Virginia Criminal Sentencing Commission

1995 Annual Report

1995 Annual Report

December 1, 1995

Virginia Criminal Sentencing Commission

◆ Virginia Criminal Sentencing Commission Members

Appointed by the Chief Justice of the Supreme Court and Confirmed by the General Assembly

Judge Ernest P. Gates, Chairman, Chesterfield County

Appointments by the Chief Justice of the Supreme Court

Judge F. Bruce Bach, Fairfax County
Judge George E. Honts, III, Fincastle
Judge J. Samuel Johnston, Rustburg
Judge William Newman, Arlington County
Judge Donald McGlothlin, Jr., Dickenson County
Judge Robert W. Stewart, Norfolk

Attorney General

The Honorable James S. Gilmore, III, Richmond
(**Frank S. Ferguson,** Attorney General's Representative)

Senate Appointments

Reverend George F. Ricketts, Mathews County
Vivian E. Watts, Annandale

House of Delegates Appointments

Peter G. Decker, Jr., Norfolk
H. Lane Kneedler, Charlottesville
B. Norris Vassar, Washington, D.C.

Governor's Appointments

Robert Bobb, Richmond
Jo Ann Bruce, Ashland
Richard Cullen, Richmond
The Honorable William H. Fuller, III, Danville

HON. ERNEST P. GATES
CHAIRMAN

Commonwealth of Virginia

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Supreme Court of Virginia
Virginia Criminal Sentencing Commission

December 1, 1995

To: The Honorable Harry L. Carrico, Chief Justice of Virginia
The Honorable George Allen, Governor of Virginia
The Honorable Members of the General Assembly of Virginia
The Citizens of Virginia

§17-235(10) of the Code of Virginia requires the Virginia Criminal Sentencing Commission to report annually upon its work and recommendations. Pursuant to this statutory obligation, we respectfully submit for your review the first annual report of the Criminal Sentencing Commission.

This was a significant year for the newly created Sentencing Commission. The Commission has overseen the development and implementation of a new discretionary sentencing guidelines system. These guidelines embody the "truth in sentencing" principles of the legislation abolishing parole for those convicted of felonies occurring on or after January 1, 1995. Significant effort has been expended in educating our judiciary, prosecutors, public defenders, members of the defense bar, probation officers, and other justice system officials on the new legislation and the mechanics of the guidelines process. The guidelines development and implementation activities were competently and expeditiously completed and we can report that Virginia has successfully made the transition to a new felony sentencing system.

This report details the work of the Commission over the past year and outlines the ambitious schedule of activities that lie ahead. The report also provides a comprehensive examination of judicial compliance with the new felony sentencing guidelines for cases received by November 15, 1995.

The Commission wishes to sincerely thank those of you in the field whose diligent work with the guidelines enables us to produce this report.

Respectfully submitted,

Ernest P. Gates

Ernest P. Gates, Chairman

◆ The Staff of the Commission

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The design and layout of the 1995 Annual Report of the Virginia Criminal Sentencing Commission was created by Judith Ann Sullivan.

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THE COMMISSION AND ITS WORK

◆ Overview

During the September 1994 Special Session, the Virginia General Assembly passed sweeping legislation which revised the system by which felons are sentenced and serve incarceration time in the Commonwealth of Virginia. The legislation abolished parole for offenders sentenced for felony offenses committed on or after January 1, 1995, and established a system of earned sentence credits which allows for a reduction in sentence not to exceed 15%. Felony offenders must now serve at least 85% of their incarceration sentences behind bars. This approach, known as "truth in sentencing," represents a comprehensive change in Virginia's criminal justice system. Under the previous system, offenders could receive sentence credits which reduced sentences by as much as 50% and could be released on parole after serving a small portion of the full sentence given by the judge or jury.

The Virginia Criminal Sentencing Commission serves to implement a system of discretionary sentencing guidelines compatible with Virginia's new criminal sentencing system to assist the judiciary in the imposition of felony sentences in the Commonwealth.

During the Special Session, the General Assembly passed accompanying legislation which established a new state agency known as the Virginia Criminal Sentencing Commission. Functioning within the Judicial Branch of government, the Sentencing Commission serves to implement a system of discretionary sentencing guidelines compatible with Virginia's new criminal sentencing system to assist the judiciary in the imposition of felony sentences in the Commonwealth. The Virginia Criminal Sentencing Commission held its first meeting on December 12, 1994.

◆ Purpose of the Commission

The Virginia Criminal Sentencing Commission was created as specified in Code of Virginia §17-233 to assist the judiciary in the imposition of sentences by establishing a system of discretionary guidelines which emphasizes accountability of the offender and the criminal justice system to the citizens of the Commonwealth. Further, the Commission is charged under the same section of the Code of Virginia with developing discretionary sentencing guidelines to achieve the goals of certainty, consistency, and adequacy of punishment with due regard to the seriousness of the offense, the dangerousness of the offender, deterrence of individuals from committing criminal offenses and the use of alternative sanctions, where appropriate.

The Commission seeks to establish rational and consistent sentencing standards which reduce unwarranted sentencing disparity, and foster public confidence in Virginia's criminal justice system.

In addition to its legislative mandates, the Commission seeks to establish rational and consistent sentencing standards which reduce unwarranted sentencing disparity. The cornerstone of this philosophy is the belief that offenders with similar criminal histories and circumstances who are convicted of similar crimes should receive comparable sanctions. It is objectionable for such offenders to receive radically different sentences without apparent justification. Further, with unsubstantiated and dramatic sentence variation, it is difficult for the citizens of the Commonwealth to develop reasonable expectations as to what the actual penalties will be for particular crimes. Rational and consistent sentencing patterns can foster public confidence in Virginia's criminal justice system.

◆ Composition of the Commission

The Commission consists of 17 members, as outlined in Code of Virginia §17-234 (A). The Chairman of the Commission is appointed by the Chief Justice of the Supreme Court of Virginia, must not be an active member of the judiciary and must be confirmed by the General Assembly. The Chief Justice also appoints six sitting judges or justices to serve on the Commission. Five members of the Commission are appointed by the General Assembly: the Speaker of the House of Delegates designates three members, and the Senate Committee on Privileges and Elections selects two members. Four members are appointed by the Governor. The final member is Virginia's Attorney General, who serves by virtue of his office.

◆ Power and Duties of the Commission

The Commission develops and maintains the statewide discretionary sentencing guidelines system for use in felony cases in Virginia.

In the legislation which created the Commission (Code of Virginia §17-235), the General Assembly specified the powers and duties of the Commission. The Commission is required to:

- Develop, maintain and modify as may be deemed necessary, a proposed system of statewide discretionary sentencing guidelines for use in all felony cases which will take into account historical data, when available, concerning time actually served for various felony offenses committed prior to January 1, 1995, and sentences imposed for various felony offenses committed on or after January 1, 1995, and such other factors as may be deemed relevant to sentencing.

- Prepare, periodically update, and distribute sentencing work sheets for the use of sentencing courts which, when used, will produce a recommended sentencing range for a felony offense in accordance with the discretionary sentencing guidelines.

- Prepare, periodically update, and distribute a form for the use of sentencing courts which will assist such courts in recording the reason or reasons for any sentence imposed in a felony case which is greater or less than the sentence recommended by the discretionary sentencing guidelines.

- Prepare guidelines for sentencing courts to use in determining appropriate candidates for alternative sanctions which may include, but not be limited to (i) fines and day fines, (ii) boot camp incarceration, (iii) local correctional facility incarceration, (iv) diversion center incarceration, (v) detention center incarceration, (vi) home incarceration/electronic monitoring, (vii) day or evening reporting, (viii) probation supervision, (ix) intensive probation supervision, and (x) performance of community service.

- Develop an offender risk assessment instrument for use in all felony cases, based on a study of Virginia felons, that will be predictive of the relative risk that a felon will become a threat to public safety.

- Apply the risk assessment instrument to offenders convicted of any felony that is not specified in (i) subdivision 1, 2 or 3 of subsection A of §17-237 or (ii) subsection C of §17-237 under the discretionary sentencing guidelines, and shall determine, on the basis of such assessment and with due regard for public safety needs, the feasibility of achieving the goal of placing 25% of such offenders in one of the alternative sanctions. If the Commission so determines that achieving the 25% or a higher percentage goal is feasible, it shall incorporate such goal into the discretionary sentencing guidelines, to become effective on January 1, 1996. If the Commission so determines that achieving the goal is not feasible, the Commission shall report that determination to the General Assembly, the Governor and the Chief Justice of the Supreme Court of Virginia on or before December 1, 1995, and shall make such recommendations as it deems appropriate.

- Monitor sentencing practices in felony cases throughout the Commonwealth, including the use of the discretionary sentencing guidelines, and maintain a database containing the information obtained.

- Monitor felony sentence lengths, crime trends, correctional facility population trends and correctional resources and make recommendations regarding projected correctional facilities capacity requirements and related correctional resource needs.

- Study felony statutes in the context of judge-sentencing and jury-sentencing patterns as they evolve after January 1, 1995, and make recommendations for the revision of general criminal offense statutes to provide more specific offense definitions and more narrowly prescribed ranges of punishment.

- Report upon its work and recommendations annually on or before December 1 to the General Assembly, the Governor and the Chief Justice of the Supreme Court of Virginia.

- Perform such other functions as may be otherwise required by law or as may be necessary to carry out the provisions of the chapter.

The Commission must develop and implement an offender risk assessment instrument that will be predictive of the relative risk that a felon will become a threat to public safety in the future, and determine, with due regard for public safety, the feasibility of diverting 25% of non-violent offenders from traditional incarceration into alternative sanctions.

◆ Effective Date of the New Sentencing Guidelines

The first sentencing guidelines for Virginia's new "truth in sentencing" system were promulgated by the General Assembly in the same legislation which established the Sentencing Commission. These guidelines are effective beginning January 1, 1995, and apply to all felonies committed on or after that date. Based on the experiences under the legislatively mandated guidelines, the Commission may recommend revisions to the guidelines, which would automatically go into effect July 1, 1996, if not acted upon by the 1996 General Assembly. The revision process will proceed on an annual basis in each successive year thereafter.

◆ Voluntary Feature of the Sentencing Guidelines

While compliance with guidelines recommendations is voluntary, completion of guidelines work sheets is now statutorily mandated.

Compliance with Virginia's guideline recommendations is voluntary: judges use them as a reference but may choose to sentence outside the guidelines in particular cases. While compliance with guideline recommendations is voluntary, completion of guidelines work sheets is now mandatory as stipulated in §19.2-298.01 of the Code of Virginia. Judges are required to review guidelines work sheets and recommendations in all felony cases covered by the guidelines and sign the work sheets. The clerk of court is required to send the work sheet and court order to the Commission. Also, in cases when judges choose to sentence outside the guidelines recommendation, judges must, pursuant to §19.2-298.01 (B), provide written explanation for the departure.

In contrast to Virginia's guidelines, the federal guidelines and most other states' guidelines bind judges to adherence through legislative mandate; consequently, departures from these guidelines constitute grounds for appeal. Compliance with Virginia's guidelines, however, is not legislatively mandated and therefore does not impede a trial judge's authority to sentence outside the guidelines. If, because of aggravating or mitigating circumstances, a judge wishes to impose a sentence outside the range recommended by the guidelines, he or she is free to do so. The Commission closely examines departures from the guidelines to determine areas where the guidelines require revision.

◆ Development of the New Sentencing Guidelines

Analysis by Offense Groups

Virginia's sentencing guidelines are organized into 12 offense groups. This organization is based on an historical analysis showing that the offense and offender factors considered by judges and the relative importance of these factors varied with the type of primary crime at conviction. Therefore, the guidelines factors found within a particular offense group are those which proved consistently important in determining historical sentences for that crime category. Since the scores and factors for each offense group were developed on the basis of only those offenses within the category, the guidelines for each offense group are tailored to the scores within that category alone and are not interchangeable among offense groups.

The sentencing guidelines are organized according to the following offense groupings: assault, burglary of a dwelling, burglary of other structures, drugs, fraud, homicide, kidnapping, larceny, robbery, rape, other sexual assault, and miscellaneous felony offenses.

Conversion to Historical Time Served

The initial sentencing guidelines adopted by the General Assembly to be in place from January 1, 1995, through June 30, 1996, were developed by first analyzing information on sentences imposed for the most recent five years of available data on sentencing decisions. Sentencing decisions were analyzed from 1988 through 1992, a total of 105,624 felony level cases. After this examination, staff then studied data on the time served in jail or prison for offenders released from incarceration from 1988 through 1992. Such analysis revealed that offenders sentenced to prison serve, on average, only about one-quarter to one-third of the sentence imposed by the judge or jury. Figure 1, for example, graphically demonstrates that offenders released in FY93 served substantially less time in prison than was originally called for by the sentence imposed in the courtroom. The study resulted in sentencing guidelines recommendations which, at this stage, reflected historical patterns of sentence dispositions (whether the offender received prison, jail, or no incarceration) and historical patterns of time served on sentence for those receiving a sentence of incarceration.

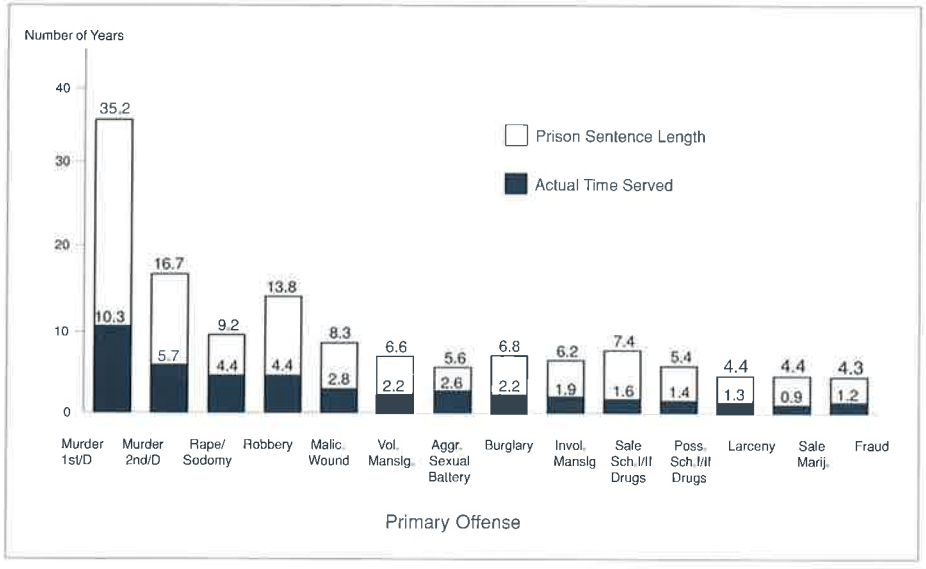


Figure 1

Average Time Served in Prison by Virginia Felons

Released in FY 93

Anticipation of Earned Sentence Credits

Recommendations for incarceration sentence lengths, which at this stage reflected historical time served, were then increased by 13.4%. This increase reflects the projected award of sentence credits that may be earned under the new system. Although offenders may earn up to 15% reduction of their sentences under the new system, it is anticipated that, on average, prisoners will earn somewhat less than that.

