Jury sentencing may serve a legitimate purpose by empowering a decision maker more in touch with the "conscience of the community" than a judge—*

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\* J.D. Candidate, Class of 2021, Washington and Lee University School of Law; B.A., Class of 2016, Princeton University. Thank you to Professor David Bruck for serving as my Note advisor and for assisting me throughout the writing process. I also must thank Allan Zaleski for originally suggesting this topic to Professor Bruck and for providing invaluable feedback as I wrote my Note. A special thank you to my family and friends for their continued love and support.

*the jury. But by limiting the jury's ability to review sentencing guidelines and to make further modifications to sentences, this particular jury sentencing scheme fails to serve this legitimate purpose and is, therefore, unconstitutional.*

*During the Virginia General Assembly's 2020 Regular Session and a 2020 Special Session, lawmakers introduced a variety of bills to modify jury sentencing. Among other things, the bills would make jury sentencing optional for defendants. This Note assesses those bills and determines whether they adequately address the constitutional problem created by Virginia's mandatory jury sentencing scheme.*

*The Note cautions against a rosy impression of jury sentencing. Instead, both academic and political figures must reckon with the possibility that political actors could exploit the practice to threaten a defendant's fundamental right to a jury trial.*

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## INTRODUCTION

In August 2019, jurors convicted Antron Adon Tucker of possessing methamphetamine with the intent to distribute, transporting meth into Virginia, and possessing marijuana with the intent to distribute.<sup>1</sup> The jurors recommended a fifty-one-year sentence for Tucker.<sup>2</sup> Virginia’s sentencing

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1. See *Convicted Drug Dealer Gets 51-Year Sentence in Wythe*, SWVA TODAY (Nov. 29, 2019), <https://perma.cc/ZAA7-T5XX> (describing Antron Adon Tucker’s case and sentence).

2. *Id.*

guidelines, which the jurors could not review,<sup>3</sup> recommended a six-year sentence.<sup>4</sup> Virginia judges have the discretion to modify the jury's "recommended" sentence by, for example, suspending the sentence in part or in full or by ordering that a defendant serve sentences for multiple offenses concurrently.<sup>5</sup> The judge in Tucker's case chose to fully impose the jury's sentence.<sup>6</sup>

In June 2017, jurors convicted Norell Sterling Ward of two counts of possessing heroin with the intent to distribute and one count of conspiracy to distribute.<sup>7</sup> The jurors recommended a sixty-five-year sentence for Ward.<sup>8</sup> Virginia's sentencing guidelines recommended a sentence of eight years and six months.<sup>9</sup> At a hearing, the judge chose not to suspend any of the jury's recommended sentence, but he did order Ward to serve the two possession counts concurrently.<sup>10</sup> This, along with the untouched twenty-five-year recommended sentence for the

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3. See VA. CODE ANN. § 19.2-298.01(A) (2020) ("In cases tried by a jury, the jury shall not be presented any information regarding sentencing guidelines.").

4. See *Convicted Drug Dealer Gets 51-Year Sentence in Wythe*, *supra* note 1 ("State sentencing guidelines recommended a punishment of six years in prison, but Tucker opted for a jury trial.").

5. See VA. CODE ANN. § 19.2-303 ("After conviction, whether with or without jury, the court may suspend imposition of sentence or suspend the sentence in whole or part and in addition may place the defendant on probation under such conditions as the court shall determine . . ."); *id.* § 19.2-308 ("When any person is convicted of two or more offenses, and sentenced to confinement, such sentences shall not run concurrently, unless expressly ordered by the court.").

6. See *Convicted Drug Dealer Gets 51-Year Sentence in Wythe*, *supra* note 1 (stating the judge's decision and quoting the judge as saying that he took the jury's recommendation "very seriously").

7. See Sean Gorman, *Heroin Dealer from Charlottesville Sentenced to 45 Years*, DAILY PROGRESS (Sept. 13, 2017), <https://perma.cc/XA8S-82SP> (explaining that a jury found the defendant guilty of three felonies).

8. See *id.* (describing the sixty-five-year sentence that was originally recommended by the jury but that the judge later slightly lowered).

9. See VA. CRIM. SENT'G COMM'N, SENTENCING GUIDELINES SUMMARY, NORELL STERLING WARD (2017) [hereinafter VCSC WARD SENTENCING GUIDELINES SUMMARY] (providing a summary of Norell Sterling Ward's convictions and the sentencing guidelines recommended punishment).

10. See Gorman, *supra* note 7.

conspiracy charge, resulted in a forty-five-year punishment for Ward.<sup>11</sup>

In March 2012, jurors convicted Robert Via Jr. of conspiracy, armed burglary, robbery, four counts of abduction, and firearms charges.<sup>12</sup> The jurors recommended a 128-year sentence for Via.<sup>13</sup> By contrast, Via's co-defendant pled guilty and was sentenced by a judge to thirteen years in prison.<sup>14</sup> The judge declined to modify the jury's sentence for Via despite having received a letter from a juror imploring him to shorten it.<sup>15</sup> In the letter the juror stated, "I believe the jury may have arrived at a different set of verdicts had we more information on Virginia's sentencing requirements and processes."<sup>16</sup>

In a system where juries must recommend a sentence after a noncapital jury trial, criminal defendants in Virginia face a daunting choice when deciding how to adjudicate their cases: should defendants exercise their Sixth Amendment<sup>17</sup> right to a jury trial, or should defendants waive that right to avoid extreme jury sentences? Stories like those of Tucker, Ward, and Via serve as stark examples of the potential danger of a jury that cannot review the sentencing guidelines. Virginia criminal defense law firms and lawyers have highlighted the impact that blocking the jury from reviewing sentencing guidelines has on

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11. See *id.* (outlining the judge's modification of the jury's sentence).

12. See Ashley Kelly, *Hampton Juror Asks Judge to Lower 128-Year Prison Sentence*, DAILY PRESS (Sept. 19, 2012), <https://perma.cc/7B9H-NFYF> (describing a juror's request to lower the jury's recommended sentence and the events that led to the trial).

13. See *id.* (explaining that "[t]he jurors sentenced [Via] to the mandatory minimum on all counts," resulting in a 128-year sentence recommendation).

14. *Id.*

15. See Peter Dujardin, *In Fourth Hampton Jury Trial, Home Invasion Defendant Gets 20 Years*, DAILY PRESS (Mar. 28, 2018), <https://perma.cc/2WFM-7VT2> ("After the jury gave [Via a 128-year punishment], the jury's foreman wrote to Circuit Judge Christopher W. Hutton, saying jurors would have gone lower if they could have. But Hutton declined to suspend any of the time, imposing all 128 years."). The Virginia Supreme Court reversed and remanded Via's first case on grounds unrelated to his sentence. *Id.* After a fourth trial, he received a twenty-year sentence. *Id.*

16. Kelly, *supra* note 12.

17. U.S. CONST. amend. VI.

jury sentence recommendations, at times delivering blunt warnings to avoid jury trials altogether.<sup>18</sup>

This Note argues that Virginia's mandatory jury sentencing scheme, which bars juries from reviewing state sentencing guidelines, places an impermissible burden on a defendant's Sixth Amendment right by unnecessarily encouraging defendants to waive jury trials. Data indicates that juries are much more likely than a judge to recommend a sentence that is more severe than what the sentencing guidelines recommend, and judges are hesitant to modify jury sentences.<sup>19</sup> Jury ability to review the guidelines—a historical record that places the defendant within the framework of all similarly situated convicted defendants—would not impede the primary goal of jury sentencing: allowing a decision maker more in touch with the “conscience of the community” to determine an appropriate punishment.<sup>20</sup> Instead, the guidelines would allow a jury to make a more informed recommendation by permitting it to use a resource created in response to the abolition of parole and its system of good credits. With the guidelines, juries could determine sentences in light of the modern system of sentencing in Virginia.<sup>21</sup>

Part I provides background on Virginia's mandatory jury sentencing scheme and presents data that illustrates why a defendant may be hesitant to choose to have a jury trial under that system. Jury trials are a somewhat rare phenomenon in Virginia now, but when they do take place, juries frequently recommend sentences that are longer than what the sentencing guidelines would recommend.<sup>22</sup> In addition, judges rarely modify those recommended sentences.<sup>23</sup> Part II identifies the

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18. See, e.g., Jessica Wildeus, *What Are Virginia Sentencing Guidelines?*, TINGEN WILLIAMS (June 26, 2019), <https://perma.cc/6FLH-N5UQ> (last updated June 29, 2020) (“The jury is not bound by the same sentencing guidelines Virginia judges must follow. Instead, Virginia juries only need to respect the VA Code’s maximum and minimum sentencing statutes. For this reason, in most cases Virginia lawyers recommend against requesting a jury trial.”).

19. See *infra* Part I.B.

20. See *infra* Part II.C.

21. See *infra* Part II.D.

22. See *infra* Part I.B.2.

23. See *infra* Part I.B.3.

possible legitimate goals of jury sentencing and how, based on those purposes, Virginia's jury sentencing scheme places an impermissible burden on a defendant's Sixth Amendment right. Part III discusses reforms members of Virginia's General Assembly have proposed and addresses whether the legislation would adequately remedy the constitutional issue identified in Part II. Part III also contends with the potential impact legislative reform will have on Virginia's criminal justice system. The Note concludes by reflecting on the broader implications of this Note.

## I. BACKGROUND AND DATA

This Part outlines Virginia's jury sentencing scheme and then assesses the impact that not allowing juries to review the sentencing guidelines has had on jury sentences. Judges, but not juries, can consider the guidelines' recommended ranges when they craft an appropriate sentence.<sup>24</sup> Has that resulted in a significant difference between the sentences that judges and juries determine? This Part addresses that question by analyzing data from the past twenty-five years.

### A. *Virginia's Jury Sentencing Scheme and Sentencing Guidelines*

#### 1. Jury Sentencing in Virginia

Jury sentencing is not a recent phenomenon: the first instance of jury discretion to choose sentences in felony cases in the United States appeared in Virginia's 1796 penal code.<sup>25</sup> Today, Virginia is one of six states that continue to allow a jury to recommend a sentence for convicted defendants in noncapital

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24. See VA. CODE ANN. § 19.2-298.01(A) (2020) (describing the discretionary nature of the sentencing guidelines for judges but preventing any party from presenting information about the guidelines to the jury).

25. See Nancy J. King, *The Origins of Felony Jury Sentencing in the United States*, 78 CHI.-KENT L. REV. 937, 937 (2003) (describing the early imposition of jury sentencing in Virginia and the westward expansion of the practice).



cases.<sup>26</sup> However, only Virginia and Kentucky make jury sentences after a jury trial mandatory;<sup>27</sup> defendants in the other states still have the ability to have only a judge determine their sentence after trial.<sup>28</sup>

Virginia has a bifurcated jury trial system.<sup>29</sup> First, the jury determines guilt or innocence.<sup>30</sup> If the jury convicts the defendant, there is then a sentencing phase where the jury hears additional evidence that may otherwise have been inadmissible at the guilt phase, including evidence of prior convictions.<sup>31</sup>

At the sentencing phase, the judge informs the jury of the statutory minimum and maximum sentence for each charge.<sup>32</sup>

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26. The other states are Arkansas, Kentucky, Missouri, Oklahoma, and Texas. *See* VA. CODE ANN. § 19.2-295(A) (“[T]he term of confinement in the state correctional facility or in jail and the amount of fine, if any, of a person convicted of a criminal offense, shall be ascertained by the jury, or by the court in cases tried without a jury.”); ARK. CODE ANN. § 16-97-101 (2020) (outlining Arkansas’s jury sentencing scheme); KY. REV. STAT. ANN. § 532.055 (West 2020) (same for Kentucky); MO. REV. ANN. STAT. § 557.036 (2020) (same for Missouri); OKLA. STAT. ANN. tit. 22, § 926.1 (West 2020) (same for Oklahoma); TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2(b) (West 2019) (same for Texas).

27. *See* VA. CODE ANN. § 19.2-295(A) (providing that after a defendant is convicted of a criminal offense, the punishment “shall be ascertained by the jury” (emphasis added)); KY. REV. STAT. ANN. § 532.055 (“In the [sentencing] hearing the jury will determine the punishment to be imposed within the range provided elsewhere by law.”).

28. *See* ARK. CODE ANN. § 16-97-101 (“After a jury finds guilt, the defendant, with the agreement of the prosecution and the consent of the court, may waive jury sentencing, in which case the court shall impose sentence . . . .”); MO. REV. ANN. STAT. § 557.036 (providing that the judge and not the jury may assess the proper punishment if the defendant requests it); OKLA. STAT. ANN. tit. 22, § 926.1 (“[T]he jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law . . . .”); TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2(b) (explaining that the judge shall assess the punishment unless the defendant requests a jury sentence).

29. *See* VA. CODE ANN. § 19.2-295.1 (describing Virginia’s bifurcated jury trial system).

30. *See id.* (explaining that the first phase of a trial is the guilt phase).

31. *See id.* (outlining the evidence that may be admitted at the separate sentencing hearing).

32. *See* Jenia Ioncheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 355 (2003) (“[In Virginia] juries do not have access to sentencing

Juries may not review the state's sentencing guidelines and no party may present any information regarding the guidelines to the jury.<sup>33</sup> Juries also have no ability to recommend whether sentences should be suspended or if sentences for multiple counts should run consecutively or concurrently.<sup>34</sup> Kentucky, the only other state that makes jury sentencing mandatory after jury trials, allows juries to recommend whether defendants should serve sentences for multiple offenses concurrently.<sup>35</sup>

The jury's decision on an appropriate sentence is advisory in Virginia, and the judge has the authority to modify it in a variety of ways; for example, the judge may decrease the sentence, suspend the sentence, or order that a defendant serve sentences for multiple counts concurrently.<sup>36</sup> When jurors recommend sentences for multiple counts, those sentences are presented to the judge as sentences to be served consecutively.<sup>37</sup> Unless the judge modifies the jury's advisory sentence by ordering the defendant to serve multiple sentences concurrently, the defendant must serve the sentences consecutively.<sup>38</sup>

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guidelines or sentencing and probation statistics to help them arrive at a verdict consistent with those rendered by other jurors for similar offenses. Instead, jurors are provided only with statutory maximums and minimums establishing a wide range of permissible sentences.”).

33. See VA. CODE ANN. § 19.2-298.01(A) (2020) (“In cases tried by a jury, the jury shall not be presented any information regarding sentencing guidelines.”).

34. See *id.* § 19.2-303 (providing that the court, but not stating that the jury, may suspend a sentence or place the defendant on probation).

35. See KY. REV. STAT. ANN. § 532.055 (West 2020) (“The jury shall recommend whether the sentences shall be served concurrently or consecutively.”).