Elimination of Extreme Lengths of Stay

Of all the lengths of time served by similarly situated offenders contained in the Commission's data base for each offense, the upper and lower quartiles were eliminated. The result captures the middle 50% of the 1988-1992 cases based on time served in prison, without the most extreme lengths of stay at either end. The remaining high and low incarceration lengths of stay marked the high and low ends of the new recommended sentencing range, with the median (middle) sentence marking the new sentencing guidelines midpoint.

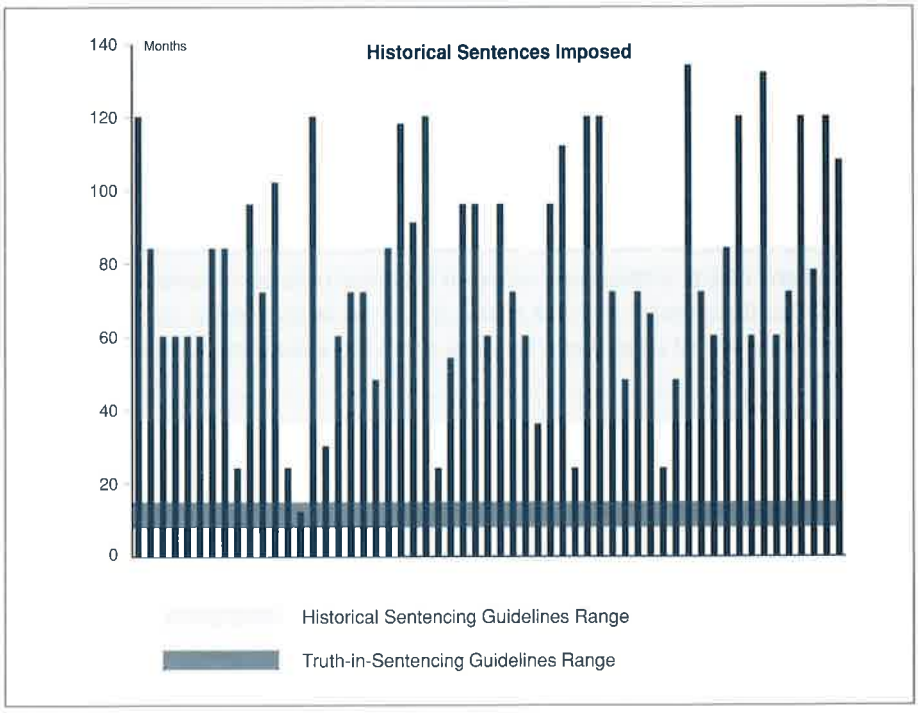
Case Example: First Time Drug Dealers

Figure 2 displays 1988-1992 sample cases for offenders convicted of the sale of a Schedule I or II drug (e.g. cocaine or heroin) with no prior felony record. The vertical bars represent historical sentences (after any suspended time) imposed by judges and juries under the system of parole and good conduct allowance in place at that time.

Figure 2

Historical Sentencing Guidelines vs. Truth-in-Sentencing Guidelines

Sell Schedule I/II Drugs for Profit
No Prior Record



Horizontal bands have been superimposed to represent the historical sentencing guidelines recommended range (3 to 7 years, with a midpoint recommendation of 5 years) and the new truth in sentencing guidelines recommendation (7 to 16 months with a 1 year midpoint). The sentencing guidelines recommendation under the new truth in sentencing system is much lower than the sentencing guidelines under the previous system.

However, under the old system a first-time drug felon receiving a 5 year sentence would serve, on average, about 10 months. Under the new sentencing scheme, a first-time drug dealer who receives a 1 year sentence will serve, on average, about 10 months. Through this methodology, time actually served in prison remains about the same but the announced sentence is much shorter.

Figure 3 shows the same sample cases of first time dealers of a Schedule I or II drug, with the vertical bars representing not the sentences imposed, but the *actual time offenders served in prison* on the sentences handed down in the courtroom. The horizontal bands again represent the historical sentencing guidelines and the new truth in sentencing guidelines recommendations. Although the truth in sentencing guidelines recommendation appears substantially lower than the historical guidelines, it truly encompasses the middle 50% of cases based on actual time served in prison. This is what is meant by the conversion to a "truth in sentencing" system.

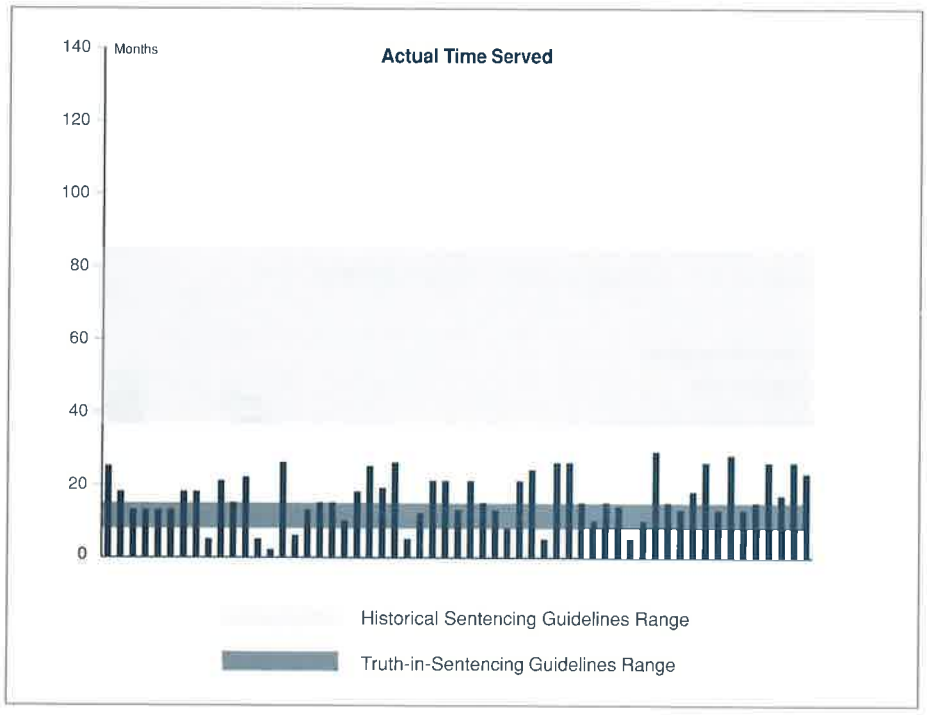


Figure 3

Historical Sentencing Guidelines vs. Truth-in-Sentencing Guidelines

Sale Schedule I/II Drugs for Profit
No Prior Record

The legislation not only established "truth in sentencing," but also ensured that violent criminals spend more time in prison. Thus, the legislation stipulated prescriptive, or normative, adjustments to the sentence guidelines recommendations in cases involving violent offenders.

Longer Sentence Recommendations for Violent Offenders

Achieving "truth in sentencing," however, was not the only goal of the new legislation. Ensuring that violent criminals spend more time in prison than in the past was also a priority. During its September 1994 Special Session, the General Assembly acted to alter recommendations for certain categories of crimes, prescribing prison sentence recommendations that are significantly greater than historical time served for these crimes. These prescriptive, or normative, adjustments are made for violent crimes or in cases involving a prior violent adjudication or conviction.

Longer Sentences through Midpoint Enhancements

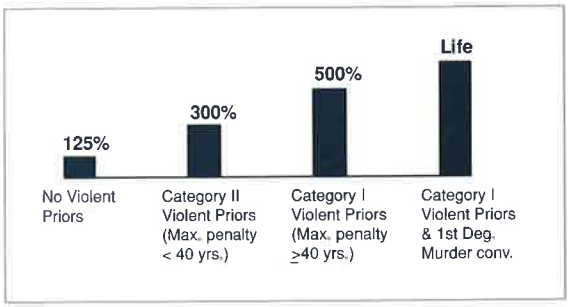
The normative adjustments enacted in the new legislation were implemented by increasing the new sentencing guidelines midpoint recommendations (now based on historical time served in incarceration) for cases involving violent offenders. Specifically, the sentencing guidelines score for the primary (most serious) offense in a case was raised, or "enhanced." Additionally, the legislation specified degrees of enhancements depending on the nature of the primary offense and the seriousness of the offender's prior record of violence. The midpoint enhancements to be incorporated into the sentencing guidelines were stipulated by the General Assembly in §17-237A of the Code of Virginia.

Specifically, for the crimes of first degree murder, second degree murder, rape in violation of §18.2-61, forcible sodomy, object sexual penetration, and aggravated sexual battery, the recommended prison sentencing guidelines midpoint for the primary offense factor was enhanced by: 125% for offenders without prior convictions for violent crimes, 300% for those with a criminal record that has at least one violent prior felony conviction or juvenile adjudication with a statutory maximum penalty of less than 40 years (classified as a **Category II** criminal record), and 500% for those with a criminal record that has at least one violent prior felony conviction or juvenile adjudication with a statutory maximum penalty of 40 years or more (classified as a **Category I** criminal record). Tables I and II in Appendix 1 provide a listing of all crimes considered to be Category I and II violent felonies.

Figure 4

Midpoint Enhancements

For first and second degree murder, rape (§18.2-61), forcible sodomy, object sexual penetration, and aggravated sexual battery-- increase midpoints by:



For the crimes of voluntary manslaughter, robbery, aggravated malicious wounding, malicious wounding, any burglary of a dwelling house or statutory burglary of a dwelling house or any burglary committed while armed with a deadly weapon or any statutory burglary committed while armed with a deadly weapon, the recommended prison sentencing guidelines midpoint for the primary offense factor was enhanced by: 100% for offenders with no prior violent convictions, 300% for Category II records, and 500% for Category I records.

For voluntary manslaughter, robbery, aggravated malicious or malicious wounding, any burglary of dwelling, or any burglary while armed with deadly weapon-- Increase midpoints by:

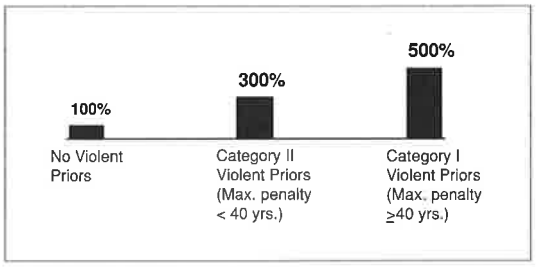


Figure 5

Midpoint Enhancements

For the crimes of manufacturing, selling, giving or distributing, or possessing with the intent to do any of the former, of a Schedule I or II controlled substance, the recommended prison sentencing guidelines midpoint for the primary offense factor will not be enhanced for those without a prior violent crime, but will be increased 200% for Category II and 400% for Category I records.

For manufacturing ,selling, giving, or distributing, possessing with intent etc. a Sch. I/II drug -- Increase midpoints by:

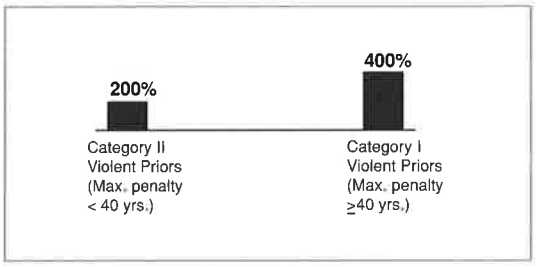


Figure 6

Midpoint Enhancements

For any offense not listed above, the recommended prison sentencing guidelines midpoint for the primary offense factor will not be enhanced for those without a prior violent crime, but will be enhanced 100% for Category II and 300% for Category I records.

For all other felony offenses -- Increase midpoints by:

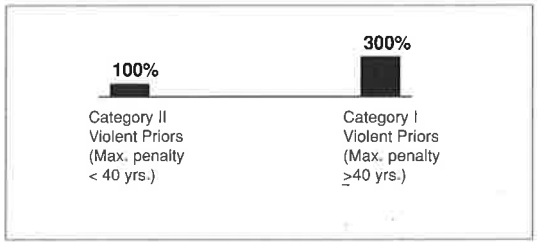


Figure 7

Midpoint Enhancements

Case Example: Robbers with a Prior Robbery Conviction

Figure 8 displays 1988-1992 sample cases for offenders convicted of robbery with a firearm who have committed a prior robbery (Category I Prior Record). The vertical bars represent historical sentences (after any suspended time) imposed under the previous sentencing system. The horizontal bands indicate the historical sentencing guidelines recommended range (6 to 18 years, with a midpoint recommendation of 13 years) and the new truth in sentencing guidelines recommendation (12 to 19 years, with a 16 year midpoint). For offenders with this type of offense profile, the two sentencing ranges overlap due to the 500% increase in the recommended prison sentencing guidelines midpoint for the offenders sentenced under the new system. The new truth in sentencing guidelines recommended midpoint of 16 years is actually higher than the recommended historical midpoint under the previous guidelines. In addition, the upper end of the recommended range under the new sentencing guidelines surpasses the upper recommendation of the historical sentencing guidelines system. Unlike their counterparts in the parole system who served on average 25%-33% of their sentences, offenders sentenced under the new truth in sentencing system must serve at least 85% of the effective sentence imposed.