36. See VA. CODE ANN. § 19.2-303 (“After conviction, whether with or without jury, the court may suspend imposition of sentence or suspend the sentence in whole or part and in addition may place the defendant on probation under such conditions as the court shall determine . . .”); *id.* § 19.2-308 (“When any person is convicted of two or more offenses, and sentenced to confinement, such sentences shall not run concurrently, unless expressly ordered by the court.”).

37. See *supra* note 36 and accompanying text.

38. See *supra* note 36 and accompanying text.

## 2. Virginia's State Sentencing Guidelines

Virginia's sentencing guidelines appeared as a result of the enactment of truth-in-sentencing laws in the mid-1990s.<sup>39</sup> In 1994, the General Assembly abolished parole, requiring convicted felons to serve at least 85 percent of their sentence.<sup>40</sup> The General Assembly also eliminated the system of sentence credits awarded to inmates for good behavior.<sup>41</sup> Virginia established the Virginia Criminal Sentencing Commission ("VCSC") to develop and administer the guidelines.<sup>42</sup>

Upon formation, the VCSC developed a series of recommended sentencing ranges for each felony offense that reflected the average incarceration time for similarly situated offenders before the abolition of parole.<sup>43</sup> In many cases, the recommended sentencing range falls below the statutory minimum sentence for a particular offense because before the abolition of parole offenders often served less time than what

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39. See VA. CODE ANN. § 53.1-165.1 ("Any person sentenced to a term of incarceration for a felony offense committed on or after January 1, 1995, shall not be eligible for parole upon that offense."); Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 893 (2004) ("Virginia abolished parole and adopted voluntary judicial sentencing guidelines in 1995, calibrating the recommended new sentence ranges for many offenses so that they replicated actual time served under the former parole system.").

40. See 2019 VIRGINIA CRIMINAL SENTENCING COMMISSION ANNUAL REPORT 11, [hereinafter 2019 VCSC REPORT], <https://perma.cc/D3NT-GA6D> (PDF) ("Under Virginia's truth-in-sentencing laws, convicted felons must serve at least 85% of the pronounced sentence and they may earn, at most, 15% off in sentence credits, regardless of whether their sentence is served in a state facility or a local jail.").

41. See *id.* ("Beginning January 1, 1995, the practice of discretionary parole release was abolished in Virginia and the existing system of sentence credits awarded to inmates for good behavior was eliminated.").

42. See VA. CODE ANN. § 17.1-803 (2020) (describing the powers and duties of the VCSC).

43. See *id.* § 17.1-805 (providing that the Commission shall establish a set of sentencing guidelines and that recommended ranges shall be determined by the "actual time-served distribution for similarly situated offenders, in terms of their conviction offense and prior criminal history").

the minimum level of punishment required.<sup>44</sup> When this happens, to remain in compliance with the guidelines recommendation, judges must suspend a sentence in whole or in part or order that the defendant serve sentences for multiple offenses concurrently.<sup>45</sup> For example, while the statutory minimum for a particular drug offense may be five years, the guidelines may recommend a punishment of only one year, implying that the judge should suspend all but one year of that five-year minimum sentence.<sup>46</sup> The recommended sentences are “effective time” sentences, which means that the defendant’s incarceration time equals the suspended time subtracted from the total imposed time.<sup>47</sup> Juries cannot recommend a punishment below the statutory minimum level, so if the guidelines recommend a punishment below the minimum, a judge must modify the jury’s sentence.<sup>48</sup>

The median time served for a particular offense is the midpoint of each recommended sentencing range.<sup>49</sup> The sentence length recommendation is the midpoint, and it is accompanied by a high-end and low-end recommendation.<sup>50</sup>

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44. See King & Noble, *supra* note 39, at 911 (“Specifically, many drug and property offenses carry a statutory minimum term of two or five years, but the guidelines ranges for these nonviolent offenses, designed to approximate the actual pre-guidelines sentences served, call for much shorter terms.”).

45. See *supra* note 36 and accompanying text.

46. See King & Noble, *supra* note 39, at 911 (“[P]rior to the abolition of parole, a drug offender sentenced to the statutory minimum five years often served less than a year.”).

47. See ROBINA INST. OF CRIM. L. & CRIM. JUST., JURISDICTION PROFILE: VIRGINIA 9 (2020), <https://perma.cc/864J-2ZDG> (PDF) (explaining the difference between effective time and imposed time sentences and that the sentencing guidelines recommend effective time sentences).

48. See King & Noble, *supra* note 39, at 911 (providing that the judge but not the jury has the ability to modify sentences to levels below the statutory minimum level).

49. See VA. CODE ANN. § 17.1-805 (2020) (explaining that “[t]he midpoint of each initial recommended sentencing range shall be the median time served for the middle two quartiles and subject to” a variety of “enhancements” unique to each felony offense).

50. See 2019 VCSC REPORT, *supra* note 40, at 16 (“For cases recommended for incarceration of more than six months, the sentence length

The VCSC developed and continues to update worksheets pertaining to different offenses, including Assault, Drug, Fraud, and Murder/Homicide.<sup>51</sup> Worksheets use a scoring system to determine the appropriate level of punishment, adding points for a variety of circumstances present when the crime took place.<sup>52</sup> For example, the Drug/Other worksheet asks whether there are additional offenses, whether a knife or firearm was in possession at the time of the offense, whether the defendant has any prior convictions, whether the defendant has a prior juvenile record, or whether the defendant was on supervised probation when the offense took place.<sup>53</sup> Midpoints increase when the defendant was previously convicted of a violent felony.<sup>54</sup>

The court must complete sentencing guidelines worksheets in all felony cases covered by the guidelines.<sup>55</sup> The guidelines are discretionary, but when the court departs from the recommended range in both jury and non-jury cases, “the court shall file with the record of the case a written explanation of such departure.”<sup>56</sup> These worksheets are sent to the VCSC.<sup>57</sup> Aware that the General Assembly—which elects state

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recommendation derived from the guidelines (known as the midpoint) is accompanied by a high-end and low-end recommendation.”).

51. See *Worksheets*, VA. CRIM. SENT’G COMM’N, <https://perma.cc/9DYG-A8K9> (providing the 2020 sentencing guidelines worksheets).

52. See 2020 VIRGINIA CRIMINAL SENTENCING COMMISSION DRUG/OTHER WORKSHEET 3–6, <https://perma.cc/Q2VS-YYXB> (PDF) (outlining the scoring system for a drug offense).

53. See *id.* at 3 (giving scores for various factors).

54. See VA. CODE ANN. § 17.1-805 (detailing how prior convictions and violent history impact midpoints for the initial recommended sentencing range).

55. See *id.* § 19.2-298.01 (“In all felony cases, other than Class 1 felonies, the court shall (i) have presented to it the appropriate discretionary sentencing guidelines worksheets and (ii) review and consider the suitability of the applicable discretionary sentencing guidelines . . .”).

56. *Id.*

57. See 2019 VCSC REPORT, *supra* note 40, at 2 (“The clerk of the circuit court is responsible for sending the completed and signed worksheets to the Commission.”).

judges<sup>58</sup>—will know when they depart from the guidelines, judges feel pressure to impose guidelines recommendations.<sup>59</sup>

## B. *Data*

### 1. Percentage of Felony Convictions Adjudicated by Juries

Studying the breakdown of how felony convictions were adjudicated may shed light on how willing or unwilling Virginia defendants have been to have a jury determine their sentence. A relevant comparison is the difference between the percentage of felony convictions resulting from jury trials and those resulting from bench trials. A higher percentage of bench trials than jury trials may indicate that defendants, while desiring to try their cases rather than plead guilty, are more willing to have a bench rather than a jury trial, where the judge can use the sentencing guidelines to determine a sentence.

In 2019, jury trials made up just over 1.3 percent of all cases in Virginia that resulted in a felony conviction.<sup>60</sup> By contrast, bench trials made up 9 percent of all cases and guilty pleas made up 90 percent.<sup>61</sup> The percentage of convictions resulting from a jury trial was around 4 percent in the years leading up to 1995—when the General Assembly implemented the truth-in-sentencing reforms<sup>62</sup>—but has since declined nearly 3 percentage points, a 75 percent decrease in value.<sup>63</sup>

Across Virginia, bench trials make up a larger fraction of felony cases that resulted in a conviction than jury trials: in

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58. See VA. CONST. art. VI, § 7 (“The judges of all other courts of record shall be chosen by the vote of the majority of the members elected to each house of the General Assembly for terms of eight years.”).

59. See King & Noble, *supra* note 39, at 916 (interviewing a group of Virginia judges, one of whom said, “In our state, what the General Assembly is looking for is that we stay within the guidelines. When we went to sentence guidelines and abolished parole their hope was that there wouldn’t be an explosion in the prison population”).

60. 2019 VCSC REPORT, *supra* note 40, at 27.

61. *Id.*

62. See *supra* Part I.A.2.

63. 2019 VCSC REPORT, *supra* note 40, at 27.

2019 alone, bench trials made up 7.7 percent more of the cases.<sup>64</sup> Perhaps defendants are more inclined to have a legal expert decide their cases, but the information disparity in sentencing discussed above may also play a role.

These state statistics mirror a national trend towards more guilty pleas and a rapidly diminishing number of jury trials. Of all felony convictions at the federal level during the twelve-month period ending on June 30, 2019, 97.8 percent resulted from guilty pleas, 2.0 percent resulted from jury trials, and just 0.2 percent resulted from bench trials.<sup>65</sup> In 2018 in Texas, a state with optional jury sentencing,<sup>66</sup> 94 percent of felony convictions resulted from guilty pleas, 4 percent resulted from bench trials, and 2 percent resulted from jury trials.<sup>67</sup>

The starkest difference between Virginia and these other jurisdictions is the percentage of felony convictions that result from bench trials. In Virginia in 2019, 9 percent of felony convictions resulted from bench trials,<sup>68</sup> while in Texas in 2018 the percentage was 4 percent<sup>69</sup> and at the federal level it was just 0.2 percent.<sup>70</sup> The percentage of felony convictions resulting from trials—both bench and jury trials—was higher in Virginia than these other jurisdictions: 10.3 percent in Virginia,<sup>71</sup> 6 percent in Texas,<sup>72</sup> and 2.2 percent at the federal level.<sup>73</sup> In sum, it appears that while Virginia defendants may be more willing to have a trial, they are much more eager than defendants in Texas or at the federal level to have a bench trial where a judge

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64. *Id.*

65. *Table D-4—U.S. District Courts—Criminal Statistical Tables for the Federal Judiciary (June 30, 2019)*, U.S. CTS., <https://perma.cc/ED7V-Y5JB> [hereinafter *2019 U.S. District Courts Table*] (download data table).

66. *See supra* note 28 and accompanying text.

67. 2018 TEX. JUDICIARY ANN. STAT. REP. CT.-LEVEL 21 [hereinafter 2018 TEXAS REPORT], <https://perma.cc/H9B3-FWG4> (PDF).

68. 2019 VCSC REPORT, *supra* note 40, at 27.

69. 2018 TEXAS REPORT, *supra* note 67, at CT.-LEVEL 21.

70. *2019 U.S. District Courts Table*, *supra* note 65.

71. 2019 VCSC REPORT, *supra* note 40, at 27.

72. 2018 TEXAS REPORT, *supra* note 67, at 21.

73. *2019 U.S. District Courts Table*, *supra* note 65.



will determine their sentence instead of a jury trial where a jury must recommend a sentence.

## 2. Sentencing Guidelines Compliance

Based on stories about individual cases alone, criminal defense lawyers in Virginia are aware of the inherent risk of going to a jury trial under mandatory jury sentencing—if convicted, juries must recommend a sentence with no ability to review the sentencing guidelines, and juries frequently deviate from what guidelines recommend.<sup>74</sup> But how often do juries really deviate from the guidelines? Is deviation limited to extreme cases like those of Tucker, Ward, and Via,<sup>75</sup> or is it much more widespread? This section seeks to answer those questions by comparing the rates at which judges and juries comply with the guidelines and how often they recommend sentences that are harsher or less severe than guideline recommendations.

The VCSC releases an annual report that includes a breakdown of “Guidelines Concurrence,” defined as “judicial agreement with the sentencing guidelines . . . .”<sup>76</sup> The Commission reviews all guidelines worksheets and analyzes them to determine judicial compliance with the guidelines.<sup>77</sup> The extent to which the decision maker agrees with the guidelines recommended ranges is the “concurrence” or “compliance” rate.<sup>78</sup> The “aggravation rate” is the rate at which the decision maker sentences defendants “to sanctions more severe than the guidelines recommendation . . . .”<sup>79</sup> For the

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74. See *supra* notes 1–18 and accompanying text.

75. See *supra* INTRODUCTION.

76. 2019 VCSC REPORT, *supra* note 40, at 12.

77. See *id.* at 2 (describing the process by which courts complete and submit worksheets and the Commission’s analysis of those worksheets for completeness and concurrence).

78. See *id.* at 14 (“The overall concurrence rate summarizes the extent to which Virginia’s judges concur with recommendations provided by the sentencing guidelines, both in type of disposition and in length of incarceration.”).

79. *Id.*



purpose of remaining consistent with the VCSC’s own terminology, this Note will refer to the rate of “upward departures” from guideline recommendations as the “aggravation rate.” They are, however, the same concept. Finally, the “mitigation rate” is “the rate at which [the decision maker] sentences offenders to sanctions less severe than the guidelines recommendation . . . .”<sup>80</sup> This Note will refer to the rate of “downward departures” from guideline recommendations as the “mitigation rate” in order to remain consistent with Commission terminology.

The Commission has tracked and published these rates in its annual reports for every type of criminal adjudication—guilty plea, bench trial, and jury trial—since its establishment in 1995.<sup>81</sup>

**Table 1: Average Guidelines Concurrence 1995–2019<sup>82</sup>**

	<b>Judges</b>	<b>Juries</b>
<b>Compliance Rate</b>	79.6%	41.8%
<b>Aggravation Rate</b>	9.9%	46.6%
<b>Mitigation Rate</b>	10.5%	11.6%

In 2019, judges accepted guideline recommendations in 83.9 percent of cases.<sup>83</sup> The aggravation rate was 7.4 percent, and the mitigation rate was 8.7 percent.<sup>84</sup> This compliance rate reflects the trend that the judge compliance rate has gradually increased from the inception of the guidelines to now: in 1995, judge compliance was 75 percent, the aggravation rate was 14.5

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80. *Id.*

81. *See infra* Appendix 1 (listing the compliance, aggravation, and mitigation rates for judges and juries from 1995–2019 as listed in the VCSC’s annual reports).

82. *Id.*

83. 2019 VCSC REPORT, *supra* note 40, at 29.