Figure 8

Historical Sentencing Guidelines vs. Truth-in-Sentencing Guidelines

Robbery of a Business with a Firearm
Category I Prior Record

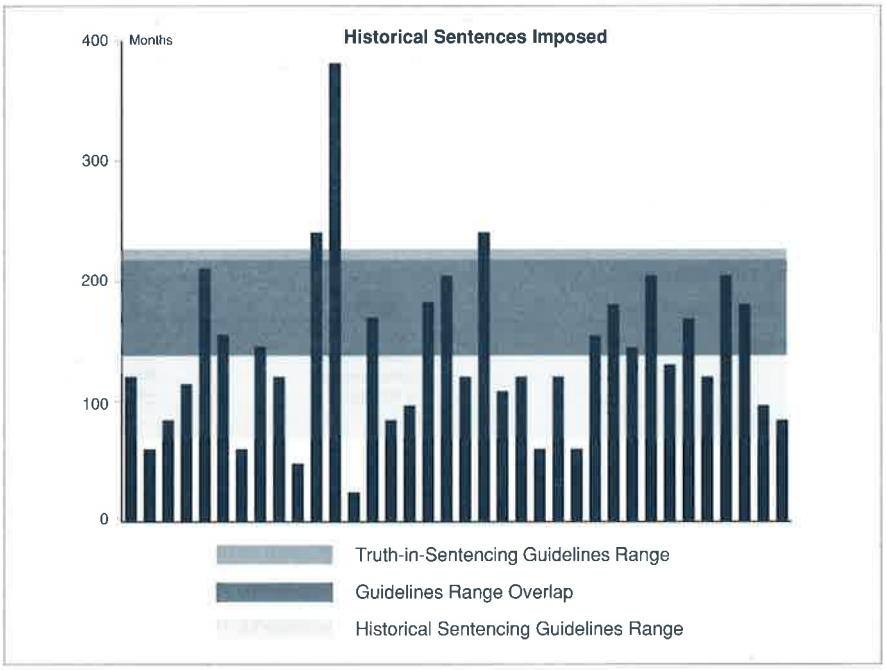


Figure 9 shows the same sample cases of second time robbers, with each vertical bar representing not the historical sentence imposed, but the actual time the offender served in prison. The historical sentencing guidelines range and the new truth in sentencing guidelines range are once again displayed by the horizontal bands. Among these 1988-1992 sample cases, not one offender even served the minimum sentence now being called for under the guidelines system. This demonstrates that, if judges comply with the new guidelines recommendations, the enhancements made to the recommended midpoints will significantly increase the amount of time served in prison by violent offenders.

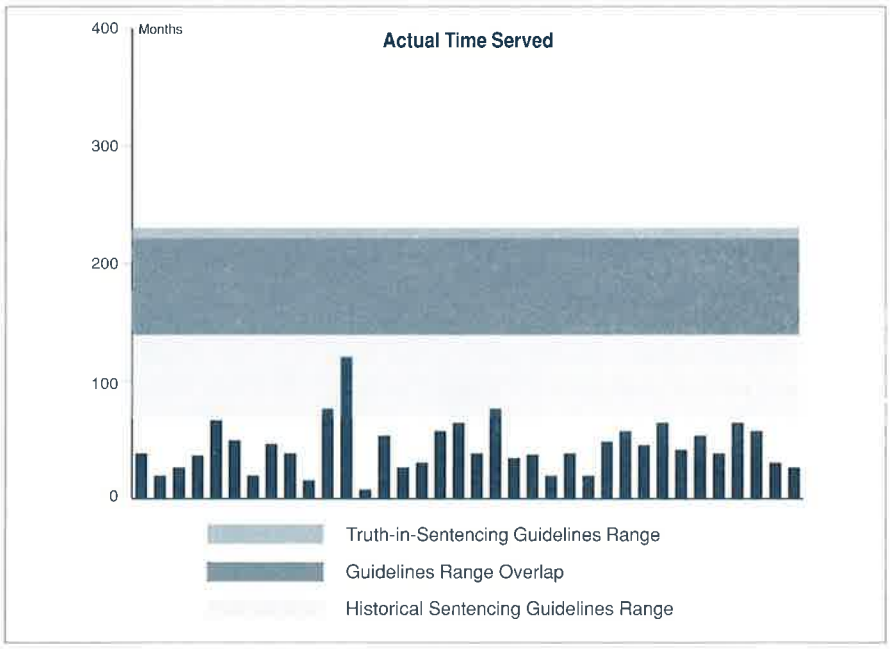


Figure 9

Historical Sentencing Guidelines vs. Truth-in-Sentencing

Robbery of a Business with a Firearm
Category I Prior Record

Figure 10 displays how the midpoint enhancements for violent offenders would apply in cases of offenders convicted of rape. Under the previous sentencing system, an offender convicted of rape with no prior history of violence (known as the "basic case") served, on average, approximately 5.6 years in prison, but even a rapist with a history of violent crime served only, on average, 6.7 years. The new sentencing guidelines call for a minimum 125% increase in historical time served as the new sentencing guidelines midpoint recommendation. The new guidelines recommend a sentence of 12.6 years for an offender with no violent criminal history. For a rapist who has committed a prior violent felony which has a statutory maximum penalty of less than 40 years (a Category II prior record), the new guidelines midpoint is 22.3 years; while a rapist with a prior violent felony that has a statutory maximum penalty of 40 years or more (a Category I prior record) would qualify for a new guidelines midpoint of 33.5 years. Again, offenders sentenced under the new system must serve at least 85% of the sentence.

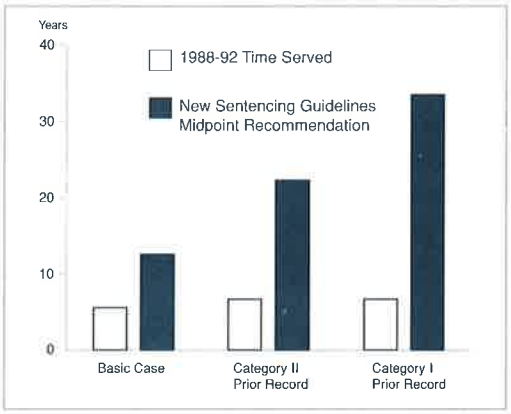


Figure 10

Historical Time Served vs. New Guidelines Midpoint Recommendation

Forcible Rape

◆ Features of The New System

Approximately ninety-five percent of all felony convictions in Virginia are covered by the new sentencing guidelines.

Nearly All Felonies Covered

The new sentencing guidelines cover approximately 95% of all felony offense convictions in our circuit courts. There are only a handful of offenses for which the guidelines are not applicable, and in these cases the judge must sentence offenders without the benefit of sentencing guidelines. The truth in sentencing system, however, still applies in these cases, and the offender will serve nearly all of the prison or jail sentence imposed in the courtroom.

Inclusion of Juvenile Adjudications

With the introduction of the new sentencing guidelines system, an offender's juvenile adjudications of delinquency for felony-level crimes are now scored as part of an offender's prior criminal record. These adjudications of delinquency count just the same as an adult conviction in scoring prior record factors. Many young offenders have extensive, and sometimes violent, criminal juvenile records the extent and seriousness of which were not explicitly scored by the sentencing guidelines in the past. Research on career criminals documents that the more prior arrests and the younger the criminal, the more likely he will continue to commit crimes. Understanding that most criminals begin their careers around age 14, peak by age 21, and "retire" by their late twenties to mid thirties, and with an eye towards the concept of incapacitating offenders through their crime-prone age years, the legislation specified that adjudications of juvenile delinquency be scored as part of an offender's prior record on the new sentencing guidelines. The previous guidelines system scored only adult convictions and convictions of juveniles tried as adults in the circuit courts, and considered juvenile record only in a limited fashion, by adding a small point value to the offender's guidelines total score if the offender had any record of juvenile delinquency.

In addition to traditional probation, judges now have the additional tools of post-release term and post-release supervision to ensure community supervision after an offender's release from incarceration.

Supervision After Release Maintained

While the new legislation put an end to the practice of discretionary early release of offenders from Virginia's prisons, the need for some form of active supervision of offenders in the community after their release from incarceration was recognized. Although judges may continue the tradition of suspending a portion of the imposed sentence and placing the offender on a period of probation following incarceration, the legislation provides for post-incarceration supervision for cases in which judges wish to impose the entire statutory maximum penalty for a particular offense without suspending any time. As specified in §18.2-10 and §19.2-295.2, the post-release term and post-release supervision period are provided as additional tools for judges. After imposing an incarceration sentence, the court may impose an additional term, all of which is suspended, on the condition of successful completion of post-release supervision; this post-release term may run anywhere from six months to three years for each felony count. If a judge elects to impose a post-release term, he or she must also specify the period of post-release supervision, which may also run from six months to three years for each felony count and may be a different length than the post-release term. This post-release supervision is to be conducted in the same manner as traditional probation.

Reasons for Departure Mandatory

In its 1994 Special Session legislation, the General Assembly enacted §19.2-298.01(A,B) of the Code of Virginia, which stipulates that after the judge is presented with, and has reviewed the guidelines, he must state for the record that the review has been accomplished. While compliance with the guidelines recommendation is still voluntary, this Code section requires that the judge provide the Commission with a written explanation of his departure if he chooses to sentence outside of the recommended range. Because the new sentencing guidelines include normative (prescriptive) adjustments, the opinions of the judiciary are deemed to be highly relevant. Detailed departure reasons provided by the judiciary may indicate to the Commission elements of the guidelines which may need adjustment or amendment.

While compliance with the guidelines is still voluntary, a judge must provide the Commission with a reason for departure if he sentences outside the guidelines recommended range.

New Maximum for Jail Sentences

Due to the abolition of parole and the conversion to a truth in sentencing system in which Virginia's felons must serve at least 85% of their prison and jail sentences behind bars, the maximum sentence for which a felony offender can be sentenced to jail is now six months. Under the previous sentencing system, a felon with a sentence of two years or less was to serve that time in a local jail facility and considered the responsibility of the locality. A felon sentenced to a sentence of more than two years was defined as a state responsible prisoner charged to the Virginia Department of Corrections, although that offender may have served out his time in the local jail. Under the previous sentencing system, offenders with sentences of one year or more were eligible for early release through parole. Parole is abolished under the new system and all felons, regardless of the length of their sentences, must serve nearly all their incarceration sentences behind bars. Therefore, only felons with sentences of six months or less are now considered to be local responsible prisoners for the local jails. Felons with sentences longer than six months are to be the responsibility of the Department of Corrections. Until June 30, 1996, the Department may continue to house prisoners with sentences of less than a year in the local jails.

Previous Sentencing Guidelines System Applies to Offenses Committed Prior to January 1, 1995

With oversight by the Sentencing Guidelines Committee of the Judicial Conference of Virginia, there has been a statewide system of discretionary sentencing guidelines in Virginia since 1991. The primary mission of that guidelines system was to reduce unwarranted sentencing disparity through the establishment of rational and consistent sentencing standards. The cornerstone of that work was the belief that offenders with similar circumstances convicted of similar crimes should receive similar punishments. The recommended sentencing ranges under those guidelines were based on the middle 50% of historical sentences imposed in Virginia's courtrooms during a system with parole and extensive reductions in sentence due to good conduct credits. These historical guidelines will continue to apply in felony cases for offenses committed prior to January 1, 1995, since offenders convicted of crimes that occurred prior to that date are eligible for parole release. Therefore, the Sentencing Guidelines Committee of the Judicial Conference of Virginia has elected to remain in existence as long as the historical sentencing guidelines are in use.

◆ What It All Means

For non-violent offenders, the new recommended sentencing guidelines midpoints and ranges will appear shorter than under the previous system, but the actual time served in jail or prison will be about the same as the period 1988-1992.

If sentencing guidelines recommendations are followed by Virginia's judges, violent offenders will serve significantly longer prison terms under the new system.

For offenders sentenced for felony offenses committed on or after January 1, 1995, parole has been eliminated. Jail and prison sentences that a judge imposes, and corresponding guidelines' recommendations, reflect actual time to be served in jail or prison, less a reduction of no more than 15% for earned sentence credit. Judges will be able to predict actual time served in jail or prison under this system with a high degree of accuracy. This embodies the "truth in sentencing" philosophy.

The new sentencing guidelines represent a departure from the previous sentencing guidelines system. The previous sentencing guidelines recommended a sentence, a large portion of which was not served after application of parole and good conduct allowance credit. In addition, the previous system was entirely based on historical sentences, with no prescriptive or normative legislative adjustments.

Under the new system, with the elimination of parole, the judge's sentence will indicate the actual time to be served in incarceration, with the offender only eligible for limited earned sentence credits. For non-violent offenders, the new recommended sentencing guidelines midpoints and ranges will appear shorter than under the previous system, but the actual time served in jail or prison will be about the same as the period 1988-1992. The new system calls for longer lengths of incarceration for violent offenders, who may now spend up to six times longer in prison than the historical average. The amount of additional time will depend on the seriousness of the crime and the offender's prior criminal record of violent offenses. If sentencing guidelines recommendations are followed by Virginia's judges, violent offenders will serve, on the average, significantly longer prison terms under the new system.

ACTIVITIES OF THE COMMISSION

◆ Overview

The Commission serves as an integral element of the criminal justice system in the Commonwealth. Fulfilling its mission requires the Commission to assume a wide array of responsibilities and to pursue an assortment of very diverse activities. In its inaugural year, the Commission has launched the Commonwealth's new criminal sentencing system and has successfully implemented an entirely redesigned system of sentencing guidelines. Currently, the Commission is engaged in various research projects, training and education services, as well as monitoring and oversight activities. The Sentencing Commission is destined to play a dynamic role within the realm of criminal justice in Virginia.

The Sentencing Commission will play a dynamic role in the criminal justice system in Virginia.

◆ Implementation of the New Sentencing Guidelines

The General Assembly established the Sentencing Commission and adopted the first set of sentencing guidelines for Virginia's new "truth in sentencing" system during its September 1994 Special Session. It became the Commission's first responsibility to implement the legislatively mandated sentencing guidelines by January 1, 1995.

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During October and November of 1994, the Commission staff developed sentencing guidelines work sheets which embodied the new truth in sentencing guidelines recommendations, as specified in §17-237(A) of the Code of Virginia. It is important that users of the sentencing guidelines be able to easily distinguish between the new truth in sentencing guidelines work sheets and the work sheets used in the previous sentencing guidelines, since the new truth in sentencing system and the historical sentencing system will operate concurrently for some time. The new sentencing guidelines apply to all offenses committed on or after January 1, 1995, while the older sentencing guidelines are applicable to offenses committed during or prior to 1994. The new work sheets are designed to have a strikingly different look from the work sheets used in the previous sentencing guidelines system, and the new work sheets were printed on blue paper to further differentiate them.