84. *Id.*

percent, and the mitigation rate was 10.5 percent.<sup>85</sup> The average judge compliance rate between 1995 and 2019 was 79.6 percent, the average aggravation rate was 9.9 percent, and the average mitigation rate was 10.5 percent.<sup>86</sup>

Juries on the other hand complied with guideline recommendations only 49.7 percent of the time in 2019, unwittingly deviating from the guidelines far more often than judges.<sup>87</sup> The aggravation rate, 36.7 percent, was over four times higher than the 2019 judge aggravation rate (7.4 percent).<sup>88</sup> However, the mitigation rate, 13.6 percent, was much closer to the judge mitigation rate (8.7 percent).<sup>89</sup> When deviating from guideline recommendations, juries were therefore much more likely to return a more severe sentence than what the guidelines would recommend than they were to return a less severe sentence.

Deprived of any information relating to the guidelines, juries have unsurprisingly shown no general trend towards complying with them since 1995.<sup>90</sup> In 1995, the jury compliance rate was 49.2 percent,<sup>91</sup> which was higher than any year except 2019, when it was 49.7 percent.<sup>92</sup> Between 1995 and 2019, the jury compliance rate oscillated from year to year; for example, in 2014, the compliance rate was 32.2 percent,<sup>93</sup> but just one

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85. 1995 VIRGINIA CRIMINAL SENTENCING COMMISSION ANNUAL REPORTED 41 [hereinafter 1995 VCSC REPORT], <https://perma.cc/GF6A-A4DA> (PDF).

86. See *infra* Appendix 1 (averaging the twenty-five years of compliance, aggravation, and mitigation rates that the Commission has provided in its annual reports since 1995).

87. 2019 VCSC REPORT, *supra* note 40, at 29.

88. *Id.*

89. *Id.*

90. See *infra* Appendix 1.

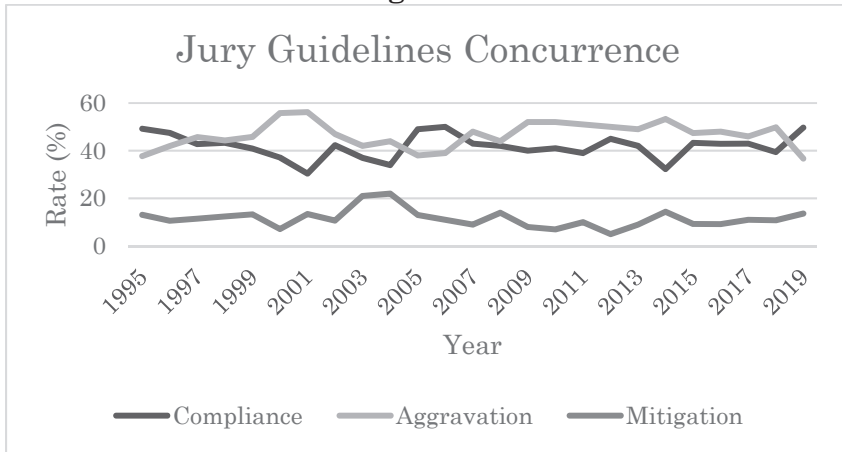
91. 1995 VCSC REPORT, *supra* note 85, at 56.

92. 2019 VCSC REPORT, *supra* note 40, at 29; see *infra* Appendix 1 (providing jury compliance rates from 1995 until 2019 as reported by the VCSC).

93. 2014 VIRGINIA CRIMINAL SENTENCING COMMISSION ANNUAL REPORT 35, <https://perma.cc/W94M-PQFC> (PDF).

year later in 2015 it increased to 43.3 percent,<sup>94</sup> and by 2018 the rate dipped back down to 39.4 percent.<sup>95</sup>

**Figure 1**<sup>96</sup>



The average jury compliance rate from 1995–2019 was 41.8 percent, the average aggravation rate was 46.6 percent, and the average mitigation rate was 11.6 percent.<sup>97</sup> Figure 1 demonstrates that the compliance and aggravation rates were somewhat unpredictable during this period.<sup>98</sup> In 2019, the compliance rate was 49.7 percent and the aggravation rate was 36.7 percent,<sup>99</sup> while in 2001 the compliance rate was 30.4 percent and the aggravation rate was 56.2 percent.<sup>100</sup> The 2001 rates reflected the general trend where the aggravation rate was

94. 2015 VIRGINIA CRIMINAL SENTENCING COMMISSION ANNUAL REPORT 37, <https://perma.cc/7MVK-GB9B> (PDF).

95. 2018 VIRGINIA CRIMINAL SENTENCING COMMISSION ANNUAL REPORT 27, <https://perma.cc/MM3U-CPU7> (PDF).

96. See *infra* Appendix 1 (listing jury compliance, aggravation, and mitigation rates from 1995 until 2019 as reported by the VCSC).

97. See *id.* (averaging the jury compliance, aggravation, and mitigation rates from 1995 until 2019 as reported by the VCSC).

98. See *supra* Figure 1.

99. 2019 VCSC REPORT, *supra* note 40, at 29.

100. 2001 VIRGINIA CRIMINAL SENTENCING COMMISSION ANNUAL REPORT, <https://perma.cc/3WRN-VYET> (PDF).

higher than the compliance rate—in twenty out of the twenty-five years since truth-in-sentencing began, the jury aggravation rate was higher than the compliance rate.<sup>101</sup>

In sum, in any given year, a jury is more likely than a judge to recommend a sentence that is more severe than what the guidelines recommend.<sup>102</sup> Furthermore, judges are more likely than a jury to comply with the guidelines, while there is a roughly equal chance that a judge or jury will impose a sentence that is less severe than what the guidelines would recommend.<sup>103</sup>

### 3. Judge Modifications of Jury Sentences

Jury sentences are recommendations: judges may choose to impose the sentence as recommended, but they also have the power to modify the recommendations by choosing, among other things, to suspend the sentence in whole or in part or by choosing to order that the defendant serve sentences for multiple offenses concurrently.<sup>104</sup> Should defendants, aware that juries are much more likely to recommend sentences that are harsher than guideline ranges, feel comforted by the judge's power to modify a jury's sentence and feel more confident about choosing to have a jury trial? Do judges routinely respond to harsh jury sentences by bringing them back into compliance with the guidelines?

Judges rarely modify jury sentences. In 2019, judges modified just 9 percent of jury sentences.<sup>105</sup> The VCSC has only tracked the exact percentage of jury sentences modified by a judge since 2004, but the average percentage of jury sentences that judges modified from 2004–2019 was 18.9 percent.<sup>106</sup>

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101. See *infra* Appendix 1 (providing the jury compliance and aggravation rates from 1995–2019 as reported by the VCSC).

102. See *supra* Table 1.

103. See *supra* Table 1.

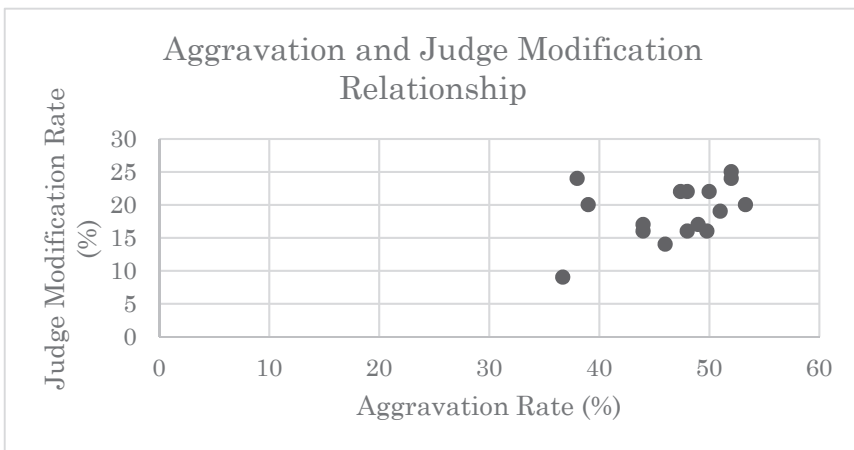
104. See *supra* note 36 and accompanying text.

105. 2019 VCSC REPORT, *supra* note 40, at 29.

106. See *infra* Appendix 1 (listing and averaging the judge modification of jury sentence rates from 2004–2019 as reported by the VCSC).

At 9 percent, the percentage of jury sentences that judges modified in 2019 is fairly low relative to the average modification rate of 18.9 percent.<sup>107</sup> In addition, as noted above,<sup>108</sup> the jury's 49.7 percent compliance rate in 2019 was, relative to other years, fairly high and the 36.7 percent aggravation rate was relatively low.<sup>109</sup> This juxtaposition of a high jury compliance rate, a low aggravation rate, and a low judge modification rate raises the question of whether there is a relationship between judge modification of jury sentences and aggravation rates. Put another way, are judge modification rates higher when aggravation rates are also higher, suggesting that judges respond to more severe punishments by making them less severe?<sup>110</sup>

**Figure 2**



The correlation coefficient between aggravation rates since 2004 and judge modification rates since 2004 is 0.39, which suggests a moderately weak to moderately positive relationship

107. 2019 VCSC REPORT, *supra* note 40, at 29; *see infra* Appendix 1.

108. *See supra* notes 91–95 and accompanying text.

109. 2019 VCSC REPORT, *supra* note 40, at 29; *see infra* Appendix 1.

110. *See* 2019 VCSC REPORT, *supra* note 40, at 29 (explaining that judges may only lower, not increase, a sentence that the jury recommends).

between the two variables.<sup>111</sup> This means that as aggravation rates go up, judge modification rates are moderately likely to go up as well. However, excluding 2019's aggravation and judge modification rates, the correlation coefficient is 0.10, which suggests a much weaker relationship between the two variables, meaning that aggravation rates have little to no impact on judge modification rates overall.<sup>112</sup> This impact on the overall correlation coefficient in addition to Figure 2 indicate that the 2019 judge modification rate may be an outlier.<sup>113</sup>

In any case, with only fifteen years of data, this data set is small, and it is difficult at this early stage to definitively determine a relationship between these two variables. In addition, any number of factors could explain a judge's decision to modify a jury's sentence,<sup>114</sup> so it is not possible to conclusively state that there is a weak probability that a judge will modify a jury's sentence if it is much more severe than what the guidelines would recommend. However, these low correlation coefficients in addition to the individual cases discussed in Part I demonstrate that one cannot also conclude that judges are strongly likely to modify a jury's sentence if it goes above the recommended sentence.<sup>115</sup>

#### 4. Data Takeaways

As in many jurisdictions, the percentage of convictions adjudicated by jury trial rapidly declined in Virginia over the

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111. See *infra* Appendix 1 (providing the judge modification rates and jury aggravation rates from 2004–2019 and calculating the correlation between the two variables); Haldun Akoglu, *User's Guide to Correlation Coefficients*, 18 *TURKISH J. MED.* 91, 91–93 (2018), <https://perma.cc/7CXL-4Q4Z> (PDF) (discussing what different correlation coefficient values mean).

112. See *infra* Appendix 1.

113. See 2019 VCSC REPORT, *supra* note 40, at 29 (listing a judge modification rate of nine percent).

114. See *id.* at 17 (providing the most common reasons judges departed from the guidelines, including “defendant’s cooperation with law enforcement” as a reason to sentence below the guidelines, and “the severity or degree of prior record” as a reason to sentence above the guidelines).

115. See *supra* INTRODUCTION.

past twenty-five years.<sup>116</sup> However, relative to Texas—a state with optional jury sentencing<sup>117</sup>—and federal courts, the percentage of convictions adjudicated by bench trials is much higher in Virginia.<sup>118</sup> The significant chance that a jury could recommend a sentence above the sentencing guidelines recommended range and the relatively safe assumption that a judge would impose the sentencing guidelines recommendation may be driving this trend.<sup>119</sup> This disparity between jury and judge sentences, in conjunction with the reality that judges usually avoid modifying jury sentences,<sup>120</sup> serves as a strong incentive for a defendant in Virginia to waive his or her right to a jury trial.

## II. UNITED STATES SUPREME COURT JURISPRUDENCE ON IMPERMISSIBLE BURDENS ON A DEFENDANT'S SIXTH AMENDMENT RIGHT AND VIRGINIA JURY SENTENCING

Under a mandatory jury sentencing scheme in Virginia, a jury is much more likely than a judge to recommend a sentence that is more severe than what the sentencing guidelines recommend, while judges are more inclined to impose what the guidelines recommend.<sup>121</sup> Does Virginia's jury sentencing scheme place an impermissible burden on a defendant's Sixth Amendment right by forcing him to choose between a decision maker that can review the sentencing guidelines and one that cannot? This Part analyzes that question as it relates to Supreme Court jurisprudence on impermissible burdens on constitutional rights and retaliation.

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116. See *supra* Part I.B.1.

117. See *supra* note 28 and accompanying text.

118. See *supra* Part I.B.1.

119. See *supra* Part I.B.2.

120. See *supra* Part I.B.3.

121. See *supra* Part I.B.2.

A. *United States v. Jackson and Needless Encouragements of Guilty Pleas and Jury Waivers*

Soon after the Supreme Court incorporated the Sixth Amendment's guarantee to a right to a jury trial to the states through the Fourteenth Amendment,<sup>122</sup> the Court addressed several state and federal statutory schemes to determine whether the scheme structures impermissibly burdened a defendant's right to a jury trial.<sup>123</sup>

In *United States v. Jackson*,<sup>124</sup> the Court struck down a provision of the Federal Kidnapping Act<sup>125</sup> that only allowed juries to impose the death penalty for a violation of the Act.<sup>126</sup> In making this determination, the Court referenced Congress's purpose in structuring the statute this way: Congress aimed to make it possible only for a jury, not a judge, to impose the death penalty.<sup>127</sup> While the Court noted that this was a "legitimate" goal, the Court also found that the "goal can be achieved without penalizing those defendants who plead not guilty and demand jury trial."<sup>128</sup> For example, Congress could allow the jury to choose between life imprisonment and the death penalty in every case, including after guilty pleas.<sup>129</sup> As a result, the Court

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122. See *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) ("Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which . . . would come within the Sixth Amendment's guarantee.").

123. See *United States v. Jackson*, 390 U.S. 570, 570–71 (1968) (analyzing the Federal Kidnapping Act); *Corbitt v. New Jersey*, 439 U.S. 212, 214–16 (1978) (addressing New Jersey's homicide statutes).

124. 390 U.S. 570 (1968).

125. Pub. L. No. 72-189, 47 Stat. 326 (1932) (codified at 18 U.S.C. § 1201).

126. *Jackson*, 390 U.S. at 591.

127. *Id.* at 582.