Thousands of the new work sheets were distributed by mail to all Commonwealth's attorneys' offices and probation & parole offices throughout the state by January 1, 1995, the first day of the new truth in sentencing system. Given the usually lengthy case processing time for a typical felony case, the Commission did not expect to see a significant number of cases sentenced under the new system until well into the third quarter of 1995. For the few cases sentenced under the new system prior to the distribution of the new instruction manuals, the Commission staff was available via the sentencing guidelines "hot line" phone to answer any questions and to provide assistance to anyone needing help completing the work sheets.

Beginning in November of 1994 and continuing into the new year, the Commission staff was also busy preparing the new sentencing guidelines instruction manual. The manual provides pertinent explanations of the new sentencing system, detailed instructions as to how to correctly complete the guidelines work sheets, and many useful examples and illustrations. The manual offers convenient look up tables to assist the user in categorizing an offender's prior criminal record for the purposes of enhanced sentence recommendations, and includes an easy-to-use reference table of

the Virginia Crimes Codes, the numeric codes designating crimes specified in the Code of Virginia. The new manual was also designed with a distinct look and new colors in order to set it apart from previously released manuals.

The new manuals were distributed through several modes. First, all active circuit court judges and retired judges who still hear cases received new manuals by mail. The majority of the Commonwealth's attorneys, probation officers and public defenders, and their respective offices, received manuals during training seminars conducted throughout the state in March, April and May 1995. Many private defense attorneys also obtained their manuals during these training seminars. New manuals are continually being ordered, especially by private defense attorneys, and the Commission is responding to these requests very effectively by mail.

As of November 15, 1995, the Sentencing Commission has distributed 1,154 manuals to Commonwealth's attorneys and probation offices and public defenders, and provided 654 manuals to private defense attorneys.

◆ Training and Education

In the spring of 1995, the Commission conducted 55 training sessions in 13 sites, from Virginia Beach to Big Stone Gap: 475 probation officers, 245 Commonwealth's attorneys, 325 defense attorneys, 64 public defenders, and 100 other criminal justice professionals attended these seminars.

Training and education are on-going activities of the Commission. The Commission gives high priority to instructing probation and parole officers and Commonwealth's attorneys how to prepare complete and accurate guidelines work sheets. The Commission also realizes the imperative of educating the judiciary, defense attorneys and the citizens of the Commonwealth as to the meaning and import of the new criminal sentencing system. In 1995, the Commission has been extremely busy in this regard.

In the first quarter of 1995, the Commission conducted seminars for circuit court judges in each of the six judicial regions across the Commonwealth. During this period, the Commission presented an overview of the new truth in sentencing guidelines at the annual public defender conference held in Richmond. In March, the Commission took part in the Commonwealth's attorneys Spring Training Institute, which was attended by over 400 Commonwealth's attorneys and assistant Commonwealth's attorneys.

In the spring, the Commission staff focused on training and education activities. The Commission conducted 55 training sessions in 13 sites around the Commonwealth, from Virginia Beach all the way to Big Stone Gap in southwest Virginia. The Commission utilized public facilities, such as law enforcement training academies and local community colleges, as training sites. The training sessions were broadly advertised by mailings to Commonwealth's attorneys' offices, probation and parole offices, public defenders and the entire membership of the Criminal Law Section of the Virginia State Bar. The spring training series was highly attended by Commonwealth's attorneys and probation officers from around the state. Despite mass mailings of brochures and approval of the class for Mandatory Continuing Legal Education credit (MCLE) hours, attendance by private defense attorneys was

less than expected. In total, 475 probation officers, 245 Commonwealth's attorneys, 325 defense attorneys, 64 public defenders, and 100 other criminal justice professionals attended these seminars.

In May, the Commission instructed new circuit court judges at their pre-bench training, and subsequently participated in the annual judicial conference held in Williamsburg and attended by circuit court judges, Court of Appeals judges and Virginia Supreme Court justices.

During the summer and fall of 1995, the Commission provided training per special request by local officials. Commission staff conducted training sessions at the behest of the Portsmouth and Henrico Commonwealth's attorneys' offices, Hanover, Richmond and Chesterfield probation & parole offices, and the Williamsburg and Alleghany/Bath/Highland Bar Associations.

In September through November of 1995, the Commission staff set up a second statewide training series. Nineteen training sessions were held in six locations, from Virginia Beach to Harrisonburg and Abingdon. These seminars were again promoted via mailings. The second round of training seminars was more highly attended by private defense attorneys than the first.

As in the past, the Commission will continue to provide sentencing guidelines training on request to any group of criminal justice professionals. The Commission regularly conducts sentencing guidelines training at the Department of Corrections' Training Academy as part of the curriculum for new probation and parole officers. In addition, the Commission will gladly consider presenting information to any group or organization interested in learning more about Virginia's new sentencing system and the new sentencing guidelines.

◆ Support Services

The Commission maintains a "hot line" phone line. Staff is available to respond to any questions or concerns regarding the sentencing guidelines, or provide assistance as needed. The hot line is an important resource for guidelines users around the Commonwealth. Each year, the Commission handles thousands of calls through its hot line service.

The Commission maintains a "hot line" service as an important resource for users who have any questions or concerns regarding the sentencing guidelines.

The Commission oversees the distribution of sentencing guidelines work sheets and instruction manuals. The Commission staff ensures that Commonwealth's attorneys and probation offices are amply stocked with a supply of sentencing guidelines work sheets and manuals, and fulfills requests for additional work sheets on an continual basis. Guidelines manuals are supplied free of charge to state and local government agencies and provided for a reasonable fee to non-governmental entities.

◆ Monitoring and Oversight

Because the new guidelines include normative adjustments, the judicial departure reasons are deemed to be highly relevant.

Work Sheet Completion and Submission

The Commission monitors the completion of the sentencing guidelines work sheets and the submission of those work sheets to the Commission. The legislation passed by the General Assembly in September 1994 (§17-235 of the Code of Virginia) requires that sentencing guidelines work sheets be completed in all felony cases for which there are guidelines and specifies that judges must announce during court proceedings that review of the guidelines has been completed. The guidelines forms must be signed by the judge and then become a part of the official record of each case. The clerk of the circuit court is responsible for sending the completed and signed work sheets to the Commission. The guidelines work sheets are reviewed by the Commission staff as they are received. The Commission staff performs this check to ensure that the guidelines forms are being completed accurately and properly.

As the result of this review process, Commission staff has encountered cases in which the work sheets have not been completed correctly. Conversion to the new truth in sentencing system involves newly redesigned forms, new procedural requirements, and several new features that were not part of the judicially developed historical guidelines system. Undoubtedly, there will be a transition period, during which users and preparers of the sentencing guidelines will become accustomed to and more knowledgeable of the new system. The Commission will continue its very active training and education schedule and will continue its support of the sentencing guidelines hot line. With these efforts, the Commission anticipates that work sheet errors will diminish in the future.

During the first year, Commission staff has noted several different types of errors:

- confusion between post-release term and post-release supervision period;
- missing judicial departure explanations;
- missing work sheets;
- lack of judicial signature;
- confusion over the new maximum jail sentence;
- unauthorized persons preparing the work sheets; and
- improper scoring of cases involving 1994 and 1995 offenses.

In addition to the above work sheet problems, the Commission has concluded that extremely general, vague or ambiguous judicial departure explanations are of limited use. For instance, a judge may cite "plea agreement" as his reason for sentencing outside the guidelines recommendation. That explanation alone does not relay useful information to the Commission about judicial thinking in the sentencing process. The detailed departure reasons on the work sheets are very important to the Commission as it considers revisions to the guidelines in the future, because it is the reaction of the judiciary that will inform the Commission as to where the guidelines may need adjustment. Because the new sentencing guidelines include normative legislative adjustments, the opinions of the judiciary are deemed to be highly relevant.

To address work sheet errors and vague departure explanations, the Commission is returning problem cases to the appropriate circuit court judge or his or her clerk accompanied by a letter of explanation of why each case is being returned. The Commission requests that the corrected forms be returned to the Commission as soon as possible. In many of these cases, the Commission disseminates reference material to help users better understand the new system.

The Commission realizes the importance of open dialog with the judiciary and work sheet preparers. The Commission feels that communication will be the key for a successful cooperative effort.

Compliance with Guidelines Recommendations

Judicial compliance with sentencing guidelines recommendations is being monitored carefully. The new sentencing guidelines were developed with the understanding that Virginia could not afford to put every offender into prison for a longer term of incarceration, but that it was important to target violent offenders for longer prison stays. The new no parole legislation designs sentencing guidelines which satisfy the goal of incarcerating violent offenders for longer periods while allowing for an affordable plan for future correctional expenditures. In order to achieve this balance, it is important for the judiciary to embrace the new sentencing guidelines with a relatively high rate of compliance. This is one reason why judicial input through departure reasons is so important as the Commission considers future revisions of the guidelines.

A detailed study of judicial compliance with the new sentencing guidelines is presented in the compliance section of this report.

◆ Commission Meetings

At its first meeting, Commission members discussed the "start-up" experiences of other states that had abolished parole to achieve truth in sentencing, and the importance of educating the public about the truth in sentencing system.

The full membership of the Commission meets at least four times annually. The Commission often invites outside speakers to its meetings to present information on issues pertinent to sentencing in Virginia and the activities of the Commission. The meetings throughout the first year of the Commission have addressed very full and active agendas.

December 12, 1994 ——

In its first full meeting, the Commission reviewed its legislatively mandated responsibilities and addressed organizational, budgetary and personnel issues. Commission staff made a detailed presentation of the methodology behind the new truth in sentencing guidelines for Commission members not previously acquainted with the development of the new guidelines. The members discussed the "start up" experiences of other states that had abolished parole to achieve truth in sentencing, such as Florida. The importance of educating the public about the new truth in sentencing system was underscored.

Judge Gates, Chairman of the Commission, informed members that an ad hoc Executive Committee had been formed out of necessity to handle the most urgent Commission business prior to the first meeting of the full Commission. He requested that the full Commission endorse several actions taken by the ad hoc Executive Committee, as follows: 1) the hiring of Dr. Richard P. Kern as Director; 2) the request for additional funding for the Commission via a budget addendum to accommodate start up costs; 3) the design and format of the new guidelines work sheets; 4) planning for training and education programs to be conducted by Commission staff in 1995; and 5) staff support of the previous sentencing guidelines system as long as offenders are still sentenced under those guidelines (for offenses committed prior to January 1, 1995). The Commission undertook the formation of the permanent Executive Committee to include at least one member from each of the bodies that appoints Commission members. By unanimous approval, Judge Gates, Judge Robert Stewart, Judge Bruce Bach, Mr. Richard Cullen, Mr. Peter Decker, Mr. Lane Kneedler and Ms. Vivian Watts comprise the Executive Committee of the Sentencing Commission. Before it adjourned, the Commission selected dates for each of its quarterly meetings in 1995.

March 13, 1995 ——

By its spring meeting, the Commission had successfully implemented the new sentencing guidelines system, despite a very short lead time. The Commission reviewed all the activities of the previous five months. This included the production and distribution of new work sheets and the development of a new instruction manual. The Commission was presented with the status and outline of the new manual, and the schedule for distribution. The Commission approved the training curriculum prepared by staff for Commonwealth's attorneys, probation officers and defense attorneys.

The Commission considered the impact of several of the new features of the guidelines system, such as the post-release term, post-release supervision period, and mandatory judicial departure explanations. The Commission considered other issues relating to the guidelines such as plea bargaining. Because defense attorneys are not

authorized to complete guidelines work sheets, the Commission members agreed that defense review of the completed work sheets prior to their becoming official record is very important. There was discussion about §19.2-389.1 and §16.1-305 of the Code of Virginia which do not provide Commonwealth's attorneys access to juvenile record information. Commonwealth's attorneys are authorized to complete guidelines work sheets in certain cases and an accurate scoring of prior record includes a review of juvenile record. It was suggested that Commonwealth's attorneys attempt to get a standing court order from their juvenile and domestic relations court judge allowing access to juvenile records in that locality. This approach would still require Commonwealth's attorneys to ask probation officers to get juvenile record information from other localities when necessary. It was noted that due to the usually lengthy felony case processing time, the Commission did not expect to see a significant number of cases sentenced under the new guidelines for several months.

The Commission discussed the issues and concerns raised by the state's circuit court judges during judicial training sessions. Circuit court judges expressed grave concern that the public will perceive judicial sentencing for non-violent offenders under the new guidelines as being more lenient than in the past. Judges debated the legality of instructing juries (who must not be told about guidelines recommendations) that an offender will now serve at least 85% of the sentence imposed. Judges raised logistical concerns about completion of guidelines in jury trials and plea bargains, access by Commonwealth's attorneys to juvenile record information, and keeping judicial departure explanations confidential to protect offenders who have cooperated extensively with law enforcement.

In training seminars, judges expressed concern that the public will perceive sentencing under the new guidelines as more lenient than in the past.

The Commission learned that the General Assembly may be interested in judicial compliance with the guidelines. Projections of future prison and jail bedspace needs assume a relatively high degree of judicial compliance with the guidelines.

The Commission was presented with a draft of a public information brochure about the new sentencing system and the new guidelines. Mr. Eric Finkbeiner, Director of Policy and Communication with the Office of the Secretary of Public Safety, spoke to the Commission regarding the Governor's public relations campaign and the plan to give offenders wallet cards as they exit prison which describe the harsher penalties of the new sentencing system.

The Commission reviewed relevant legislation which had passed during the 1995 General Assembly Session, including House Bill 2258, which gives the Commission the responsibility to study and prepare impact statements on bills involving sentencing in Virginia.

Mr. Ron Jordan, Legislative Fiscal Analyst for the House Appropriations Committee, spoke about the recent General Assembly actions pertaining to community corrections in Virginia. Governor George Allen and Chief Justice Harry Carrico briefly greeted the Commission, and Governor Allen thanked the Commission for their hard work in implementing the new sentencing system.

During training seminars, prosecutors and probation officers frequently complained about the inadequacies of the automated criminal history record system.

June 26, 1995 ——

During its summer meeting, Commission staff updated members on training and education activities to date. The staff had addressed over 2,000 people in six months. The Commission reviewed the various concerns raised by those attending training seminars, which included: 1) workload issues, 2) logistical concerns about completion of the guidelines in jury cases and plea bargains, 3) perceived leniency of the guidelines for non-violent offenders, 4) midpoint enhancements for violent offenders which appear arbitrary and extreme, 5) the inclusion of burglaries as violent offenses, and 6) the scoring of prior juvenile adjudications with the same weight as prior adult convictions.

The largest area of concern raised during training, however, related to the issue of prior record. Both prosecutors and probation officers complained that the Central Criminal Records Exchange (CCRE) "rap sheet" system is incomplete, riddled with missing or ambiguous information, and only rarely contains juvenile information. Since scoring prior record is such an important feature of the new guidelines system, there is more concern than ever in having a criminal history record keeping system in place that will complement the new no parole/truth in sentencing legislation. The Commission agreed that some prior record concerns could be addressed at trial through the rules of discovery, but that the criminal history record keeping system as a whole needed much improvement.

Mr. Carl Baker, Deputy Secretary of Public Safety, spoke to the Commission about the criminal history information system. Mr. Baker believed that, while some problems do exist with the current system, he has found that most attorneys simply do not know what information is available and how to get it. Most Commonwealth's attorneys' offices have automated computer access to the rap sheet system. Defense attorneys can submit a form to the State Police with proper documentation and get a copy of their client's criminal history within five working days. Mr. Baker admitted that very few juvenile criminal records are currently available on the system. He described federal grant monies available for localities to improve records, and the goal to integrate the criminal history system with information from the CCRE system, old juvenile records and corrections records.

Mr. Lloyd Young of the Department of Criminal Justice Services (DCJS) made a presentation on the Comprehensive Community Corrections and Pre-Trial Services Acts. He reported that these two acts will be locally established and controlled and funded with monies made available through DCJS. The Comprehensive Community Corrections Act replaces the Community Diversion Incentive (CDI) program. Mr. Young noted that rehabilitative and community-based programming will be extensive and much more coordinated than at present. Mr. Walter Pulliam from the Department of Corrections (DOC) spoke about the State Community-Based Corrections Act. He discussed the Department's plan for diversion centers, detention centers and work camps. Mr. Pulliam described the development of a judicial "bench card" to assist judges in sentencing offenders to the alternative programs in their districts. The Commission staff reminded members that the Commission is legislatively mandated to develop a risk assessment instrument with the goal to divert certain offenders from traditional incarceration into alternative sanctions. The risk assessment tool will ultimately include the new programs described for the Commission at this meeting.

The Commission reviewed the types of completion and submission problems found on the work sheets received to date. The most serious problems appear to be: 1) missing disposition information or missing work sheets, 2) missing, very general or ambiguous departure explanations, 3) confusion relating to post-release term and post-release supervision, as well as the new maximum jail sentence, and 4) submission of photocopies of guidelines work sheets in place of the originals. In addition, the Commission decided that the departure explanation of "plea agreement" was too general and vague to be useful to the Commission as it considers revisions to the guidelines. The Commission members stressed the importance of an open dialog with the judiciary, in order to promote the cooperative effort that will be required for a successful transition to the new system. The Commission resolved to return problem work sheets to the appropriate judge or court clerk, accompanied by a letter of explanation as to why the case was being returned and including any relevant reference material.

The Commission decided that the departure explanation of "plea agreement" is too general and vague to be useful, and is requesting judges to provide more detailed reasons in these departures.

The staff director, Dr. Kern, reported that in order to fulfill its mandate to develop a risk assessment instrument, the Commission had applied for a grant through DCJS from the Byrne Memorial Federal Grant program for $100,000 to conduct the additional research on juvenile record to supplement existing criminal history information. The Commission was presented with a second draft of the Commission's public information brochure, and Commission members submitted several recommendations. The need for informing the public about the new sentencing system was emphasized. During this meeting, the members of the Commission elected to create a number of subcommittees. The Commission resolved to establish the Legislative Subcommittee and the Research Subcommittee.

September 11, 1995 ——

At its fall meeting, the Commission heard reports from the Commission's Legislative Subcommittee and the Research Subcommittee on their activities and meetings. Judge F. Bruce Bach, chairman of the Legislative Subcommittee, reported that this subcommittee had thoroughly discussed a number of issues and had prepared recommendations on each issue for the Commission's consideration. The Commission discussed the following issues: statutory mandatory minimum penalties, revisions of the general offense statutes to achieve more specific offense definitions, narrower statutory penalty ranges, jury instructions regarding abolition of parole, Commonwealth's attorneys access to juvenile records, expungement of juvenile record information, standardization of criminal offense recording using Virginia Crime Codes (VCC), and statutory revision requiring court clerks to submit the original blue guidelines forms to the Commission. Detailed discussion of these issues and the Commission's full recommendations are presented later in this report.

Judge Robert Stewart, chairman of the Research Subcommittee, reported that this subcommittee had met, and that the main topic was the offender risk assessment instrument and related research. The primary purpose of the meeting was to provide a general discussion of risk assessment research that would be used to classify offenders by risk of recidivism. The Subcommittee will be making some critical decisions in the months ahead and this meeting was primarily viewed as providing background and context for those decisions. Most of the substantive decisions would await further data collection and research.

The Commission received an update on training activities. Per specific requests, staff was planning to conduct training for several probation and parole and Commonwealth's attorneys' offices in the fall. Staff was also planning a second round of training seminars around the state, especially targeting defense attorneys, due to the low turnout of defense attorneys during training seminars conducted in the spring.

The staff proposed for the Commission an auditing plan to review completion and submission of work sheets. The objectives of the audit would be to improve implementation, correct distribution problems, and promote adherence to §19.2-298.01 of the Code of Virginia, which relates to completion requirements for the guidelines. The plan would be to visit every circuit court over a period of time, and would require a review of court files and the administration of structured interviews with judges, Commonwealth's attorneys, clerks, probation officers and public defenders, and possibly observing court proceedings involving sentencing. The Commission elected to take no action on the audit plan until the issues could be considered further.

October 30, 1995 ——

At its last regularly scheduled meeting for 1995, the Commission received a report from the Legislative Issues Subcommittee on their final recommendations for the upcoming legislative session. Judge F. Bruce Bach, Chairman of this subcommittee, noted that agreement had been reached on two issues: 1) the wording of a study resolution proposal to the General Assembly on the matter of statutory mandatory minimum penalties, and 2) the revision of general criminal offense statutes to provide more specific offense definitions and more narrowly prescribed ranges of punishment.

The Commission also received a report from the Chairman of the Executive Committee, Judge Ernest P. Gates. Judge Gates noted that the Executive Committee was in the final stages of approving for publication a brochure which would explain, in succinctly worded, non-legal language, the new truth in sentencing system. The Committee also reported that they had reviewed and approved a proposed budget for the next fiscal year. Judge Gates asked Dr. Kern to provide the full Commission with a detailed overview of the proposed budget. After a review of the proposed budget for fiscal year 1997, the Commission voted its approval. Finally, Judge Gates reminded the Commission members that §17-235(10) required them to report on their work and recommendations on or before December 1 to the General Assembly, the Governor and the Chief Justice of the Supreme Court of Virginia. A draft of this report was then distributed to all members and Dr. Kern reviewed the contents. Judge Gates asked the members to provide any suggested edits to the staff by mid November. He also requested and received approval from the Commission to allow the Executive Committee to oversee the process of finalizing the contents of the annual report.

The Commission also received an updated status report on judicial compliance with the guidelines. In addition, the Commission was briefed on the fall statewide training seminars.

◆ The Executive Committee

In §17-235 of the Code of Virginia, the Commission is charged with numerous functions and responsibilities. To best address all of its legislative mandates, the Commission established a system of subcommittees. The Commission has entrusted the Executive Committee with oversight of public relations, inter-governmental relations, judicial compliance with the guidelines and recommendations for guidelines modifications. In addition, the Executive Committee is in charge of personnel matters and development of the Commission's annual budget. The Executive Committee has met three times: in November 1994 and December 1994 for the purpose of dealing with personnel and budgeting matters and in October 1995 to oversee the development of the annual report.

The Executive Committee is composed of: **Judge Ernest P. Gates, Chairman, Judge Bruce Bach, Judge Robert Stewart, Mr. Richard Cullen, Mr. Peter Decker, Mr. Lane Kneedler and Ms. Vivian Watts.**

◆ The Legislative Subcommittee

The Legislative Subcommittee must grapple with the complex legislative and legal issues which relate to the sentencing guidelines and criminal sentencing in Virginia. Specifically, this subcommittee must study felony statutes in the context of judge and jury sentencing patterns as they evolve after January 1, 1995. The subcommittee is responsible for developing recommendations for the revision of general criminal offense statutes to provide more specific offense definitions and more narrowly prescribed ranges of punishment, and with making legislative recommendations as necessary to ensure timely, reliable and complete preparation and distribution of sentencing guidelines work sheets. Lastly, the subcommittee oversees the impact analysis work which estimates the likely effect of legislative bills on future correctional resource needs.

Among other duties, the Legislative Subcommittee oversees the impact analysis work which estimates the effect of proposed legislation on future correctional resource needs.

The Legislative Subcommittee held its first meeting on August 21, 1995. The focus of the agenda for this meeting was to discuss issues relating to felony statutes and the sentencing guidelines, and to prepare recommendations for proposed statutory revisions, for consideration by the full Commission. The Subcommittee addressed each of the following issues: statutory mandatory minimum penalties, revisions of the general offense statutes to provide more specific offense definitions, narrower statutory penalty ranges, jury instructions regarding abolition of parole, Commonwealth's attorneys' access to juvenile records, expungement of juvenile record information, standardization of criminal offense recording using Virginia Crime Codes (VCC), and clarification of the statute requiring clerks to send the original blue guidelines forms to the Commission. On October 25, 1995, the Subcommittee met again to finalize its recommendations. The recommendations which resulted from the work of the Legislative Subcommittee and approved by the full Commission are presented later in this report.

The Legislative Subcommittee is comprised of: **Judge Bruce Bach, Chairman, Judge George Honts, Judge William Newman, Mr. Frank Ferguson, Mr. William Fuller and the Reverend George Ricketts.**

◆ The Research Subcommittee

The Commission has empowered the Research Subcommittee to oversee a number of the its legislatively mandated responsibilities The Research Subcommittee will direct the risk assessment research and subsequent application of a risk assessment instrument within the sentencing guidelines, as stipulated by §17-235(4-6) in the Code of Virginia. Additionally, the Research Subcommittee is to supervise the development of a computer simulation model which forecasts correctional bed space needs, specified in §17-235(8) of the Code of Virginia. This subcommittee will also coordinate ad hoc or miscellaneous research studies as they arise.

The Research Subcommittee met on August 31, 1995, to discuss the plan for risk assessment research and to hear an update on the forecast simulation model. The Subcommittee meeting laid the ground work for the risk assessment research plan and the critical decisions that the Subcommittee will make in the coming months. Detailed discussion of risk assessment research and the forecast simulation model is presented in the following sections.

The Research Subcommittee is composed of: **Judge Robert Stewart, Chairman, Judge J. Samuel Johnston, Judge Donald McGlothlin, Mr. Robert Bobb, Ms. Jo Ann Bruce and Mr. Bobby Vassar.**

◆ The Risk Assessment Instrument: §17-235(4,5,6)

The Commission will develop a risk assessment instrument that will be predictive of the relative risk that an offender will pose a threat to public safety. The intent is diversion of up to 25% of non-violent offenders who otherwise would be incarcerated.

In §17-235, paragraphs 4, 5, and 6 of the Code of Virginia, the Commission is charged with developing an offender risk assessment instrument for use in all felony cases. Based on a study of Virginia felons, the risk assessment instrument will be predictive of the relative risk that an offender will pose a threat to public safety. The Commission must apply the risk assessment instrument to offenders convicted of any felony that is not specified in (i) subdivision 1, 2 or 3 of subsection A of §17-237 or (ii) subsection C of §17-237, which specify the offenses to be considered violent for the purposes of the sentencing guidelines and that are designated to receive midpoint enhancements. The purpose of this legislation and the goal of the risk assessment instrument is to determine, with due regard for public safety needs, the feasibility of placing 25% of non-violent offenders in alternative (intermediate) sanctions.

The legislation as it is currently written is somewhat ambiguous. Overall, far more than 25% of non-violent offenders, the goal specifically stated in the legislation, are given sanctions that do not require incarceration in prison or jail. The Commission understands that the intent of the legislation is diversion of up to 25% of non-violent offenders who otherwise would be incarcerated into alternative means of punishment.

Thus far, scientifically assessing the risk of recidivism has been primarily the realm of academic research. One of the essential elements of risk assessment research has been the study of criminal careers. The study of criminal careers has revealed that a significant share of criminal activity is accounted for by a relatively small proportion of "chronic" offenders. Some offenders will have long, destructive criminal careers, while many offenders are unlikely to engage in long term criminal activity and pose little risk to public safety.

If properly developed and utilized, risk assessment instruments could reduce recidivism and do much for furthering the goal of public safety. The primary purpose of a risk assessment instrument is to classify offenders by risk of resuming criminal activity. If the offenders who are likely to pose a significant threat to public safety could be better identified early in their careers, the criminal justice system could make more effective sentencing and correctional decisions. Once identified, these offenders can be given longer incarceration sentences and thus their careers as criminals will be curtailed due to incapacitation.

An accurate assessment of an offender's recidivism risk would assist judges in adjusting their sanctions accordingly.

By contrast, the risk assessment instrument can also be used to identify individuals who are unlikely to pose potential risk to public safety. These offenders could be diverted from traditional incarceration to one of several intermediate sanction programs. Such offenders would be candidates for programs made available in the Community Corrections Act passed by the Virginia General Assembly in its 1994 Special Session.

Careful selection of those to be incapacitated and those placed in intermediate sanction programs would make the criminal justice system more effective both in terms of public safety and cost. An accurate assessment of an offender's risk of recidivism at the time of sentencing would be an extremely valuable tool for judges. The uses of an instrument that measures risk of recidivism are profound: it is a means of estimating an individual's likelihood of continued involvement in crime, and adjusting the sanction during sentencing based on this information.

The application of a risk assessment instrument grounded in research and data and officially incorporated into a system of sentencing guidelines which supports a range of alternative sanctions as well as traditional incarceration would be the first of its kind in the nation. By integrating recidivism risk assessment into Virginia's sentencing guidelines, Virginia would be well placed to optimize its resources and reduce crime through more focused sentencing practices. This instrument will be judged against the dual goals of public safety and cost effectiveness.