128. *Id.*

129. See *id.* ("In some States, for example, the choice between life imprisonment and capital punishment is left to a jury in every case—regardless of how the defendant's guilt has been determined.").



found that the death penalty clause of the Act was unenforceable.<sup>130</sup>

The Court elaborated that “the evil in the federal statute is not that it *necessarily* coerces guilty pleas and jury waivers but simply that it *needlessly* encourages them.”<sup>131</sup> Procedures do not need to be “inherently coercive” to meet this threshold.<sup>132</sup> Some guilty pleas may still be voluntary under a statutory scheme that imposes an impermissible burden on a defendant’s constitutional right.<sup>133</sup> The critical inquiry is whether, referencing the legitimate purpose in structuring the statutory system, the statutory scheme “needlessly” encourages guilty pleas and jury waivers.<sup>134</sup> If there are alternative ways to achieve that legitimate purpose without encouraging guilty pleas and jury waivers, then the particular procedure imposes an impermissible burden on a defendant’s Sixth Amendment right.<sup>135</sup>

Professor Loftus Becker construed *Jackson* as creating a two-part inquiry.<sup>136</sup> First, does the statutory system have any legitimate purpose, other than chilling the constitutional rights of those who assert them?<sup>137</sup> Failing to assert a legitimate purpose results in a per se impermissible burden on a

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130. *See id.* at 582–83 (finding that because there were alternative ways to limit “the death penalty to cases in which a jury recommends it,” the death penalty provision of the Federal Kidnapping Act could not “be justified by its ostensible purpose”).

131. *Id.* at 583 (emphasis added).

132. *Id.*

133. *See id.* (finding that the death penalty provision’s tendency to encourage defendants to waive jury trial does not mean every guilty plea is involuntary).

134. *See id.* at 582 (“The question is not whether the chilling effect is ‘incidental’ rather than intentional; the question is whether the effect is unnecessary and therefore excessive.”).

135. *See id.* at 582–83 (finding that, after identifying alternative ways to limit the imposition of the death penalty, “Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right”).

136. Loftus E. Becker, Jr., *Plea Bargaining and the Supreme Court*, 21 LOY. L.A. L. REV. 757, 793 (1988).

137. *Id.*

constitutional right.<sup>138</sup> In *Jackson*, the Court found that the government's goal of limiting the imposition of the death penalty to cases where the jury recommends it was legitimate.<sup>139</sup>

Second, are the particular characteristics of the system necessary to implement the legitimate purposes served?<sup>140</sup> The *Jackson* Court found that the death penalty clause failed to pass this test; the government could find other ways to limit the imposition of the death penalty to cases in which a jury recommends it without burdening a defendant's Sixth Amendment right to a jury trial.<sup>141</sup>

This Note argues that Virginia's jury sentencing scheme, by not allowing the jury to review the sentencing guidelines, fails *Jackson's* two-part test. First, Virginia's jury sentencing scheme may serve a legitimate purpose.<sup>142</sup> For example, the jury may be the more appropriate decision maker, as the conscience of the community, to determine the appropriate level of punishment. However, blocking the jury's access to the sentencing guidelines—a record of how decision makers have sentenced similarly situated defendants in the past—is not necessary to implement jury sentencing's legitimate purposes, and it needlessly encourages Virginia defendants to waive their right to a jury trial.<sup>143</sup>

### B. *The Current Status of Jackson*

Before fully analyzing Virginia's jury sentencing scheme, however, this Note must address how subsequent Supreme

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138. See *United States v. Jackson*, 390 U.S. 570, 581 (1968) (“If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional.”).

139. See *id.* at 582 (“The goal of limiting the death penalty to cases in which a jury recommends it is an entirely legitimate one.”).

140. Becker, *supra* note 136, at 793.

141. See *Jackson*, 390 U.S. at 582 (discussing alternative ways to only allow a jury to impose the death penalty, including leaving “the choice between life imprisonment and capital punishment” to a jury in every case, “regardless of how the defendant's guilt has been determined”).

142. See *infra* Part II.C.1.

143. See *infra* Part II.C.2.

Court cases have impacted the scope of *Jackson* and the test identified by Professor Becker.

1. Clarifying Then Narrowing the Scope of *Jackson*

Two years after *Jackson*, the Supreme Court held in *Brady v. United States*<sup>144</sup> that a defendant's guilty plea—after he was charged under the same Federal Kidnapping Act before *Jackson* was decided—was not involuntary.<sup>145</sup> The Court in *Jackson* had explicitly stated that not all guilty pleas under a statutory scheme that imposes an impermissible burden on a defendant's constitutional rights are involuntary.<sup>146</sup> Accordingly, the Court in *Brady* found that *Jackson* did not fashion “a new standard for judging the validity of guilty pleas” and that guilty pleas are not necessarily compelled or invalid when the defendant wants to accept a lesser penalty rather than risk receiving a harsher one at trial.<sup>147</sup> The Court left untouched the two-pronged approach that identifies (1) the legitimate purpose a statutory system serves and (2) whether the characteristics of that system are necessary to achieve that purpose.<sup>148</sup>

The scope of *Jackson* became less clear after *Corbitt v. New Jersey*.<sup>149</sup> In *Corbitt*, the Court reviewed the New Jersey homicide statutes, which provided that defendants convicted of first-degree murder by a jury were subject to mandatory life imprisonment, while defendants that pled guilty received either

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144. 397 U.S. 742 (1970).

145. See *id.* at 752 (“We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities . . .”).

146. See *Jackson*, 390 U.S. at 583 (“Thus the fact that the Federal Kidnaping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily.”).

147. *Brady*, 397 U.S. at 747.

148. See *id.* at 745–48 (summarizing the Court's holding in *Jackson* that relied on identifying the legitimate goal of limiting the imposition of the death penalty and the unnecessary way Congress chose to achieve that goal).

149. 439 U.S. 212 (1978).

life imprisonment or a lesser sentence.<sup>150</sup> The Court distinguished *Jackson*, noting that pleading guilty to homicide did not guarantee a lower sentence than if the defendant had requested a jury trial: a judge could still impose a life sentence.<sup>151</sup> By contrast, a defendant charged under the Federal Kidnapping Act in *Jackson* could no longer receive the death penalty if she pled guilty.<sup>152</sup>

The Court, addressing *Jackson*, found that “not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid.”<sup>153</sup> The chance that a defendant would receive a more lenient sentence by waiving a jury trial did not invalidate the defendant’s guilty plea.<sup>154</sup> Such a scheme furthers a state’s interest in encouraging guilty pleas, creating a system that benefits both the state and defendants.<sup>155</sup>

Justice Stevens, writing for the dissent, in essence argued that the statutory scheme in *Corbitt* failed the first prong of *Jackson*’s test identified by Professor Becker—the scheme served no other purpose than to penalize the defendant’s right to plead not guilty.<sup>156</sup> New Jersey provided no legitimate purpose for the characteristics of the homicide statutes other

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150. *Id.* at 214–16.

151. *Id.* at 217–18.

152. *Id.*

153. *Id.* at 218.

154. *See id.* at 221 (“In *Bordenkircher*, the probability or certainty of leniency in return for a plea did not invalidate the mandatory penalty imposed after a jury trial.”).

155. *See id.* at 222 (finding that the “State’s legitimate interest in encouraging the entry of guilty pleas and in facilitating plea bargaining” is “a process mutually beneficial to both the defendant and the State”).

156. *See id.* at 229 (Stevens, J., dissenting) (“[A] statute that has no other purpose or effect than to penalize assertion of the right not to plead guilty is ‘patently unconstitutional.’ The Court so held in [*Jackson*], and that holding is dispositive of this case.” (quoting *United States v. Jackson*, 390 U.S. 570, 581 (1968))).

than to encourage guilty pleas to conserve prosecutorial resources.<sup>157</sup>

Justice Stevens noted that under this particular scheme, the defendant faced a harsher potential penalty if he demanded a jury trial: he would receive a mandatory life sentence if found guilty, while if he pled guilty the judge *may* impose a life sentence or even no sentence at all.<sup>158</sup> The effect of this system—one that included a more severe range of statutory penalties after a jury trial—was that a defendant found guilty after a jury trial was punished not only for the conduct in committing the offense but also for the “offense” of entering a “false” not-guilty plea.<sup>159</sup>

Because New Jersey failed to enunciate any purpose for its homicide statutory system other than to encourage defendants to plead guilty, Justice Stevens did not address whether the particular characteristics of the statutory system were necessary to achieve a legitimate purpose.<sup>160</sup> While Justice Stevens noted that the majority did not overrule *Jackson*, he lamented that the majority divorced *Jackson* “from the rationale on which it rested.”<sup>161</sup>

## 2. Modern Application of *Jackson*

After *Corbitt*, the question is: what is left of *Jackson*?

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157. *See id.* (“New Jersey does not seriously contend that [the homicide statute] has any purpose or effect other than to penalize the assertion of the right not to plead guilty.”).

158. *Id.* at 230–31.

159. *Id.* at 232; *see* Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 58 (“In some cases, the unconscionable nature of the plea bargaining process induces defendants who would otherwise be acquitted at trial to plead guilty.”).

160. *See Corbitt v. New Jersey*, 439 U.S. 212, 229 (1978) (Stevens, J., dissenting) (arguing that *Jackson*’s holding that “a statute that has no other purpose or effect than to penalize assertion of the right not to plead guilty is ‘patently unconstitutional’” was dispositive of this case).

161. *Id.*

a. *Reconciling Jackson and Corbitt*

The strictest reading of *Corbitt* would essentially overrule *Jackson*. By failing to articulate a legitimate purpose for the statutory scheme at issue, the Court in *Corbitt* did not use the same type of analysis to determine whether a statutory scheme had placed an impermissible burden on a defendant's Fifth and Sixth Amendment rights.<sup>162</sup> Instead, the Court solely focused on a state's interest in encouraging guilty pleas to save prosecutorial costs.<sup>163</sup>

However, while the Court did not use the same analysis laid out in *Jackson*, the Court did not explicitly overrule *Jackson*.<sup>164</sup> The Court distinguished *Jackson*, finding that Corbitt's case did not involve the death penalty and the statutory scheme at issue did not allow the defendant to escape the maximum possible punishment by pleading guilty.<sup>165</sup> Under a narrow reading of both *Jackson* and *Corbitt*, two factors must be present for *Jackson* to be relevant and binding. First, the statutory scheme must include the death penalty as a potential punishment.<sup>166</sup>

162. *See id.* (arguing that *Jackson* mandates that states must establish a purpose for a statute other than simply encouraging defendants to plead guilty).

163. *See id.* at 218–19 (majority opinion) (“Specifically, there is no *per se* rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea.”).

164. *Cf. id.* at 217 (“[T]here are substantial differences between this case and *Jackson*, and . . . *Jackson* does not require a reversal of Corbitt's conviction.”).

165. *See id.* (distinguishing *Jackson* on the grounds that “[f]irst, the death penalty, which is ‘unique in its severity and irrevocability,’ . . . is not involved here” and second, while the defendant in *Jackson* could avoid the maximum penalty by pleading guilty, the defendant in *Corbitt* could not).

166. *See id.* (noting that the death penalty, which is “unique in its severity and irrevocability,” was present in the Federal Kidnapping Act, but it was not in the New Jersey statutory scheme). *But see id.* (articulating that the Court “need not agree with the New Jersey court that the *Jackson* rationale is limited to those cases where a plea avoids any possibility of the death penalty's being imposed” but that the absence of the death penalty “is a material fact”).

Second, the defendant must be able to avoid a harsher punishment by waiving a jury trial.<sup>167</sup>

The underlying rationale of *Jackson*, however, went beyond these two factors alone—Justice Stevens noted that *Jackson*'s rationale required courts to identify a legitimate purpose for the statutory system that allegedly encouraged guilty pleas and jury waivers; any system that did so with no other purpose than to chill a defendant's Fifth and Sixth Amendment rights was "patently unconstitutional."<sup>168</sup>

#### *b. Jackson as a Retaliation Case*

More recently in *Wilkie v. Robbins*,<sup>169</sup> the Court cited *Jackson* as an example of a retaliation case to illustrate the Court's "longstanding recognition that the Government may not retaliate for exercising First Amendment speech rights . . . or certain others of constitutional rank."<sup>170</sup> According to the Court, retaliation cases "turn on an allegation of impermissible purpose and motivation . . ."<sup>171</sup>

In *Jackson*, the Government had a legitimate purpose when it only allowed a jury to impose the death penalty: it wanted to limit the imposition of the death penalty to cases where the jury recommended it.<sup>172</sup> But that purpose was "impermissible" under that particular statutory scheme.<sup>173</sup> Because the legitimate

167. *See id.* ("[I]n *Jackson*, any risk of suffering the maximum penalty could be avoided by pleading guilty. Here . . . the risk of [life imprisonment] is not completely avoided by pleading *non vult* because the judge accepting the plea has the authority to impose a life term.")

168. *See id.* at 229 (Stevens, J., dissenting) (arguing that *Jackson* held that "a statute that has no other purpose or effect than to penalize assertion of the right not to plead guilty is 'patently unconstitutional'" and that the entry of a guilty plea "cannot at once be criminally punishable and constitutionally protected").

169. 551 U.S. 537 (2007).

170. *Id.* at 555–56.

171. *Id.* at 556.

172. *See United States v. Jackson*, 390 U.S. 570, 582 (1968) ("The goal of limiting the death penalty to cases [in] which a jury recommends it is an entirely legitimate one.")

173. *Id.* at 572.

purpose could be achieved in a way that did not needlessly encourage defendants to waive jury trials or plead guilty, the death penalty provision of the Federal Kidnapping Act amounted to retaliation and was accordingly unconstitutional.<sup>174</sup>

This Note argues that *Jackson* remains apposite in cases where there is an impermissible purpose or motivation underlying the statutory system at issue. Such an impermissible purpose or motivation is present when statutory schemes needlessly encourage guilty pleas and jury waivers.<sup>175</sup> With no necessary link to a legitimate purpose, a particular characteristic of a statutory scheme that encourages guilty pleas or jury waivers rises to the level of retaliation and is accordingly invalid.<sup>176</sup>

A court honoring *Corbitt* may point out that New Jersey and other states may structure their criminal statutes in ways that encourage defendants to plead guilty and waive a jury trial to receive a more lenient sentence.<sup>177</sup> New Jersey's homicide statute was not a form of "retaliation" because the state legislature operated within permissible bounds to induce defendants into pleading guilty.<sup>178</sup>

But this runs in tension with the Court's earlier announcement that actions where the "legislature, prosecutor,

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174. *See id.* at 582 ("Whatever the power of Congress to impose a death penalty for violation of the Federal Kidnaping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right.").

175. *See id.* ("Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights.").

176. *See id.* (finding that while Congress' goal to limit the imposition of the death penalty was legitimate, the method it chose to do so was invalid because there were alternative ways to achieve the goal without encouraging guilty pleas and jury waivers).

177. *See Corbitt v. New Jersey*, 439 U.S. 212, 220 (1978) (reiterating that deciding to avoid a potentially harsher punishment is a difficult choice that is an inevitable and permissible aspect of a legitimate system that encourages the negotiation of pleas).

178. *See id.* at 219 ("We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea.").



judge, or all three ‘deliberately employ their charging and sentencing powers to induce [a] defendant to tender a plea of guilty,’ and where they do so with the ‘objective [of] penaliz[ing] a person’s reliance on his legal rights, [are] ‘patently unconstitutional.’”<sup>179</sup> Plea negotiations play an important role in providing the defendant with options—and at times leverage—in the pretrial phase.<sup>180</sup> But a statutory system that needlessly encourages defendants to waive their constitutional rights is still invalid.<sup>181</sup>

*Jackson* was a retaliation case because, prior to any plea negotiations, the defendant needlessly faced a much harsher penalty if he asserted his right to a jury trial.<sup>182</sup> Congress, in limiting the death penalty to those defendants that asserted their constitutional right, “deliberately employ[ed] [its] charging and sentencing powers to induce [a] defendant to tender a plea of guilty.”<sup>183</sup> That impermissible congressional purpose was evidence of retaliation in *Jackson*, which the Court confirmed in *Wilkie*.<sup>184</sup>

### C. *Is Virginia’s Jury Sentencing Scheme a Form of Retaliation?*

Data demonstrating a jury’s tendency to recommend a sentence that is harsher than what the guidelines and judges would recommend in addition to the low probability that a judge will modify a severe jury sentence indicates that defendants have a strong incentive to waive their Sixth Amendment right

179. *Id.* at 232 n.7 (Stevens, J., dissenting) (quoting *Brady v. United States*, 397 U.S. 742, 757 n.8 (1970); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)).

180. *See id.* at 222 (majority opinion) (describing the plea bargaining process as a “process mutually beneficial to both the defendant and the State”).

181. *See Jackson*, 390 U.S. at 583 (“For the evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them.”).

182. *See id.* (“Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right.”).

183. *Brady v. United States*, 397 U.S. 742, 751 n.8 (1970).

184. *See Wilkie v. Robbins*, 551 U.S. 537, 556 (2007) (“Those [retaliation] cases turn on an allegation of impermissible purpose and motivation.”).

under mandatory jury sentencing.<sup>185</sup> The question, however, is whether Virginia's statutory scheme for jury sentencing places an impermissible burden on a defendant's Sixth Amendment right to a jury trial.

Answering this question requires analyzing whether the statutory scheme reveals an impermissible purpose or motivation on the part of the Virginia General Assembly in burdening a defendant's constitutional rights.<sup>186</sup> This calls for identifying a purpose behind the statutory scheme, determining whether that purpose goes beyond simply encouraging defendants to waive their right to a jury trial, and, if there is a legitimate purpose, concluding whether the particular characteristics of the system are necessary to implement that purpose.<sup>187</sup>

This Note argues that jury sentencing serves a legitimate purpose beyond simply encouraging defendants to waive their right to a jury trial. Jury sentencing places the decision-making power in the hands of a non-governmental body that more accurately represents the "conscience of the community."<sup>188</sup> The jury also has a long history in the Anglo-American legal tradition as a bulwark against oppression by the government.<sup>189</sup>

However, by making jury sentencing mandatory after a jury trial and by not allowing the jury to use the sentencing guidelines, the General Assembly created a system where judge-created sentences and jury-recommended sentences

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185. See *supra* Part I.B.

186. See *Wilkie*, 551 U.S. at 556 (finding that all retaliation cases exhibit impermissible motivations and purposes).

187. See *Becker*, *supra* note 136, at 793 (defining a two-prong test from *Jackson*).

188. See *Ring v. Arizona*, 536 U.S. 584, 615–16 (2002) (Breyer, J., concurring) (discussing how, with regards to retribution, the jury more accurately reflects the "composition and experiences of the community as a whole," and as a result is more likely to "express the conscience of the community").

189. See *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) ("The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.").

dramatically diverge.<sup>190</sup> Limiting the jury's ability to use the guidelines and to make further recommendations to modify sentences has no connection to jury sentencing's legitimate purposes, so the General Assembly's scheme needlessly encourages jury trial waivers.

### 1. Legitimate Purposes of Jury Sentencing in Virginia

As mentioned, the focus of the two-part inquiry of jury sentencing in Virginia will focus on the jury's particular inability to review the sentencing guidelines and to recommend additional modifications to sentences. However, answering the first part of the inquiry from *Jackson*—whether a statutory scheme has any legitimate purpose other than chilling the Sixth Amendment right of those who assert it—requires looking at the broader purposes of jury sentencing.<sup>191</sup>

Jury sentencing in noncapital cases, though currently only in force in six states, has a long history in the Anglo-American legal tradition.<sup>192</sup> Nonetheless, by the end of the twentieth century, scholarly opposition to jury sentencing in noncapital cases was “nearly unanimous” and it came to be seen as “an outdated remnant of the postcolonial period.”<sup>193</sup> A resurgence of support for jury sentencing in noncapital cases began in the late 1990s.

In the scholarly community, academics began to understand the possible benefits of limiting a judge's power in the sentencing process. Adriaan Lanni in 1999 wrote a student Note that was potentially the first academic paper supporting jury sentencing in noncapital cases since 1918.<sup>194</sup> In response to

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190. See *supra* Part I.B.2.

191. See *supra* notes 136–141 and accompanying text.

192. See Iontcheva, *supra* note 32, at 316 (“This history reveals that jury sentencing—a uniquely American innovation—was a valued democratic institution in the early republic, but was gradually abandoned in the twentieth century as scientific approaches to punishment came into favor.”).

193. Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1788 (1999).

194. See Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 951 (2003) (“I want to thank Adriaan Lanni, whose Note in the *Yale Law*

the shift towards giving sentencing authority to “inexperienced legislators” and judges subject to political pressure, Lanni argued that jury sentencing is the “most direct and least distorting mechanism to conform criminal sanctions to community sentiment.”<sup>195</sup>

Practitioners and academics followed her lead at the beginning of the twenty-first century in calling for a return to jury sentencing in noncapital cases. According to jury sentencing’s supporters, juries are the best decision makers to deliver a sentence because they embody the conscience of the community and they act as bulwarks against oppressive government power.<sup>196</sup>

A line of Supreme Court cases beginning with *Apprendi v. New Jersey*<sup>197</sup> provided jury sentencing’s supporters with another argument in favor of jury sentencing: jury sentencing ostensibly forecloses confusion about whether judges are able to determine a particular sentencing factor or if that factor is a sentence enhancer that a jury must find beyond a reasonable doubt.<sup>198</sup> In *Apprendi*, the Court held that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>199</sup> *Apprendi* and the cases that followed created uncertainty about the difference between elements that require jury determinations and sentencing

*Journal* in 1999 was the first article in eighty-one years to call for a return to jury sentencing.”).

195. Lanni, *supra* note 193, at 1802.

196. See Hoffman, *supra* note 194, at 951 (arguing that jurors are the “best arbiters” of the “moral inquiry” of retribution); Bertrall L. Ross, *Reconciling the Booker Conflict: A Substantive Sixth Amendment in a Real Offense Sentencing System*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 725, 725 (2006) (discussing how the jury was “once noted as the ‘bulwark’ of our liberties and protector against oppressive government power”).

197. 530 U.S. 466 (2000).

198. See Iontcheva, *supra* note 32, at 314 (“This Article will argue that legislatures should clear this jurisprudential thicket and take the final logical step suggested by the *Apprendi* line of decisions: reintroduction of jury sentencing.”).

199. *Apprendi*, 530 U.S. at 490.

factors that judges may determine.<sup>200</sup> Sending the entire sentencing determination to a jury avoids this confusion altogether.

Jury sentencing therefore does more than just encourage a defendant to waive his or her right to a jury trial. Potential legitimate purposes include but are not limited to the jury's ability to conform punishments to community sentiment and to serve as a bulwark against government oppression, as well as avoiding confusion about whether a judge or a jury should determine a sentencing factor.

## 2. Are the Particular Characteristics of Virginia's Jury Sentencing Scheme Necessary to Implement its Legitimate Purposes?

The next part of the inquiry focuses on whether particular characteristics of a statutory scheme that tends to encourage guilty pleas and jury trial waivers are necessary to implement its legitimate purposes.<sup>201</sup> The particular characteristic at issue here is the jury's inability to review Virginia sentencing guidelines worksheets—a capability that judges already have.<sup>202</sup>

This Note focuses on two legitimate purposes of jury sentencing: (1) giving more authority to the “conscience of the community,” and (2) preventing government oppression.<sup>203</sup>

### *a. The Conscience of the Community*

In the criminal justice system, juries represent a cross section of the community and in theory serve as that

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200. See Hoffman, *supra* note 194, at 982 (“[T]here seems to be no principled basis upon which to truly distinguish elements from sentencing factors.”).

201. See *supra* notes 136–141 and accompanying text.

202. See *supra* Part I.A.1.

203. This Note will not focus on jury sentencing's ability to solve the “jurisprudential problems” presented by *Apprendi*. This Note discusses *Apprendi* solely to provide background on the resurgence in support for jury sentencing in the early twentieth century.

community's "conscience."<sup>204</sup> In the late twentieth century, retribution gradually replaced rehabilitation as the main goal of sentencing, and juries are hypothetically the better decision maker to determine a sentence in line with the community's standards for retribution.<sup>205</sup>

One possible reason behind not allowing juries to review guidelines worksheets may be to enable the jury to deliver a sentence fully in line with the community's standard for retribution. Reviewing guidelines worksheets may only confuse the jury and distract it from its main task, and the only person who should interact with this more administrative aspect of the sentencing process is the judge, a legal expert.

On the other hand, providing this tool to the jury may support the jury's role as the community's representative by giving it a clear picture of how sentencing works today. Even some of jury sentencing's supporters recognize the need for the jury to have access to the guidelines.<sup>206</sup> The guidelines provide judges with a snapshot of how decision makers have sentenced all other defendants guilty of similar types and numbers of offenses as well as how the decision maker factored in such characteristics as prior criminal history.<sup>207</sup> The guidelines came into being to fill the void that the abolition of parole and the system of good credits created.<sup>208</sup> They are discretionary; they do not replace a decision maker's ultimate judgment in fashioning an appropriate sentence.<sup>209</sup> Instead, they provide the decision maker with an accurate depiction of Virginia's modern

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204. See Lanni, *supra* note 193, at 1775 ("The one task that juries indisputably perform better than judges is to reflect the 'conscience of the community' and to express public outrage at the transgression of community norms.").

205. See Ross, *supra* note 196, at 728 (discussing the shift from rehabilitation goals of sentencing to retributive goals).

206. See Iontcheva, *supra* note 32, at 359 ("The key, therefore, is to devise sentencing standards (for example, statutory ranges or sentencing guidelines) that would enhance the coherence of jury sentencing decisions.").

207. See *supra* Part I.A.

208. See *supra* Part I.A.

209. See VA. CODE ANN. § 19.2-298.01(A) (2020) (describing the judge's duty to review the relevant discretionary sentencing guidelines worksheets).

system of sentencing. Accepting the usefulness of this tool, judge concurrence rate with the guidelines has steadily increased since 1995 to what it is today: 83.4 percent.<sup>210</sup>

By contrast, the current statutory scheme presents the jury with a distorted picture of the sentencing process by only providing the statutory minimum and maximum sentences for each offense.<sup>211</sup> The current scheme inhibits a jury's ability to consider whether a defendant should receive a sentence that is similar to other defendants convicted of the same offense and with similar criminal histories.

A few years after parole was abolished in Virginia, the Supreme Court of Virginia held that sentencing juries shall be instructed on the abolition of parole for noncapital offenses.<sup>212</sup> The Supreme Court of Virginia based this holding in part on its finding that a jury should have "all significant and appropriate information that would avoid the necessity that it speculate or act upon misconceptions concerning the effect of its decision."<sup>213</sup> That same concern should apply here. A jury, in performing its mission as the community's conscience, should be aware of how the sentencing process works and the judicial branch's role—i.e., in Virginia, the jury's role—in that process.<sup>214</sup> Achieving this level of awareness requires allowing the jury to review guidelines worksheets.

*b. Bulwark Against Government Oppression*

When the Supreme Court held that the Due Process Clause of the Fourteenth Amendment incorporated the Sixth Amendment right to a jury trial, it found that "[a] right to jury

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210. 2019 VCSC REPORT, *supra* note 40, at 29.

211. See *supra* note 32 and accompanying text.

212. See *Fishback v. Commonwealth*, 532 S.E.2d 629, 634 (Va. 2000) ("[W]e will direct that henceforth juries shall be instructed, as a matter of law, on the abolition of parole for non-capital felony offenses committed on or after January 1, 1995 . . .").

213. *Id.* at 633.

214. See *Hinton v. Commonwealth*, 247 S.E.2d 704, 706 (Va. 1978) ("Under our system, the assessment of punishment is a function of the judicial branch of government, while the administration of such punishment is a responsibility of the executive department.").

trial is granted to criminal defendants in order to prevent oppression by the Government.”<sup>215</sup> Drawing on the fundamental purpose of the right to a jury trial, some academics, including Professor Bertrall Ross, have identified jury sentencing’s potential to prevent government oppression at the sentencing phase.<sup>216</sup>

Blocking the jury’s access to guidelines worksheets that are available to judges is not necessary to allow the jury to serve as a bulwark against government oppression. On the contrary, limiting the jury’s ability to use this tool enhances the government’s power over a defendant by encouraging defendants to waive their right to a jury trial. The ability to review the sentencing guidelines would provide the jury with more options to create a more lenient sentence.<sup>217</sup> Virginia’s jury sentencing scheme instead pressures defendants to turn away from the jury and towards the government because juries are much more likely to recommend a sentence that is more severe than what the guidelines would recommend.<sup>218</sup>

### 3. *Corbitt*, *Jackson*, and Virginia’s Jury Sentencing Scheme

*Corbitt* appeared to limit the holding of *Jackson* to situations where the defendant is subject to a harsher sentence than he would be if he waived a jury trial.<sup>219</sup> The death penalty provision in *Jackson* allowed the defendant to avoid the death penalty by waiving a jury trial.<sup>220</sup> By contrast, in *Corbitt*, the

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215. *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).

216. *See* Ross, *supra* note 196, at 728 (“It will also be argued that this role of the jury can coexist alongside a system of real offense sentencing that both individualizes sentencing and maintains the balance of power between the prosecutor and the judge at sentencing.”).

217. *See supra* note 5 and accompanying text.

218. *See supra* Part I.B.2.

219. *See supra* notes 164–167 and accompanying text.