Currently, there exists two major obstacles to the development of a valid and reliable offender risk assessment instrument in Virginia. Each of these obstacles deals with our inability to accurately measure criminal conduct. The first impediment toward progress in this area is the fact that juvenile record information on our felon population is often absent. Prior criminological research uses detailed juvenile record information to predict future involvement in crime as an adult. The second problem area which bars advances in this research is the poor status of our method to record adult criminal histories. The automated records of criminal histories are often characterized by ambiguous or overly general entries and are missing critical information such as dispositions. Thus, it is not easy in Virginia to thoroughly assess the true extent of an individual's prior involvement with the juvenile and adult justice systems. The inability to make such a judgment delays, but does not prohibit, the development of an offender risk assessment tool.

The importance of developing a high quality risk assessment instrument for use by Virginia's judiciary cannot be stressed enough. If the instrument does not perform well, there will undoubtedly be a loss of confidence in the usefulness of the tool by judges and prosecutors, as well as the rest of the criminal justice community. Such a

loss of confidence could also affect the level of success of the intermediate sanction programs. Use of the community-based programs could decrease. In addition, inappropriate offenders could be placed in the various programs, resulting in unnecessarily high failure (recidivism) rates or net widening (placement of persons in the programs who would otherwise be placed in less restrictive sanctions if the programs did not exist).

◆ Risk Assessment Instrument: Action to Date

The Commission concluded that juvenile record information should be tested for incorporation into any risk assessment instrument if that instrument is to be as accurate and as useful a predictor of future criminality as possible.

The Commission and its staff quickly initiated efforts to fulfill the legislative requirements. The Commission must first address the obstacle produced by limitations of the prior criminal record information that is available, particularly juvenile information. As noted above, research around the United States has revealed that an offender's prior juvenile record is a significant predictive factor when weighing the chances of the offender returning to criminal behavior. In Virginia, current automated data relating to prior juvenile record is typically missing, ambiguous or unattainable. The Commission concluded that juvenile record information should be tested for incorporation into any risk assessment instrument if that instrument is to be as accurate and as useful a predictor of future criminality as possible. The Commission applied for and was approved to receive a grant through Department of Criminal Justice Services from the Byrne Memorial Federal Grant program for $98,742 to conduct additional research on juvenile record, in order to supplement existing criminal history information. Grant monies will fund the extensive manual data collection effort that will be necessary to obtain and automate juvenile record data. The data collected through the Byrne Grant will help in producing a sounder risk assessment tool.

The staff will need to collect as much juvenile and adult data as is available statewide. Furthermore, the staff will make use of automated data wherever possible, to be supplemented by hard copy records when it can be reliably collected statewide. Already, staff have interviewed state and local officials on the availability of prior criminal records, with a particular focus on juvenile record. A preliminary group of non-violent offenders was drawn from automated pre-sentence investigation reports. Staff are working with Richmond area juvenile court clerks to track members of this group. The results of this sample are now being collected and are being analyzed to help direct the study from this point forward.

Following this assessment, grant funds will be used to hire part-time staff to collect the additional information. During the training period for new staff, the juvenile courts will be contacted, then data collection can begin. The tentative time line calls for data collection to be finished in summer of 1996. Following that work, analysis will be completed during the fall, and a risk assessment tool prepared. A pilot test of the risk assessment instrument is currently scheduled to be conducted beginning in early 1997. The Commission will evaluate the results of the pilot program. The Research Subcommittee and the Commission will then make judgments regarding the appropriateness of this tool and the logistics of employing it.

After conducting thorough research and analysis, the Commission is to report to the General Assembly about the feasibility of using a risk assessment tool to achieve the 25% diversion goal. The 1994 Special Session legislation specified that, if the Commission determined the goal to be feasible, the risk assessment instrument should become effective on January 1, 1996. The Commission is required to report to the General Assembly by December 1, 1995, if it is determined that the goal is not feasible. The General Assembly should consider this report as notification that additional time is required for the Commission to complete the risk assessment research before making the determination that the stipulated diversion goal is feasible.

◆ Forecasting Correctional Resource Needs

During its 1995 session, the General Assembly passed legislation which requires the Commission to conduct an assessment of the impact of all proposed legislation on correctional resource needs (§30-19.1:5 of the Code of Virginia) and to report the results of the analysis to the General Assembly. Commission staff has developed a tool to estimate the impact of legislation on future correctional bed space needs. The Commission will utilize a computer simulation forecast model to conduct such analysis. The computer program models judicial decision-making specifically within the context of the new truth in sentencing guidelines.

The General Assembly should consider this report as notification that additional time is required for the Commission to complete the risk assessment research before making the determination that the stipulated diversion goal is feasible.

The computer program simulates the impact of changes in sentencing practices on future prison bed space needs. This program has the flexibility to model a wide range of sentencing policies. One of its features is its linkage to the Virginia Sentencing Guidelines. There are numerous components of the simulation program: criminal justice system admissions, guidelines emulation, judicial compliance, rates of earned sentence credits, recidivism rates, and the offender-mix distribution. In addition, the model can accommodate anticipated changes in the crime prone "at-risk" age groups within the admissions module of the program.

The design phase of the simulation project occurred during the summer of 1994, and the programming of the simulation with the most recent available data was completed by the end of October. Validation of the simulation model occurred in November. The Commission is prepared to perform impact assessments as needed for the 1996 General Assembly session.

GUIDELINES
COMPLIANCE

◆ Full Impact Not Expected Until 1996

The new truth in sentencing guidelines became effective January 1, 1995, and apply to felony offenses committed on or after that date. Due to the usually lengthy criminal justice processing time (from offense date to date of sentencing) for felony cases, especially violent offenses, the Commission did not expect to see a significant number of cases until well into the third quarter of 1995. The Commission received only two guidelines cases sentenced in February, but recorded well over 900 cases sentenced in the month of September, and nearly as many for the month of October (Figure 11).

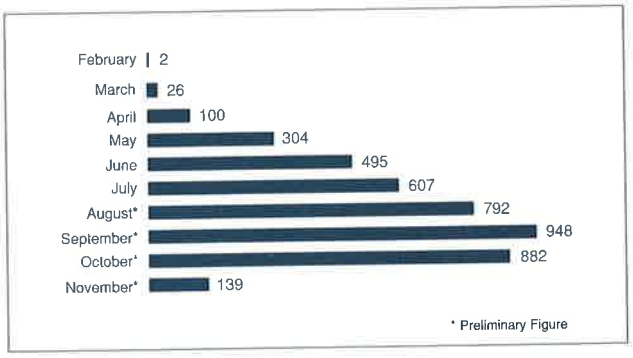


Figure 11

Number of Cases Received by Month of Sentencing

In 1994, the average criminal justice processing time was over 7 1/2 months between offense and sentencing (Figure 12). In that year, approximately 23,000 felony cases were processed through Virginia's circuit courts. It is anticipated that the full impact of the new truth in sentencing guidelines will not be realized until sometime in 1996. From January 1 through November 15, 1995, the Commission has received 4,352 sentencing guidelines cases. Overall, these early cases sentenced under the new guidelines may not be representative of the cases the Commission will eventually receive. Therefore, the data presented in this, the Commission's first annual report, should be viewed as preliminary in nature.

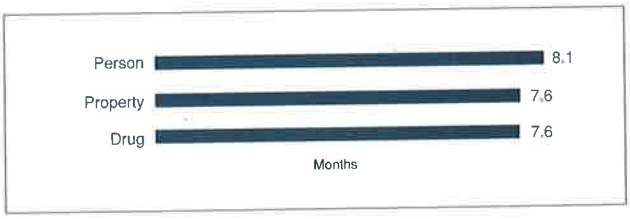


Figure 12

1994 Criminal Justice Average Case Processing Time by Type of Felony Offense

◆ Case Characteristics

Of the 4,352 cases received by November 15, 1995, nearly 86% have been the result of guilty pleas or plea agreements. Only 12% have been tried by a judge, while less than 2% have been trials by jury.

Figure 13

Number of Cases Received by Circuit

Number of Cases Received by Circuit

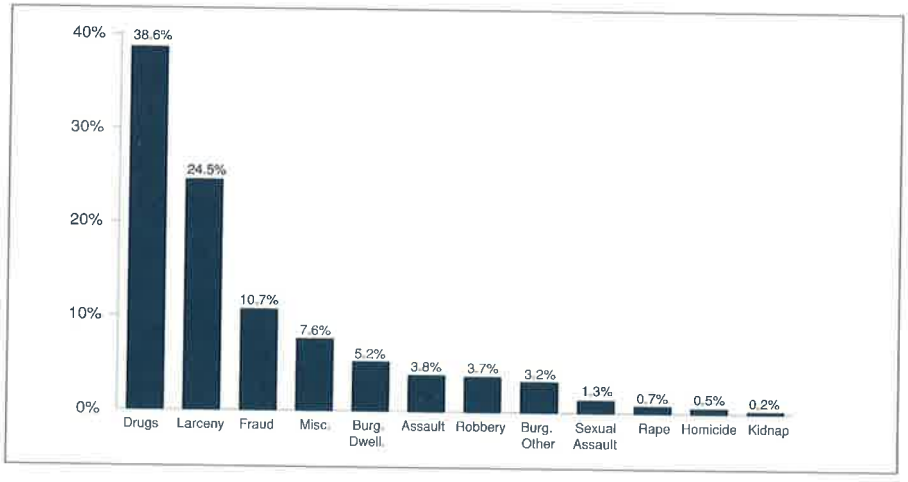
Circuit	Number of Cases
1	79
2	**311**
3	95
4	**450**
5	105
6	50
7	**278**
8	78
9	100
10	67
11	45
12	96
13	**506**
14	159
15	163
16	69
17	140
18	138
19	**282**
20	60
21	63
22	85
23	222
24	217
25	149
26	114
27	37
28	33
29	25
30	19
31	117

Each of the 31 judicial circuits has sentenced cases under the truth in sentencing guidelines, with Richmond (Circuit 13), Norfolk (Circuit 4), Virginia Beach (Circuit 2), Fairfax (Circuit 19) and Newport News (Circuit 7) having submitted the greatest number of guidelines forms (Figure 13).

The new truth in sentencing guidelines are partitioned into 12 offense groups: assault, burglary of dwellings, burglary of other structures, drugs, fraud, larceny, homicide, rape, other sexual assault offenses, robbery and other miscellaneous felony offenses. The cases received to date are heavily weighted with drug and larceny offenses, which comprise 39% and 25% of the total respectively (Figure 14). In fact, nearly a quarter of the total number of cases are convictions for the possession of a Schedule I or II drug, such as cocaine or heroin. Almost 14% are cases of grand larceny ($200 or more) or petit larceny (3rd offense) convictions. These proportions of drug and larceny cases are nearly identical to those which emerged in 1994 under the previous sentencing guidelines system. Few cases for violent offenses been have received, due to their relative infrequence and their longer average criminal justice system processing time. For instance, only 22 homicide cases and 32 rape cases have been received by the Commission. Therefore, compliance results for the violent offense categories should be reviewed especially cautiously.

Figure 14

Percentage of Cases Received by Primary Offense Group



The felony classification of the offenses indicates the statutory seriousness level of the crimes committed. Class 1 felonies are the most serious felony offenses and Class 6 felonies are the least serious. While one-third of the cases received involve Class 5 felonies (penalty range of 1 to 10 years in the Code of Virginia), 44% involve felonies which are unclassed (Figure 15). An unclassed felony is one with a unique penalty that does not fall into one of the established Class 1 through 6 penalty ranges. The large number of these two classes of felonies is explained by the dominance of drug offenses received to date. The offense of selling a Schedule I or II drug is an unclassed felony, while possession of such a drug carries the Class 5 penalty.

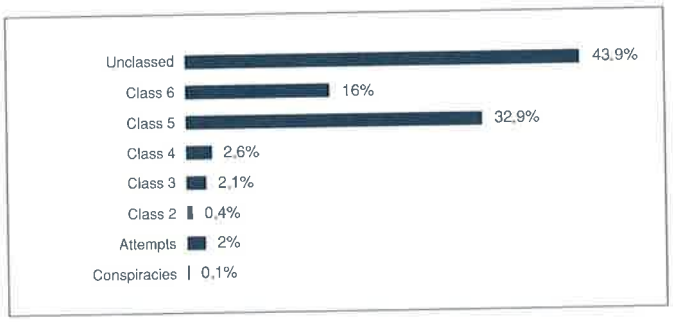


Figure 15

Types of Felony Classifications Received

The sentencing guidelines for the 4,352 cases recommended that 43% of these offenders be sentenced to a prison term (a sentence of greater than 6 months) and an additional 20% be given a jail term (any sentence 6 months or less). About 62% of these offenders were recommended for incarceration (Figure 16). Approximately 38% of the offenders were recommended for probation or some other alternative sanction.

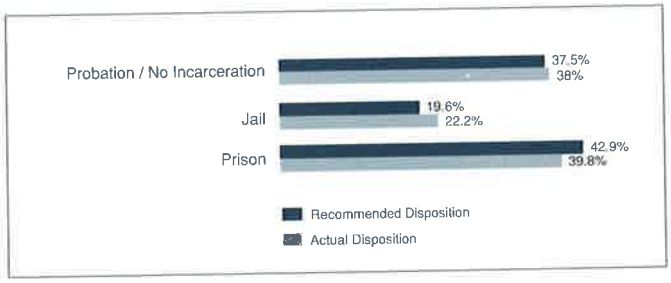


Figure 16

Recommended Disposition and Actual Disposition

For these cases, judges and juries actually sentenced 40% of the offenders to prison, 22% to time in a local jail, and 38% were given probation or some other non-incarceration sanction for their crimes.

The guidelines legislation specifies that only probation officers and Commonwealth's attorneys may complete the guidelines work sheets for the court. A review of the work sheets received to date reveals that over half (51%) of the guidelines are completed by the Commonwealth's attorneys' office, while less than half (49%) are completed by probation officers. The high completion rate by Commonwealth's attorneys may be the result of their offices completing a large number of work sheets for cases involving plea agreements. Analysis shows that a handful of cases have been completed by defense attorneys, although they are not authorized to do so.

◆ Compliance Defined

Compliance with the sentencing guidelines is measured by two distinct classes of compliance: strict and general compliance. Together, they comprise the overall compliance rate. Strict compliance with the guidelines makes up by far the largest share of the overall compliance rate. For a case to be in strict compliance with the guidelines, the offender must be sentenced to the same type of sanction (prison, jail or probation) as the guidelines recommend and to a term which falls within the sentence range recommended by the guidelines. Three types of compliance together are known as general compliance, the second class of compliance. General compliance is composed of: compliance by rounding, time served compliance and compliance by boot camp/jail equivalency. General compliance results from the Commission's attempt to understand judicial thinking in the sentencing process, and is also meant to accommodate special sentencing circumstances.

Compliance by rounding provides for a very modest rounding allowance in instances when the effective sentence handed down by a judge or jury is very close to the sentencing guidelines recommended range. For example, a judge would be considered to be in compliance with the guidelines if he sentenced an offender to a two year sentence based on a guidelines recommended range which ends at 1 year 11 months.

The sentencing guidelines recommendations are designed to gradually increase as the point total on the guidelines work sheet increases. The result is a table of sentencing recommendations which reflect gradations, or a gradual stair step effect. Virginia has the only sentencing guidelines in the country in which sentence length recommendations are made in specific monthly gradations as the point values from the work sheets get larger. Other states' guidelines use a grid system, with sentences recommended by distinct blocks of time that are not finely graduated in between. The Commission acknowledges that judges typically sentence in round, whole years. Judges sometimes cite rounding as the reason for departure from the guidelines recommendation. In general, rounding allows for an effective sentence which is within 5% of the guidelines recommendation.

Time served compliance is intended to accommodate judicial discretion and the complexity of the criminal justice system at the local level. A judge may sentence an offender to the amount of pre-sentence incarceration time served in a local jail when the guidelines call for a short jail term. Even though the judge does not sentence the offender to post-sentence incarceration time, the Commission typically considers this type of case to be in compliance.

Compliance by boot camp/jail equivalency arises when a judge sentences an offender to the state's boot camp program instead of a three month jail term as called for by the guidelines recommendation. Because boot camp is a three month program, during which the offender is subjected to a military-style shock incarceration program, that is followed by probation, many judges believe themselves to be in compliance when sentencing in this fashion.

In the future, the Commission will examine use of alternative to incarceration programs by members of the judiciary around the state. The 1994 Comprehensive Community Corrections Act and the State Community-based Corrections Acts authorized several community-based sanctioning programs to be established. The Commission will be able to measure the extent to which judges sentence offenders to these intermediate sanction programs instead of traditional incarceration.

◆ Overall Compliance with the Sentencing Guidelines

The overall compliance rate for the 4,352 cases received through November 15, 1995, is 75% (Figure 17). When judges impose a sentence above the guidelines recommendation range, they "aggravate" the guidelines recommendation. Judges aggravated guidelines recommendations in 14.5% of the 1995 guidelines cases received. Judges "mitigate" the guidelines recommended sentence when they impose a sentence below the guidelines range. In 10.5% of the 1995 cases, judges mitigated guidelines recommendations. When examining just the cases that are not in compliance, sentences exceed the guidelines in 58% of the departures. In 42% of the departure cases, sentences fall short of the guidelines recommendation. Under the previous guidelines system, the overall compliance rate was roughly the same but the departures from the guidelines recommendations exhibited the opposite pattern: sentences fell below the guidelines in nearly two-thirds of the departure cases.

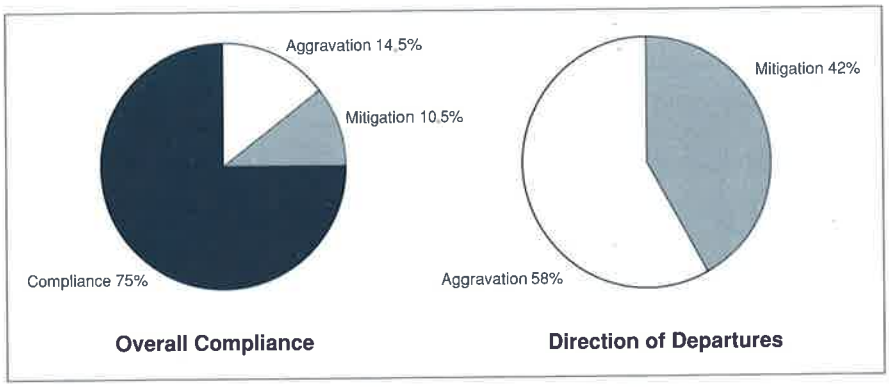


Figure 17

Overall Guidelines Compliance and Direction of Departures

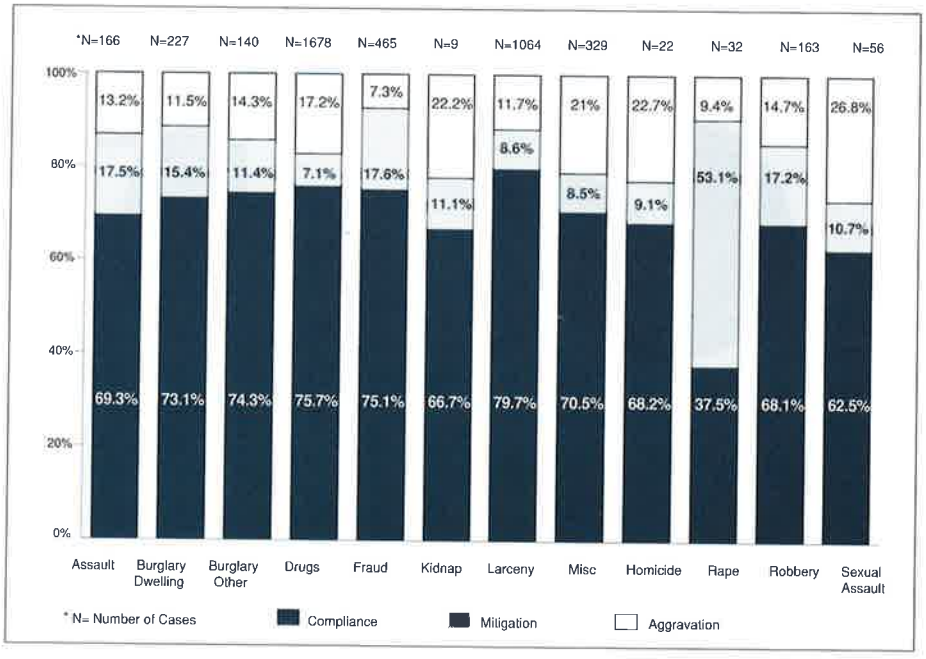
◆ Compliance by Offense

The compliance rate varies among the 12 sentencing guidelines offense groups. The compliance rate ranges from a high of 80% for larceny cases to a low of 38% for rape cases (Figure 18). Burglary, drug, fraud, larceny, and the miscellaneous offense groups all have compliance rates in the 70 to 80% range. Assault, homicide, rape, robbery, kidnapping and sexual assault offense groups have compliance rates below the 70% mark. Again, caution should be used when examining compliance rates of the violent offense groups. Compliance rates for most of the violent offense groups are based on a low number of cases and may change dramatically as more cases are received.

The departure patterns differ dramatically among the offense groups. For instance, in fraud cases judges seem to be complying at a relatively high rate, but typically choose to sentence below the guidelines when they do decide to depart. Drug cases show the opposite pattern. Judges are complying at a rate of 76% with the drug sentence recommendations, but when it comes to departing from the guidelines, judges sentence above the guidelines by nearly a 3 to 1 margin over sentencing below them. Other offenses, such as robbery and larceny, appear to be much more evenly split between high and low departures from the guidelines.

Figure 18

Overall Compliance by Offense



◆ Dispositional Compliance

Dispositional compliance with the sentencing guidelines is the rate at which judges sentence offenders to the same type of disposition that is recommended by the guidelines for that case. Dispositional compliance is an important feature of the overall compliance patterns. For the cases examined, the rate of dispositional compliance is 84% (Figure 19). Much higher than the rate of overall compliance with the guidelines, the dispositional compliance rate indicates that judges agree with the type of sanction recommended by the guidelines in the vast majority of cases. Dispositional compliance ranges from 100% for kidnapping and 97% for robbery to 78% for rape and 73% for sexual assault.

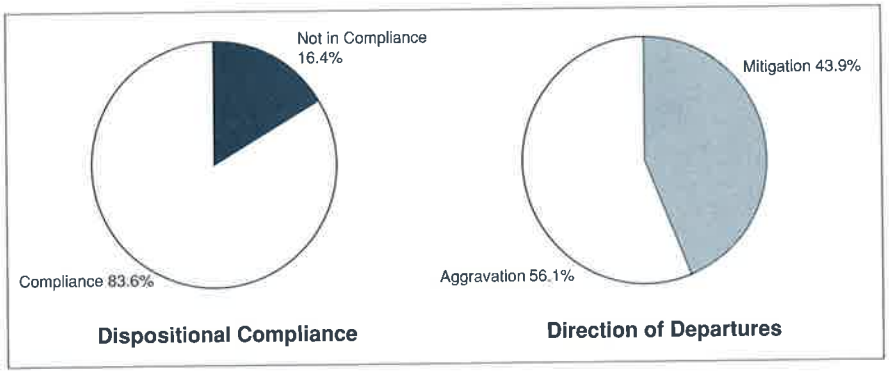


Figure 19

Dispositional Compliance

Of the cases not in dispositional compliance, 56% represent instances in which the offender received a sanction more severe than what the guidelines recommended for that case. Nearly one-third of the cases not in dispositional compliance are cases in which the guidelines recommended probation/no incarceration but the judge imposed a jail sentence. As will be seen later in this report, in a large number of drug possession cases, the judge has imposed a jail term, despite a recommendation that these offenders be given a suspended incarceration term and active probation.

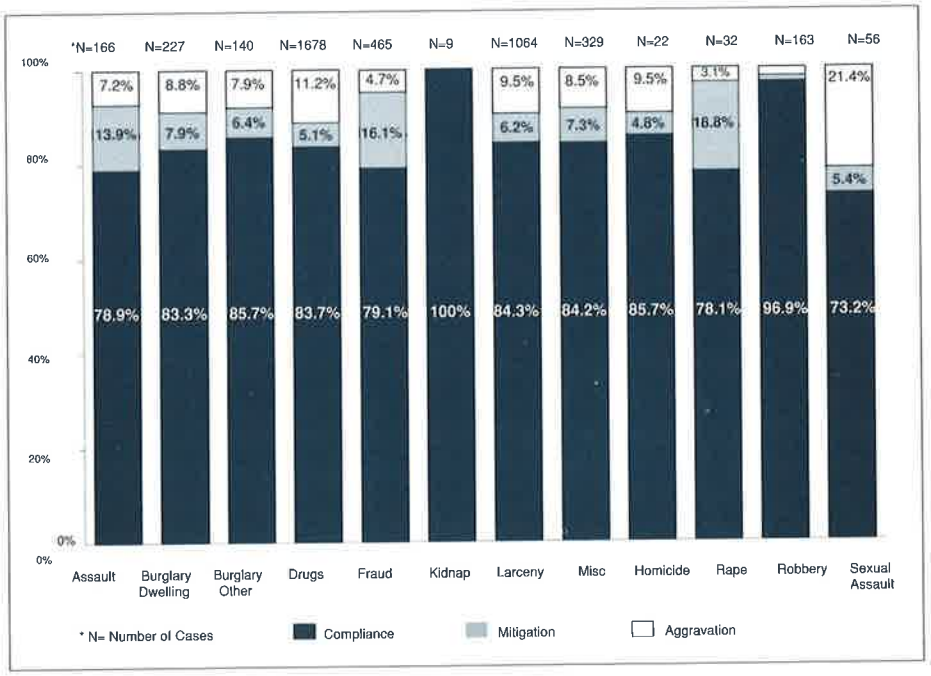


Figure 20

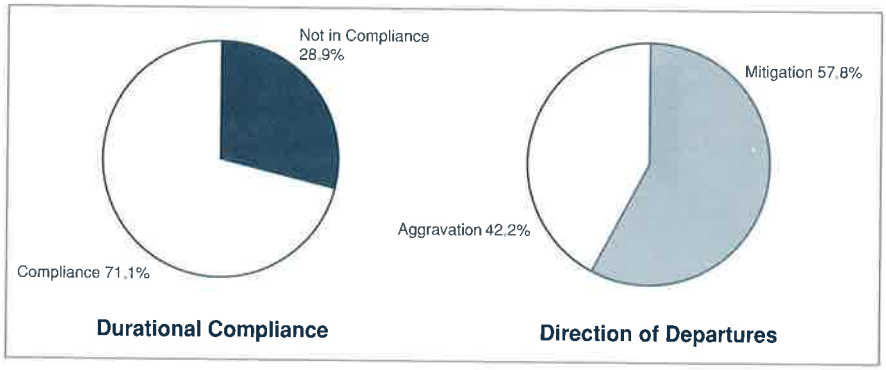
Dispositional Compliance by Offense

◆ Durational Compliance

Durational compliance is defined as the rate at which judges sentence offenders to a term of incarceration that falls within the recommended guidelines range. Durational compliance considers only those cases in which the guidelines recommend an active term of incarceration. For the 1995 cases received by the Commission, durational compliance is 71%, which is significantly lower than the rate of dispositional compliance (Figure 21). This result indicates that judges agree with the type of sentence recommended by the guidelines more often than they agree with the recommended sentence length for incarceration cases.

Figure 21

Durational Compliance



For each case recommended for incarceration in prison, the guidelines furnish the judge with a recommended sentencing range and a recommended sentence midpoint within the range. The midpoint recommendation represents the median value of time served in prison derived from the analysis of historical time served and the application of midpoint enhancements if any are required for the case (See *Development of the New Sentencing Guidelines* in this report). Within the guidelines ranges, generally, half of the historical cases reflect time served values which are at the midpoint value or less, while the other half of the historical cases have time served values at the midpoint or above. Because the sentencing ranges recommended by the guidelines are relatively broad, they allow for judges to utilize their discretion in sentencing offenders to different incarceration terms while still remaining in compliance with the guidelines recommendation. The Commission, therefore, is interested in the sentencing patterns exhibited by judges for cases that are in durational compliance with the guidelines.