220. *See* *United States v. Jackson*, 390 U.S. 570, 571 (1968) (describing the death penalty provision of the Federal Kidnaping Act).



defendant could not avoid the possibility of a life sentence, the maximum sentence, if he waived a jury trial.<sup>221</sup>

While Virginia defendants cannot avoid a statutory maximum punishment by waiving a jury trial, the data shows there is a much higher likelihood that they will receive a harsher punishment from a jury as opposed to a judge.<sup>222</sup> Judges have increasingly relied on the guidelines to determine punishments.<sup>223</sup> There is a strong likelihood that juries will deliver a sentence higher than what the sentencing guidelines would recommend; so, by waiving a jury trial, defendants have a significantly higher chance of receiving a lower punishment.<sup>224</sup>

For example, had Mr. Tucker pled guilty or chosen to have a bench trial, he would have had a 79.6 percent chance of receiving a six-year sentence in line with the sentencing guidelines recommendation.<sup>225</sup> Instead, he chose to assert his Sixth Amendment right to a jury trial and faced a 46.6 percent chance of receiving a sentence higher than what the guidelines recommended.<sup>226</sup> In the end he received a much more severe fifty-one-year sentence.<sup>227</sup>

The facts of *Jackson* are clear: the death penalty provision of the Federal Kidnapping Act created two different statutory maximum punishments for those who asserted their right to a jury trial and those who waived that right.<sup>228</sup> However, the Court's holding in that case was not limited to this particular type of situation where the statutory scheme creates two distinct levels of punishment; rather, the Court tied its finding of an impermissible burden to its inability to find the provision

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221. See *Corbitt v. New Jersey*, 439 U.S. 212, 214–16 (1978) (describing the New Jersey homicide statutes).

222. See *supra* Part I.B.2.

223. See *supra* Part I.B.2.

224. See *supra* Part I.B.2.

225. See *supra* Table 1.

226. See *supra* Table 1.

227. See *supra* notes 1–6 and accompanying text.

228. See *Jackson*, 390 U.S. at 571 (describing the death penalty provision of the Federal Kidnaping Act).

necessary to carry out a legitimate purpose.<sup>229</sup> A rigid factual rule like the one suggested in *Corbitt* encourages legislatures to devise more clever statutory schemes that, while they may not in fact create two different maximum sentences, they do so in effect.<sup>230</sup>

That is the situation in Virginia under mandatory jury sentencing. Defendants, aware of the strong likelihood that a jury would give them a harsher sentence than a judge would, waive their right to a jury trial to avoid that harsher sentence.<sup>231</sup> This is the reality absent any preliminary negotiations with the government to waive a jury trial or plead guilty.

### III. NEXT STEPS

The jury sentencing scheme established by the Virginia General Assembly in 1994 imposes an impermissible burden on a defendant's Sixth Amendment right to a jury trial—a constitutional issue that defendants could attempt to address by challenging the validity of the system in court as the defendant successfully did in *Jackson*.<sup>232</sup> By declaring the statutes that deny the jury the abilities to review the guidelines and to consider other ways to modify a sentence as unconstitutional, a court would permanently block the General Assembly from maintaining these aspects of jury sentencing.

Virginia's General Assembly is now attempting to fix the problem by passing legislation to amend the relevant sentencing statutes.<sup>233</sup> While this is a positive step, the General Assembly

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229. See *id.* at 582 (finding that the legitimate goal of limiting the imposition of the death penalty “can be achieved without penalizing those defendants who plead not guilty and demand jury trial”).

230. See *Corbitt*, 439 U.S. at 217 (noting that the statutory scheme in *Jackson* included the death penalty and a more lenient maximum sentence if the defendant pled guilty).

231. See *supra* Part I.B.2.

232. See *United States v. Jackson*, 390 U.S. 570, 571 (1968) (describing the district court's dismissal of count one of the indictment based on its finding that the Federal Kidnapping Act was unconstitutional because it “makes the ‘risk of death’ the price for asserting the right to jury trial, and thereby ‘impairs . . . free exercise’ of that constitutional right”).

233. See *infra* Part III.D.

and Governor during one session may choose to reform the sentencing scheme, but the General Assembly and Governor during another session could choose to reinstate the previous, unconstitutional scheme in response to, for example, a significant increase in the number of jury trials after reform, or in response to jurors struggling to properly use the guidelines.<sup>234</sup>

This Part discusses how making jury sentencing optional for defendants would adequately safeguard a defendant's Sixth Amendment right.<sup>235</sup> This Part also explains what reforms—in the absence of optional jury sentencing—are necessary to give juries access to the guidelines and what procedures are necessary to facilitate effective use of the guidelines.<sup>236</sup> Finally, this Part considers how reform would impact Virginia criminal sentencing and the future possibility that the General Assembly could pass legislation to return to a constitutionally problematic jury sentencing scheme.<sup>237</sup>

A. *Optional Jury Sentencing and Virginia Senate Bills 811 and 5007*

Even if jurors could review sentencing guidelines worksheets, jurors would not face the same pressure from the General Assembly that judges—who are elected by the General Assembly<sup>238</sup>—feel to comply with the guidelines.<sup>239</sup> Allowing a defendant to opt for a judge-created sentence would remove the danger of an extreme jury sentence and also avoid any problems that could stem from less pressure on juries to follow the guidelines.

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234. See *infra* Parts III.B, IV.D.

235. See *infra* Part III.A.

236. See *infra* Part III.B–C.

237. See *infra* Part III.D.

238. See VA. CONST. art. VI, § 7 (“The judges of all other courts of record shall be chosen by the vote of the majority of the members elected to each house of the General Assembly for terms of eight years.”).

239. King & Noble, *supra* note 39, at 916. (“Judges and lawyers alike explained that guidelines adherence was linked to the judicial apprehension that upward departures would be considered negatively by the legislature at reelection.”).

Virginia and Kentucky stand alone as the only states that make jury sentencing mandatory after the guilt phase of a noncapital jury trial.<sup>240</sup> The other four states that allow jury sentencing provide varying options to the defendant.<sup>241</sup> For example, in Arkansas the defendant may waive jury sentencing but must first obtain consent from the court and prosecution.<sup>242</sup> In Texas, the judge will impose the sentence unless the defendant requests a jury sentence.<sup>243</sup> While a system like that of Texas is more favorable to the defendant, either way, the possibility that a judge may first determine a sentence lifts pressure off of the defendant when he is deciding whether or not to assert his Sixth Amendment right to a jury trial.

On February 5, 2020, Democrats on the Virginia Senate Judiciary Committee introduced Virginia Senate Bill 811 to allow juries to give both a verdict on guilt and a sentence at the same time with no additional sentencing hearing.<sup>244</sup> However, senators dramatically altered the bill to instead end mandatory jury sentencing by making judge sentencing the default after jury trials, while preserving a defendant's ability to choose to have a jury sentence.<sup>245</sup> The House of Delegates later pushed the bill to 2021 for reconsideration, but Senate Democrats revived the effort to end mandatory jury sentencing in August 2020

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240. See *supra* notes 27–28 and accompanying text.

241. See *supra* note 28 and accompanying text.

242. See ARK. CODE ANN. § 16-97-101 (2020) (“After a jury finds guilt, the defendant, with the agreement of the prosecution and the consent of the court, may waive jury sentencing, in which case the court shall impose sentence . . .”).

243. See TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2(b) (West 2019) (explaining that the judge shall assess the punishment unless the defendant requests a jury sentence).

244. See S.B. 811, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (substituting the original bill that was titled “Sentencing in a criminal case; bifurcated jury trial”).

245. See *id.* (“If the jury finds the defendant guilty of an offense for which the death penalty may not be imposed and the accused has requested that the jury ascertain punishment of the offense . . . it shall fix the punishment as provided in § 19.2-295.1.”).

during a Special Session.<sup>246</sup> After two months of back and forth between the Senate and House and a series of amendments, Virginia Senate Bill 5007, which would make jury sentencing optional, passed on October 16, 2020 with the caveat that the bill would not be enacted until July 2021.<sup>247</sup>

Granting defendants the power to decide who will determine their sentence would give them the ability to choose between a decision maker who has complete access to resources like the sentencing guidelines and leniency modification tools (a judge) or one that does not (a jury). By choosing a judge, a defendant could avoid the risk discussed in this Note that a jury might recommend a harsher sentence than a judge.<sup>248</sup> This legislative solution alone could adequately address that constitutional issue.

### B. *Jury Access to the Sentencing Guidelines and Virginia Senate Bill 810*

Without optional jury sentencing, the next best reform is providing the jury with sentencing guidelines recommendations. One line in Virginia's code blocks the jury's access to the sentencing guidelines: "In cases tried by a jury, the jury shall not be presented any information regarding sentencing guidelines."<sup>249</sup> To address the constitutional issue that results from not allowing the jury to review the guidelines, the General Assembly could begin by simply deleting "not" from that sentence and giving the jury the ability to review completed sentencing guidelines worksheets.

At the beginning of 2020 some Virginia senators attempted to do just that. On January 8, 2020, Senator Joseph Morrissey

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246. See S.B. 5007, 2020 Gen. Assemb., Spec. Sess. (Va. 2020) (allowing the defendant to choose whether to have a jury sentence him or her).

247. See Ned Oliver, *Virginia Lawmakers Vote to Reform 224-Year-Old Jury Sentencing Law*, VA. MERCURY (Oct. 17, 2020), <https://perma.cc/6MJ2-AJQ3> (describing Virginia Senate Bill 5007's history and the debate surrounding it).

248. See *supra* Part I.B.

249. VA. CODE ANN. § 19.2-298.01 (2020).

introduced Virginia Senate Bill 810,<sup>250</sup> titled, “Discretionary sentencing guidelines worksheets; use by juries,” which seeks to add language to Virginia Code Section 19.2-295.1<sup>251</sup> including that “the jury shall be presented with discretionary sentencing guidelines worksheets” and that “the court shall instruct the jury that the applicable discretionary sentencing guidelines worksheets are discretionary and not binding.”<sup>252</sup> The bill also intends to modify the language of Virginia Code Section 19.2-298.01,<sup>253</sup> which prevents any party from presenting information regarding the guidelines worksheets to the jury, to instead allow juries to receive the applicable worksheets.<sup>254</sup>

The proposed bill is not clear as to whether the jury would receive blank sentencing guidelines worksheets that the jury must complete or if the jury would receive completed sentencing guidelines worksheets that probationary officers currently complete.<sup>255</sup> Requiring jurors to complete worksheets themselves would be problematic. The VCSC offers a variety of training programs to teach practitioners how to accurately score guidelines factors in the worksheets,<sup>256</sup> which means that it would be impossible to effectively train juries in a more limited sentencing phase timeframe. Virginia Senate Bill 810 should clarify this point to avoid court confusion by definitively stating that probation officers will continue to complete the worksheets and then submit them to the jurors for review.

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250. S.B. 810, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

251. VA. CODE ANN. § 19.2-295.1.

252. Va. S.B. 810, at 1.

253. VA. CODE ANN. § 19.2-298.01.

254. Va. S.B. 810, at 1.

255. See VA. CODE ANN. § 19.2-298.01(C) (2020) (“In felony cases, other than Class 1 felonies, tried by a jury and in felony cases tried by the court without a jury upon a plea of not guilty, the court shall direct a probation officer of such court to prepare the discretionary sentencing guidelines worksheets.”).

256. See *Training*, VA. CRIM. SENT’G COMM’N, <https://perma.cc/77TG-4VTQ> (providing a variety of training programs for attorneys and criminal justice professionals, including a \$125 “Introduction to Sentencing Guidelines” course that teaches practitioners how to accurately score guidelines worksheets).

C. *Jury Ability to Recommend Sentences Below the Statutory Minimum Level and Virginia Senate Bill 326*

Allowing juries to review completed sentencing guidelines worksheets would not benefit criminal defendants if juries cannot also recommend sentences below the statutory minimum sentence. Juries must also have the power to recommend that the judge suspend a sentence in full or in part and that the judge order that the defendant serve sentences for multiple offenses concurrently.

Before Virginia abolished parole, offenders often served much less time than what the statutory minimum prescribed for a particular offense, so the guidelines—keyed to pre-parole abolition punishment levels—may therefore recommend a punishment range below the statutory minimum punishment for a particular offense.<sup>257</sup> To remain in compliance with the guidelines, judges must frequently suspend a sentence or order that a defendant serve multiple offenses concurrently.<sup>258</sup> For example, if a drug offense statutory minimum punishment is five years but the guidelines recommend one year of punishment, the judge must impose the five-year sentence but would need to suspend four years to comply with the guidelines recommendation. In this example, the shortest sentence the jury could recommend is the five-year statutory minimum. A judge can bring the jury recommended sentence into compliance with the guidelines by suspending the sentence him or herself;<sup>259</sup> however, the reality is that judges are hesitant to modify jury sentences.<sup>260</sup> Permitting juries to review guidelines worksheets must therefore coincide with allowing juries to recommend that the judge suspend a sentence in whole or in part and that the judge order that the defendant serve sentences for multiple offenses concurrently.

Virginia Senator Creigh Deeds introduced a bill in January 2020 that would give a jury those abilities. Virginia Senate Bill

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257. See *supra* notes 44–47 and accompanying text.

258. See *supra* notes 44–47 and accompanying text.

259. See *supra* note 36 and accompanying text.

260. See *supra* Part I.B.3.

326,<sup>261</sup> titled “Sentencing proceeding by the jury after conviction; recommendation of leniency,” seeks to amend Section 19.2-295.1 of the Virginia Code<sup>262</sup> by adding language that includes, “In ascertaining punishment, the jury may recommend that the sentence imposed be suspended in whole or in part, or that sentences imposed for multiple offenses be served concurrently, except where such suspension of sentence or concurrent service is prohibited by law.”<sup>263</sup> If passed, this bill alone would increase the probability that juries would recommend sentences that comply with guidelines recommendations because it allows them to recommend sentences below the statutory minimum sentence.

However, without the guidelines, juries would still have no way of knowing the extent to which (1) defendants sometimes receive punishments at or near the statutory minimum level, and (2) a judge would modify punishments through suspension or by ordering a defendant to serve sentences for multiple offenses concurrently. For example, a jury convicted Norell Sterling Ward of two counts of possessing heroin with intent to distribute and one count of conspiracy to distribute.<sup>264</sup> The Virginia Criminal Code provides that each of those offenses requires a minimum sentence of five years and a maximum sentence of forty years.<sup>265</sup> After factoring in Ward’s criminal history and other extraneous factors, the guidelines recommended range of punishment for all three counts was six years and four months to ten years and five months, with a

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261. S.B. 326, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

262. VA. CODE ANN. § 19.2-295.1 (2020).

263. Va. S.B. 326, at 1.

264. See *supra* notes 7–11 and accompanying text.

265. See VA. CODE ANN. § 18.2-248(C) (“[A]ny person who violates this section with respect to a controlled substance classified in Schedule I or II shall upon conviction be imprisoned for not less than five nor more than 40 years and fined not more than \$500,000.”); *Id.* § 18.2-256 (providing that the punishment for a person found guilty of conspiring to commit any offense included in the article “may not be less than the minimum punishment nor exceed the maximum punishment prescribed for the offense, the commission of which was the object of the conspiracy”).



midpoint of eight years and six months.<sup>266</sup> That means the sentencing guidelines recommended a midpoint punishment of a little under three years for each offense, which is two years below the statutory five-year minimum level.<sup>267</sup> If the judge in Ward's case had sentenced Ward and complied with the guidelines—and, in 2017, judges complied 81.6 percent of the time<sup>268</sup>—he would have had at least two options if he imposed the statutory minimum level of five years for each offense. First, the judge could have ordered Ward to serve three five-year minimum sentences consecutively—a total of fifteen years—and suspend at least four years and seven months of the sentence to reach the high-end recommendation of ten years and five months.<sup>269</sup> Second, he could have ordered Ward to serve two of the five-year sentences concurrently alongside the third sentence for a total punishment of ten years.<sup>270</sup>

Instead, without the guidelines and with no ability to recommend suspending the sentence or ordering that the sentences be served concurrently, the jury recommended a sixty-five-year sentence.<sup>271</sup> The jury went well beyond recommending the statutory minimum five-year punishment for each offense: at sixty-five years total, the jury recommended a little under twenty-two years for each offense.<sup>272</sup> To reach the guidelines recommended range with its sixty-five-year recommended punishment, the jury would have needed to recommend that the judge suspend at least fifty-four years and

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266. VCSC WARD SENTENCING GUIDELINES SUMMARY, *supra* note 9. To comply with the guidelines, a decision maker does not need to impose the midpoint; rather, the decision maker must impose a sentence within the recommended range, which can be slightly below or above the midpoint. See 2019 VCSC REPORT, *supra* note 40, at 12 (defining concurrence with guidelines).

267. See *supra* note 265 and accompanying text.

268. 2017 VIRGINIA CRIMINAL SENTENCING COMMISSION ANNUAL REPORT 27, <https://perma.cc/N897-3YVW> (PDF).

269. See VCSC WARD SENTENCING GUIDELINES SUMMARY, *supra* note 9 (recommending a high-end punishment of ten years and five months).

270. See *id.* (recommending a high-end punishment of ten years and five months).

271. See *supra* note 8 and accompanying text.

272. *Id.* Sixty-five divided by three is 21.67.

seven months to reach the high-end recommendation of ten years and five months.<sup>273</sup> Alternatively, if the jury had recommended that Ward serve all three sentences concurrently, the total recommended sentence would have been around twenty-two years.<sup>274</sup> Still, the jury would have needed to recommend that the judge suspend at least eleven years and seven months of the sentence.<sup>275</sup>

In sum, the jury still has a number of hoops to jump through to reach guidelines recommended ranges with no ability to review guidelines worksheets. Juries would likely fail to (1) recommend a sentence at or near statutory minimum levels, or (2) recommend sufficient modifications to the sentence. As a result, recurrent jury sentence divergence from guidelines recommendations would persist.<sup>276</sup> While jury concurrence with guidelines may rise slightly in the interim, this statistic would continue to pale in comparison to judge concurrence rates, which have steadily risen over the past twenty-five years to 83.9 percent in 2019.<sup>277</sup>

Accordingly, the proposed changes in both Virginia Senate Bill 810 and Virginia Senate Bill 326 must both be in effect to address the constitutional problems that stem from Virginia's mandatory jury sentencing scheme.<sup>278</sup> Without the ability to recommend sentence suspensions or concurrent sentences, a jury would be unable to recommend a sentencing guidelines recommendation that falls below the statutory minimum punishment level. Without the sentencing guidelines, a jury would have no way of understanding the extent to which judges have modified sentences to levels well below what a statute may command.

Naturally, passing legislation like Virginia Senate Bills 326 and 810 in addition to Virginia Senate Bills 811 and 5007 would be the best-case scenario: together, the bills would place the

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273. See VCSC WARD SENTENCING SUMMARY, *supra* note 9 (recommending a high-end punishment of ten years and five months).

274. See *supra* note 8 and accompanying text.

275. See VCSC WARD SENTENCING GUIDELINES SUMMARY, *supra* note 9 (providing the high-end recommendation for Ward).

276. See *supra* Part I.B.2.

277. 2019 VCSC REPORT, *supra* note 40, at 29.

278. See *supra* Part II.

judge and jury on roughly equal footing while still reserving the ultimate choice of who will determine the sentence for the defendant. Nevertheless, each would represent a significant step towards lifting the burden on a Virginia defendant's Sixth Amendment right.

D. *Jury Sentencing After Legislative Reform*

Virginia Senate Democrats acted rapidly at the beginning of the 2020 Regular Session by passing a “cascade” of bills.<sup>279</sup> Among those bills were Virginia Senate Bills 326, 810, and 811, all of which the Virginia Senate narrowly passed on February 11, 2020—only one or two Republicans joined the Senate Democrats to pass each of the bills, demonstrating the contentiousness of the issue of jury sentencing but also the potential for bipartisan cooperation.<sup>280</sup> While the Senate passed these three bills, the House of Delegates Courts of Justice Committee decided to push consideration of the bills until 2021—sending them to the Virginia Crime Commission for further study.<sup>281</sup> Nevertheless, Senate Democrats successfully

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279. See Gregory S. Schneider et al., *Virginia Democrats Push Liberal Agenda—with a Dose of Caution*, WASH. POST (Feb. 11, 2020), <https://perma.cc/6J7M-6QAC> (describing the “hundreds of bills” Senate Democrats passed in the early 2020 Regular Session).

280. See *SB 326 Sentencing Proceeding by the Jury After Conviction; Recommendation of Leniency*, VA.'S LEGIS. INFO. SYS., <https://perma.cc/4C85-YAZP> [hereinafter SB 326 VLIS] (providing that the bill passed in the Virginia Senate on February 11, 2020 with twenty-two votes in favor of the bill and eighteen votes against the bill); *SB 810 Discretionary Sentencing Guidelines Worksheets; Use by Juries*, VA.'S LEGIS. INFO. SYS., <https://perma.cc/4NXT-EPF2> [hereinafter SB 810 VLIS] (providing that the bill passed in the Virginia Senate on February 11, 2020 with twenty-two votes in favor of the bill and eighteen votes against the bill); *SB 811 Sentencing in a Criminal Case; Bifurcated Jury Trial*, VA.'S LEGIS. INFO. SYS., <https://perma.cc/2X2C-CNJ2> [hereinafter SB 811 VLIS] (providing that the amended bill passed in the Virginia Senate on February 11, 2020 with twenty-three votes in favor of the bill and seventeen votes against the bill).

281. See SB 326 VLIS, *supra* note 280 (providing that the House Courts of Justice Committee decided to continue the bill to 2021 by voice vote on February 24, 2020); SB 810 VLIS, *supra* note 280 (providing that the House Courts of Justice Committee decided to continue the bill to 2021 by voice vote on March 2, 2020); SB 811 VLIS, *supra* note 280 (providing that the House

made a second push to end mandatory jury sentencing during a 2020 Special Session, assuring that mandatory jury sentencing will end in Virginia in July 2021.<sup>282</sup>

During the Regular Session, the Courts of Justice Committee likely pushed the three bills back to 2021 in response to concerns with the speed at which the Senate moved to make major changes to jury sentencing. During a Senate Judiciary Committee meeting on February 5, 2020, Stafford County Commonwealth's Attorney Eric Olsen spoke in opposition to Virginia Senate Bill 811, which sought to end mandatory jury sentencing.<sup>283</sup> Mr. Olsen, also speaking on behalf of the Virginia Association of Commonwealth's Attorneys, called the amended bill an "extreme step" without an additional study.<sup>284</sup> He went on to state that "in a community, with your fellow citizens, you are entitled to have your fellow citizens decide your fate on issues of criminal justice," and he argued that this bill, if passed, would demonstrate a lack of "trust" in juries.<sup>285</sup> During the Senate's Regular Session on February 11, Senator Mark Obenshain of Rockingham County also spoke in opposition to Virginia Senate Bill 811.<sup>286</sup> Senator Obenshain argued that the bill was a "significant change of policy and it is not something we should do without giving it some thought" and that, if passed, the bill was something "we will regret doing with this

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Courts of Justice Committee decided to continue the bill to 2021 by voice vote on March 2, 2020).

282. See *SB 5007 Criminal Cases; Sentencing Reform, Procedure for Trial by Jury, Etc.*, VA.'S LEGIS. INFO. SYS., <https://perma.cc/Y5BH-255G> [hereinafter SB 5007 VLIS] (providing that after nearly two months of debate, both the House of Delegates and Senate agreed to end mandatory jury sentencing after adding an enactment date of July 1, 2021).

283. *Feb. 5, 2020 Hearing on S.B. 811 Before the Senate Comm. on the Judiciary*, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) at 1:23:25, <https://perma.cc/FL5E-3S67> (discussing the amended bill and allowing community members to voice support or opposition for the bill).

284. *Id.*

285. *Id.*

286. See *Feb. 11, 2020 Regular Session*, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) at Part 1 2:33:27, <https://perma.cc/FL5E-3S67> (showing the full Senate debate on Senate Bill 811 and other bills).

speed and dispatch.”<sup>287</sup> The Senate then passed Virginia Senate Bill 811 with twenty-three votes in favor of the bill and seventeen votes against.<sup>288</sup>

Despite the House’s decision to push Virginia Senate Bills 326, 810, and 811 to 2021, Senate Democrats successfully passed Virginia Senate Bill 5007 during a 2020 Special Session, assuring that mandatory jury sentencing will end in Virginia in July 2021.<sup>289</sup> Ending mandatory jury sentencing represents a landmark departure from Virginia’s longtime support of the controversial practice,<sup>290</sup> and the reform could have a sizeable impact on Virginia’s criminal justice system.

Theoretically, consistent with comments made by those who opposed Virginia Senate Bills 811 and 5007, requests for jury trials could rise dramatically if jury sentencing became optional, overwhelming court caseloads. Compared with Texas, a state with optional jury sentencing similar to the proposed system in Virginia Senate Bills 811 and 5007, the percentage of convictions adjudicated by bench trials in Virginia was over twice as large as that of Texas.<sup>291</sup> A large percentage of defendants in Virginia that would have previously requested a bench trial could instead request a jury trial. As a result, the percentage of convictions adjudicated by jury trials could increase significantly. However, as the sponsors and supporters of Senate Bill 5007 explained during the Special Session, the reality is that it is unlikely that jury trials will rise dramatically given how infrequent they are in other optional jury sentencing states.<sup>292</sup> The more likely scenario will be a moderate initial

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287. *Id.*

288. *See* SB 811 VLIS, *supra* note 280 (providing the history of Virginia Senate Bill 811).

289. *See* Oliver, *supra* note 247 (explaining the history of Virginia Senate Bill 5007).

290. *See supra* notes 25–28 and accompanying text.

291. *See supra* notes 68–69 and accompanying text.

292. *Sept. 25, 2020 Hearing on S.B. 5007 Before the House of Delegates Comm. on Appropriations*, 2020 Gen. Assemb., Spec. Sess. (Va. 2020) at 10:40:47, <https://perma.cc/5R32-5Z8U> (discussing the potential financial impact of Virginia Senate Bill 5007).

uptick in the number of jury trials, followed by a downward trend to levels similar to other optional jury sentencing states.<sup>293</sup>

Another potential situation that could prompt reinstating mandatory jury sentencing could be a change in political control of the General Assembly. However, which political party has control may have little to do with the matter. When Virginia first passed truth-in-sentencing reforms in 1994—including abolishing parole and denying the jury the ability to review the sentencing guidelines—Democrats held majorities in both the House of Delegates and the Senate.<sup>294</sup>

Without the reforms contained in Virginia Senate Bills 326, 810, 811, and 5007, the constitutional issue discussed in this Note would persist in Virginia, and defendants would be stuck between choosing to have a jury trial or waiving their Sixth Amendment right to ensure a judge determines their sentences.<sup>295</sup> The best way to reform Virginia jury sentencing is to make jury sentencing optional for defendants, the solution proposed by Virginia Senate Bills 811 and 5007.<sup>296</sup> But if mandatory jury sentencing returns, passing both Virginia Senate Bills 326 and 810—allowing juries to review completed guidelines worksheets and giving juries the ability to recommend that a judge suspend a sentence or order a defendant to serve multiple sentences concurrently—would also resolve the constitutional issue, provided that the General Assembly make the suggested edit to Virginia Senate Bill 810 that the jury receive completed guidelines worksheets.<sup>297</sup> Passing and preserving these reforms is essential to resolve the constitutional issue discussed in this Note, and critical for criminal defendants in Virginia.

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293. *Id.*

294. *See Party Control of Virginia State Government*, BALLOTPEdia, <https://perma.cc/7MES-EBLT> (illustrating that in 1994, Democrats controlled the General Assembly, while the Governor was a Republican).

295. *See supra* Part II.

296. *See supra* Part III.A.

297. *See supra* Part III.B–C.

## CONCLUSION

Virginia legislators are now attuned to the potential problems created by jury sentencing schemes and in particular the detrimental impact that mandatory jury sentencing has had on Virginia criminal defendants for decades. As a result of successful reform efforts, Virginia will become one of five states with an optional jury sentencing scheme.<sup>298</sup>

This Note focused on Virginia's jury sentencing scheme, but the issues discussed are relevant for all states that allow or that could choose to allow the jury to first recommend a sentence for the defendant. Any proponent of jury sentencing—academic or political—must reckon with the possibility that political actors could exploit the system to threaten a defendant's right to a jury trial.

Legislative reform or abolition of jury sentencing schemes may shield a defendant's Sixth Amendment right, but the fact remains that future legislative action could reverse that reform.<sup>299</sup> Advocates must therefore continue to monitor jury sentencing statutory schemes and the legislative bodies that create them, holding them accountable by referencing the harmful effect that jury sentencing can have on a defendant's ability to exercise his or her fundamental Sixth Amendment right.<sup>300</sup>

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298. *See supra* Part III.

299. *See supra* Part III.D.

300. *See* *Duncan v. Louisiana*, 391 U.S. 145, 157–58 (1968) (“Our conclusion is that in the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants.”).

### Appendix 1

Table 1: Jury Sentencing Guidelines Compliance

JURY Year	Compliance (%)	Aggravation (%)	Mitigation (%)	Cite
1995	49.2	37.7	13.1	1995 VA. CRIM. SENT'G COMMISSION ANN. REP. 56, <a href="https://perma.cc/GF6A-A4DA">https://perma.cc/GF6A-A4DA</a> (PDF).
1996	47.5	41.99	10.6	1996 VA. CRIM. SENT'G COMMISSION ANN. REP. 34, <a href="https://perma.cc/7DX3-7WFH">https://perma.cc/7DX3-7WFH</a> (PDF).
1997	42.8	45.7	11.5	1997 VA. CRIM. SENT'G COMMISSION ANN. REP. 40, <a href="https://perma.cc/XFP6-LWC3">https://perma.cc/XFP6-LWC3</a> (PDF).
1998	43.3	44.3	12.4	1998 VA. CRIM. SENT'G COMMISSION ANN. REP. 46, <a href="https://perma.cc/6T93-WCBN">https://perma.cc/6T93-WCBN</a> (PDF).
1999	40.9	45.8	13.3	1999 VA. CRIM. SENT'G COMMISSION ANN. REP. 54, <a href="https://perma.cc/5BWQ-DYBC">https://perma.cc/5BWQ-DYBC</a> (PDF).



2000	37.1	55.8	7.1	2000 VA. CRIM. SENT'G COMMISSION ANN. REP. 42, <a href="https://perma.cc/5N8C-3GN5">https://perma.cc/5N8C-3GN5</a> (PDF).
2001	30.4	56.2	13.4	2001 VA. CRIM. SENT'G COMMISSION ANN. REP. 30, <a href="https://perma.cc/3WRN-VYET">https://perma.cc/3WRN-VYET</a> (PDF).
2002	42.3	47	10.7	2002 VA. CRIM. SENT'G COMMISSION ANN. REP. 38, <a href="https://perma.cc/2A6U-2VS3">https://perma.cc/2A6U-2VS3</a> (PDF).
2003	37	42	21	2003 VA. CRIM. SENT'G COMMISSION ANN. REP. 34, <a href="https://perma.cc/M2SS-NBGR">https://perma.cc/M2SS-NBGR</a> (PDF).
2004	34	44	22	2004 VA. CRIM. SENT'G COMMISSION ANN. REP. 35, <a href="https://perma.cc/Q4DC-ZPXM">https://perma.cc/Q4DC-ZPXM</a> (PDF).
2005	49	38	13	2005 VA. CRIM. SENT'G COMMISSION ANN. REP. 28, <a href="https://perma.cc/M695-72AN">https://perma.cc/M695-72AN</a> (PDF).

2006	50	39	11	2006 VA. CRIM. SENT'G COMMISSION ANN. REP. 30, <a href="https://perma.cc/P6H-9XVS">https://perma.cc/P6H-9XVS</a> (PDF).
2007	43	48	9	2007 VA. CRIM. SENT'G COMMISSION ANN. REP. 38, <a href="https://perma.cc/8KTT-8BYL">https://perma.cc/8KTT-8BYL</a> (PDF).
2008	42	44	14	2008 VA. CRIM. SENT'G COMMISSION ANN. REP. 32, <a href="https://perma.cc/3NVB-BMY7">https://perma.cc/3NVB-BMY7</a> (PDF).
2009	40	52	8	2009 VA. CRIM. SENT'G COMMISSION ANN. REP. 35, <a href="https://perma.cc/Q7C3-EBA6">https://perma.cc/Q7C3-EBA6</a> (PDF).
2010	41	52	7	2010 VA. CRIM. SENT'G COMMISSION ANN. REP. 37, <a href="https://perma.cc/9SF6-P4V7">https://perma.cc/9SF6-P4V7</a> (PDF).
2011	39	51	10	2011 VA. CRIM. SENT'G COMMISSION ANN. REP. 27, <a href="https://perma.cc/3QDE-VFPP">https://perma.cc/3QDE-VFPP</a> (PDF).

2012	45	50	5	2012 VA. CRIM. SENT'G COMMISSION ANN. REP. 24, <a href="https://perma.cc/7VW4-F94K">https://perma.cc/7VW4-F94K</a> (PDF).
2013	42	49	9	2013 VA. CRIM. SENT'G COMMISSION ANN. REP. 32, <a href="https://perma.cc/HER4-DVYZ">https://perma.cc/HER4-DVYZ</a> (PDF).
2014	32.3	53.3	14.4	2014 VA. CRIM. SENT'G COMMISSION ANN. REP. 35, <a href="https://perma.cc/W94M-PQFCf">https://perma.cc/W94M-PQFCf</a> (PDF).
2015	43.3	47.4	9.3	2015 VA. CRIM. SENT'G COMMISSION ANN. REP. 37, <a href="https://perma.cc/7MVK-GB9B">https://perma.cc/7MVK-GB9B</a> (PDF).
2016	42.9	48	9.2	2016 VA. CRIM. SENT'G COMMISSION ANN. REP. 28, <a href="https://perma.cc/79Q9-E3ME">https://perma.cc/79Q9-E3ME</a> (PDF).
2017	43	46	11	2017 VA. CRIM. SENT'G COMMISSION ANN. REP. 27, <a href="https://perma.cc/N897-3YVW">https://perma.cc/N897-3YVW</a> (PDF).

2018	39.4	49.8	10.8	2018 VA. CRIM. SENT'G COMMISSION ANN. REP. 27, <a href="https://perma.cc/M3U-CPU7">https://perma.cc/M3U-CPU7</a> (PDF).
2019	49.7	36.7	13.6	2019 VA. CRIM. SENT'G COMMISSION ANN. REP. 29, <a href="https://perma.cc/D3NT-GA6D">https://perma.cc/D3NT-GA6D</a> (PDF).
AVERAGES	41.84 4	46.587 6	11.57 6	

Table 2: Judge Sentencing Guidelines Compliance

JUDGE Year	Compliance (%)	Aggravation (%)	Mitigation (%)	Cite
1995	75	14.5	10.5	1995 VA. CRIM. SENT'G COMMISSION ANN. REP. 41, <a href="https://perma.cc/GF6A-A4DA">https://perma.cc/GF6A-A4DA</a> (PDF).
1996	75.8	13.1	11.1	1996 VA. CRIM. SENT'G COMMISSION ANN. REP. 34, <a href="https://perma.cc/7DX3-7WFH">https://perma.cc/7DX3-7WFH</a> (PDF).
1997	76.2	12.5	11.3	1997 VA. CRIM. SENT'G COMMISSION ANN. REP. 40, <a href="https://perma.cc/XFP6-LWC3">https://perma.cc/XFP6-LWC3</a> (PDF).
1998	75.4	11.8	12.8	1998 VA. CRIM. SENT'G

				COMMISSION ANN. REP. 46, <a href="https://perma.cc/6T93-WCBN">https://perma.cc/6T93-WCBN</a> (PDF).
1999	78.1	10.5	11.4	1999 VA. CRIM. SENT'G COMMISSION ANN. REP. 54, <a href="https://perma.cc/5BWQ-DYBC">https://perma.cc/5BWQ-DYBC</a> (PDF).
2000	80.3	9.1	10.6	2000 VA. CRIM. SENT'G COMMISSION ANN. REP. 42, <a href="https://perma.cc/5N8C-3GN5">https://perma.cc/5N8C-3GN5</a> (PDF).
2001	80.8	8.6	10.6	2001 VA. CRIM. SENT'G COMMISSION ANN. REP. 30, <a href="https://perma.cc/3WRN-VYET">https://perma.cc/3WRN-VYET</a> (PDF).
2002	78.2	9.3	12.5	2002 VA. CRIM. SENT'G COMMISSION ANN. REP. 38, <a href="https://perma.cc/2A6U-2VS3">https://perma.cc/2A6U-2VS3</a> (PDF).
2003	80	10	10	2003 VA. CRIM. SENT'G COMMISSION ANN. REP. 34, <a href="https://perma.cc/M2SS-NBGR">https://perma.cc/M2SS-NBGR</a> (PDF).
2004	81	9	10	2004 VA. CRIM. SENT'G

				COMMISSION ANN. REP. 35, <a href="https://perma.cc/Q4DC-ZPXM">https://perma.cc/Q4DC-ZPXM</a> (PDF).
2005	82	9	9	2005 VA. CRIM. SENT'G COMMISSION ANN. REP. 28, <a href="https://perma.cc/M695-72AN">https://perma.cc/M695-72AN</a> (PDF).
2006	82	9	9	2006 VA. CRIM. SENT'G COMMISSION ANN. REP. 30, <a href="https://perma.cc/P66H-9XVS">https://perma.cc/P66H-9XVS</a> (PDF).
2007	80	10	10	2007 VA. CRIM. SENT'G COMMISSION ANN. REP. 38, <a href="https://perma.cc/8KTT-8BYL">https://perma.cc/8KTT-8BYL</a> (PDF).
2008	80	10	10	2008 VA. CRIM. SENT'G COMMISSION ANN. REP. 32, <a href="https://perma.cc/3NVB-BMY7">https://perma.cc/3NVB-BMY7</a> (PDF).
2009	80	10	10	2009 VA. CRIM. SENT'G COMMISSION ANN. REP. 35, <a href="https://perma.cc/Q7C3-EBA6">https://perma.cc/Q7C3-EBA6</a> (PDF).
2010	80	9	11	2010 VA. CRIM. SENT'G COMMISSION ANN.

				REP. 37, <a href="https://perma.cc/9SF6-P4V7">https://perma.cc/9SF6-P4V7</a> (PDF).
2011	80	9	11	2011 VA. CRIM. SENT'G COMMISSION ANN. REP. 27, <a href="https://perma.cc/3QDE-VFPP">https://perma.cc/3QDE-VFPP</a> (PDF).
2012	79	10	11	2012 VA. CRIM. SENT'G COMMISSION ANN. REP. 24, <a href="https://perma.cc/7VW4-F94K">https://perma.cc/7VW4-F94K</a> (PDF).
2013	79	10	11	2013 VA. CRIM. SENT'G COMMISSION ANN. REP. 32, <a href="https://perma.cc/HER4-DVYZ">https://perma.cc/HER4-DVYZ</a> (PDF).
2014	78.9	10	11.1	2014 VA. CRIM. SENT'G COMMISSION ANN. REP. 35, <a href="https://perma.cc/W94M-PQFCf">https://perma.cc/W94M-PQFCf</a> (PDF).
2015	80.6	8.9	10.5	2015 VA. CRIM. SENT'G COMMISSION ANN. REP. 37, <a href="https://perma.cc/7MVK-GB9B">https://perma.cc/7MVK-GB9B</a> (PDF).
2016	81.1	9.1	9.8	2016 VA. CRIM. SENT'G COMMISSION ANN.

				REP. 28, <a href="https://perma.cc/79Q9-E3ME">https://perma.cc/79Q9-E3ME</a> (PDF).
2017	81.6	8.8	9.6	2017 VA. CRIM. SENT'G COMMISSION ANN. REP. 27, <a href="https://perma.cc/N897-3YVW">https://perma.cc/N897-3YVW</a> (PDF).
2018	82.3	8.7	8.9	2018 VA. CRIM. SENT'G COMMISSION ANN. REP. 27, <a href="https://perma.cc/M3U-CPU7">https://perma.cc/M3U-CPU7</a> (PDF).
2019	83.9	7.4	8.6	2019 VA. CRIM. SENT'G COMMISSION ANN. REP. 29, <a href="https://perma.cc/D3NT-GA6D">https://perma.cc/D3NT-GA6D</a> (PDF).
AVERA GES	79.64 8	9.892	10.45 2	



Table 3: Judge Modification of Jury Sentence Rate

Year	Judge Modification Rate (%)	Cite
2004	16	2004 VA. CRIM. SENT'G COMMISSION ANN. REP. 35, <a href="https://perma.cc/Q4DC-ZPXM">https://perma.cc/Q4DC-ZPXM</a> (PDF).
2005	24	2005 VA. CRIM. SENT'G COMMISSION ANN. REP. 28, <a href="https://perma.cc/M695-72AN">https://perma.cc/M695-72AN</a> (PDF).
2006	20	2006 VA. CRIM. SENT'G COMMISSION ANN. REP. 30, <a href="https://perma.cc/PP6H-9XVS">https://perma.cc/PP6H-9XVS</a> (PDF).
2007	22	2007 VA. CRIM. SENT'G COMMISSION ANN. REP. 38, <a href="https://perma.cc/8KTT-8BYL">https://perma.cc/8KTT-8BYL</a> (PDF).
2008	17	2008 VA. CRIM. SENT'G COMMISSION ANN. REP. 32, <a href="https://perma.cc/3NVB-BMY7">https://perma.cc/3NVB-BMY7</a> (PDF).
2009	24	2009 VA. CRIM. SENT'G COMMISSION ANN. REP. 35, <a href="https://perma.cc/Q7C3-EBA6">https://perma.cc/Q7C3-EBA6</a> (PDF).
2010	25	2010 VA. CRIM. SENT'G COMMISSION ANN. REP. 37, <a href="https://perma.cc/9SF6-P4V7">https://perma.cc/9SF6-P4V7</a> (PDF).
2011	19	2011 VA. CRIM. SENT'G COMMISSION ANN. REP. 27, <a href="https://perma.cc/3QDE-VFPP">https://perma.cc/3QDE-VFPP</a> (PDF).

2012	22	2012 VA. CRIM. SENT'G COMMISSION ANN. REP. 24, <a href="https://perma.cc/7VW4-F94K">https://perma.cc/7VW4-F94K</a> (PDF).
2013	17	2013 VA. CRIM. SENT'G COMMISSION ANN. REP. 32, <a href="https://perma.cc/HER4-DVYZ">https://perma.cc/HER4-DVYZ</a> (PDF).
2014	20	2014 VA. CRIM. SENT'G COMMISSION ANN. REP. 35, <a href="https://perma.cc/W94M-PQFCf">https://perma.cc/W94M-PQFCf</a> (PDF).
2015	22	2015 VA. CRIM. SENT'G COMMISSION ANN. REP. 37, <a href="https://perma.cc/7MVK-GB9B">https://perma.cc/7MVK-GB9B</a> (PDF).
2016	16	2016 VA. CRIM. SENT'G COMMISSION ANN. REP. 28, <a href="https://perma.cc/79Q9-E3ME">https://perma.cc/79Q9-E3ME</a> (PDF).
2017	14	2017 VA. CRIM. SENT'G COMMISSION ANN. REP. 27, <a href="https://perma.cc/N897-3YVW">https://perma.cc/N897-3YVW</a> (PDF).
2018	16	2018 VA. CRIM. SENT'G COMMISSION ANN. REP. 27, <a href="https://perma.cc/MM3U-CPU7">https://perma.cc/MM3U-CPU7</a> (PDF).
2019	9	2019 VA. CRIM. SENT'G COMMISSION ANN. REP. 29, <a href="https://perma.cc/D3NT-GA6D">https://perma.cc/D3NT-GA6D</a> (PDF).
AVERAGE	18.9375	

Table 4: Correlation Between Jury Aggravation Rate and Judge Modification Rate

Year	JURY Agg Rate (%) <sup>301</sup>	JUDGE Mod Rate (%) <sup>302</sup>
2004	44	16
2005	38	24
2006	39	20
2007	48	22
2008	44	17
2009	52	24
2010	52	25
2011	51	19
2012	50	22
2013	49	17
2014	53.3	20
2015	47.4	22
2016	48	16
2017	46	14
2018	49.8	16
2019	36.7	9
Correlation	0.38961429	
Correlation without 2019	0.10012348	

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301. See Appendix Table 1.

302. See Appendix Table 3.