Analysis of cases in durational compliance reveals that nearly 20% are sentenced to prison terms equivalent to the midpoint recommendation, and nearly 76% of the prison cases received sentences at or below the sentencing guidelines midpoint. When complying with the guidelines for prison sentences, judges are sentencing at the lower end of the recommended range more often than they are sentencing at the upper end (56% below the midpoint; 24% above the midpoint). These figures may change as the Commission receives more cases. Such analysis has two applications

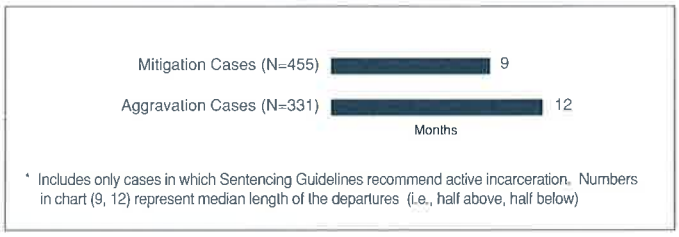
for the Commission. First, the analysis provides the Commission with valuable information as it considers possible revisions to the sentence range recommendations. Second, the analysis supplies pertinent sentencing data for the computer simulation forecast model developed by the Commission to generate projections of future correctional bed space needs. To truly be of use to the Commission for these purposes, the data must be disaggregated by offense categories and by type of midpoint enhancement. At this time, the Commission does not have enough data to support such a disaggregated analysis.

For cases not in durational compliance, judges sentence offenders to terms shorter than what the guidelines recommend more often than they do to terms which exceed the guidelines recommendation.

Examination of cases which are not in durational compliance with the guidelines reveals that judges tend to sentence offenders to terms of incarceration shorter than what the guidelines recommend more often than they do to terms which exceed the guidelines recommendation (58% versus 42%, respectively). In cases receiving shorter than recommended sentences, effective sentences (sentences less any suspended time) fell below the guidelines by a median value of nine months (Figure 22). For offenders receiving longer than recommended sentences, the effective sentence exceeded the guidelines by a median value of 12 months. The length of the departure in some cases was small, but in other cases, particularly those that were sentenced above the guidelines, the length of the departure was extreme.

Figure 22

Median Length of Durational Departures*



* Includes only cases in which Sentencing Guidelines recommend active incarceration. Numbers in chart (9, 12) represent median length of the departures (i.e., half above, half below)

The Commission will continue to study durational compliance and departures, as it may divulge useful information for the Commission regarding the extent to which judges believe the guidelines sentence length recommendations should be adjusted.

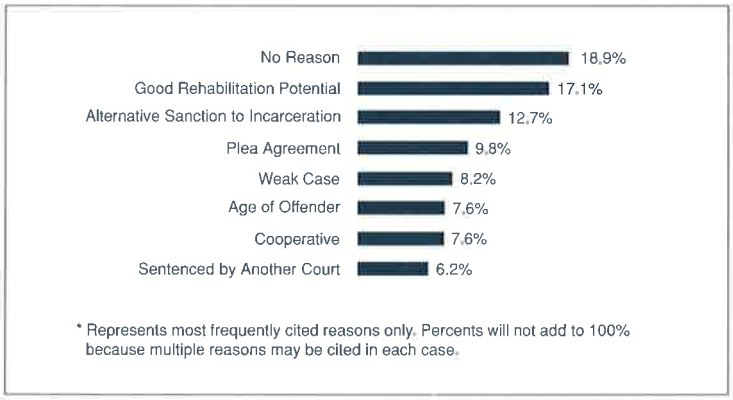
◆ Reasons for Departure from the Guidelines

While compliance with guidelines recommendations is still voluntary, §19.2-298.01 of the Code of Virginia requires each judge to articulate and submit his or her reason(s) for sentencing outside the guidelines recommended range. The reasons for departure will be very important to the Commission as it considers revision to the guidelines in the future. The explanations that judges impart will indicate to the Commission where judges disagree with the sentencing guidelines and where the guidelines may need adjustment or amendment. Because the new sentencing guidelines include normative (prescriptive) adjustments which can be revised by the Commission over time, the opinions of the judiciary are deemed to be highly relevant. Multiple reasons for departure can be cited in each guidelines case, and the Commission studies departure reasons in this context.

In 10.5% of the 1995 cases studied, judges sentenced below the guidelines recommendations. Isolating these cases reveals that judges neglected to provide departure reasons 19% of the time, despite the requirement that they do so (Figure 23). In fact, a missing departure reason occurred more frequently than any specific reason for mitigation. Following approved procedure, Commission staff are returning cases that are missing departure reasons to the appropriate judge so that he or she can enter an explanation for the departure. The Commission is currently waiting for corrected forms to be returned.

Figure 23

Most Frequently Cited Reasons for Mitigation*



Judges referred to the offender's potential for rehabilitation more frequently than any other mitigation departure reason (17%). For instance, judges often cite the offender's family background, excellent employment record or progress being made by the offender in a rehabilitation program since the offense. In 13% of the mitigation cases, judges noted that the offender was sentenced to a community or treatment program in lieu of incarceration. Judges indicated only that they sentenced in accordance with a plea agreement in 10% of the mitigation cases. As noted earlier, the Commission decided that "plea agreement" alone is too general a departure explanation to be useful. The Commission is sending copies of the cases back to the sentencing judges to request that more detailed departure information be provided in the future.

In 8% of the cases sentenced below the guidelines, judges cited that the evidence presented by the Commonwealth was weak, or that a relevant witness refused to

tesify in the case. Also, in 8% of the mitigation cases, judges referred to the offender's youth, while in another 8%, judges cited the offender's cooperation with authorities, such as aiding in the apprehension or prosecution of others. Judges sentenced below the guidelines in 6% of the mitigation cases, reporting that the offender had already been sentenced to incarceration by another jurisdication or in a previous proceeding.

Judges aggravated guidelines recommendations in 14.5% of the 1995 guidelines cases received by the Commission. Judges failed to provide departures reasons for 15% of the departure cases involving the aggravation of the guidelines sentence (Figure 24).

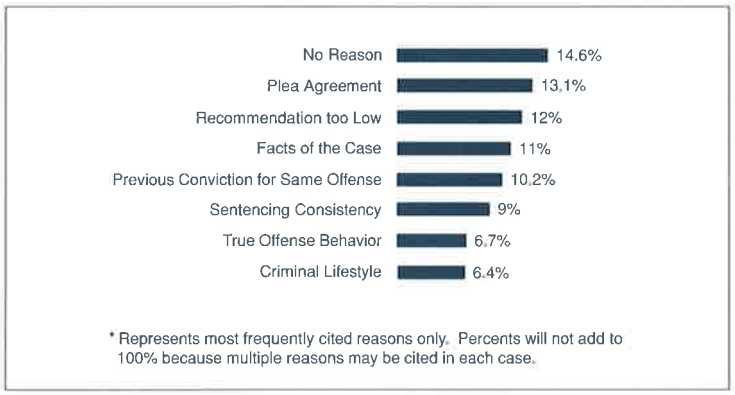


Figure 24

Most Frequently Cited Reasons for Aggravation*

The most frequently cited aggravation departure reason is "plea agreement," which was recorded as the only departure reason for 13% of the aggravation cases. In these instances, the defendant's plead guilty as part of a plea agreement and received a sentence above the maximum recommended by the guidelines. This is somewhat of a curious result since plea agreements are often thought of as a device to secure a more favorable sanction outcome on the defendant's behalf in exchange for some concession on their part to the prosecution (usually a guilty plea).

In 12% of the aggravation cases, judges felt that the guidelines recommendations were inadequate. In nearly half of the instances in which the judge felt the guidelines to be too low, he indicated that the guidelines did not weigh the offender's prior criminal record heavily enough. Judges felt that 11% of the aggravation cases deserved a longer than recommended sentence due to the extreme aggravating circumstances, or facts of the case. In 10% of the aggravation cases, judges indicated that the offender's prior record for the same offense as the current conviction led them to sentence the offender to a longer term. Judges referred to sentencing consistency with a codefendant's case or with other similar cases in 9% of the cases given sentences above the guidelines. For 7% of these cases, judges noted that the offender's true behavior was more serious than the offenses the offender was actually convicted of in the court room. Judges also cited, in 6% of aggravation cases, the degree of the offender's criminal orientation and the offender's immersion in the criminal life-style.

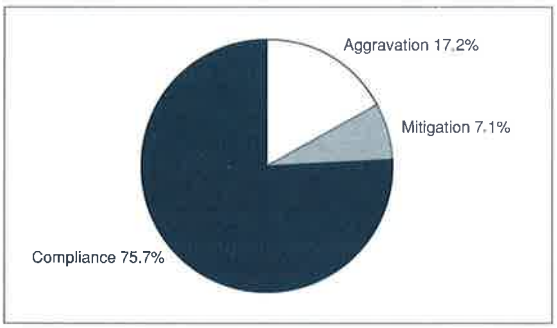
Appendix 2 contains a detailed analysis of the reasons for departure from guidelines recommendations for each of the 12 guidelines offense groups.

◆ Compliance in Drug Cases

Together, drug and larceny cases comprise 63% of all the guidelines cases received to date in 1995, and it is sentencing for these two offense groups that are driving the overall compliance patterns. The compliance rate in drug cases is 76% (Figure 25). Isolating just the departures from the guidelines reveals that judges will sentence above the guidelines more than twice as often as they will sentence below the guidelines in drug offense cases.

Figure 25

Compliance for Drug Offenses



Analysis of departure reasons shows that for the drug cases given sentences above the guidelines recommendations, judges most often cited "sentencing consistency" as the reason for departure (in 18% of the cases). In these cases judges are sentencing above the guidelines to sentence consistently with a codefendant's case or with other similar cases in their jurisdictions.

Judges specified in 13% of the drug aggravation cases that the unusually large amount of the drug in the offense led to a longer than recommended sentence. The offender's prior convictions for the same offense as the current conviction explained 13% of these departures. In 12% of the drug cases given sentences above the guidelines recommendation, judges felt the guidelines were too low, often referring to the weight given to the offender's prior criminal record. In another 12% of the aggravation cases for drug offenses, judges did not cite a departure reason other than "plea agreement."

Nearly two-thirds of the 1995 drug cases studied are convictions for the possession of a Schedule I or II drug, such as cocaine or heroin. Conviction for the sale, distribution or manufacture of a Schedule I or II drug or the possession with intent to do any of those acts, represent 26% of the drug cases examined.

Analysis reveals that the compliance rate for the possession of a Schedule I or II drug is 80% (Figure 26). However, judges sentence above the guidelines recommendation in 88% of the total departures for these possession cases. In only 12% of the possession cases involving departures, do judges sentence below the guidelines. In the vast majority of these departures, judges opt to incarcerate an offender convicted of the possession of cocaine or heroin for a short jail term instead of imposing a suspended incarceration term and simply placing the offender on probation, as the guidelines often recommend.

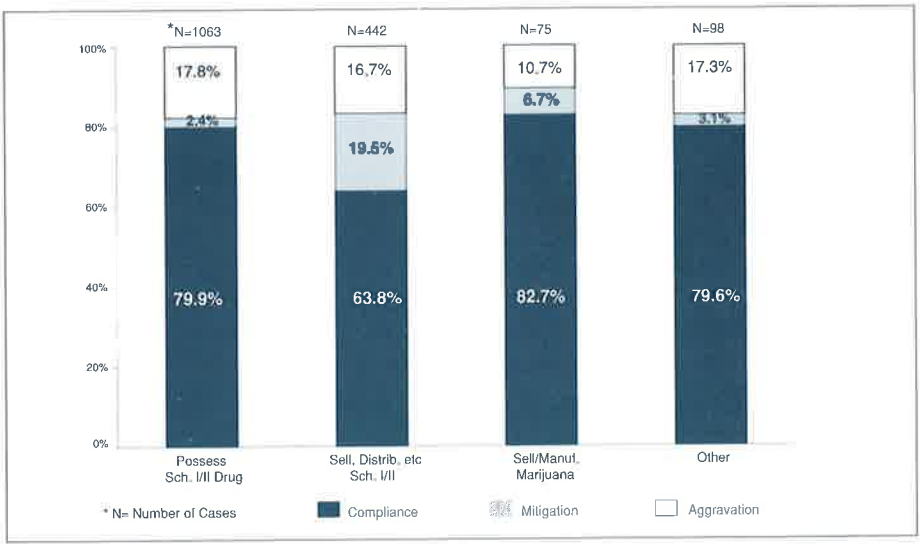


Figure 26

Compliance for Specific Drug Offenses

For the sale of a Schedule I or II drug, the compliance rate is a relatively low 64%, with departures about evenly split between aggravation and mitigation. When judges mitigated guidelines sentences for these drug sale offenses, they most frequently referred to intermediate sanctions in lieu of incarceration (i.e., boot camp), the offender's rehabilitation potential, plea agreements, and the offender's cooperation with authorities, in explaining their departures. In these drug cases sentenced above the guidelines, judges cited the excessive drug amount involved in the case more frequently than any other reason (Figure 27). Judges' consideration of the quantity of a Schedule I/II drug involved in the case may convey a desire on the part of the judiciary that the guidelines account for this factor on the drug offense work sheet. In addition, many judges noted extreme case circumstances, while several reported that they felt the guidelines recommendation to be inadequate in cases involving the sale of a Schedule I/II drug, and still others cited sentencing consistency. Finally, judges specified in many cases that the offender's immersion in the drug culture led them to impose a more severe sanction than called for by the sentencing guidelines.

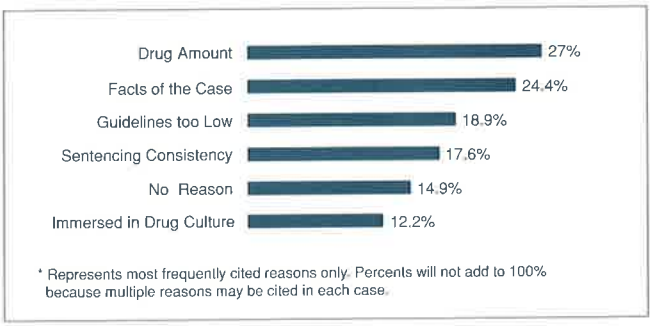


Figure 27

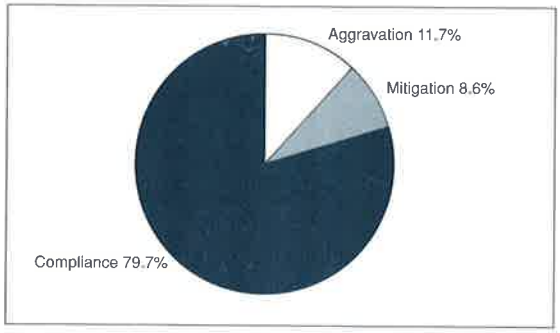
Most Frequently Cited Reasons for Aggravation in Sale, Distribution or Manufacture of a Schedule I/II Drug Cases*

◆ Compliance in Larceny Cases

With larceny comprising nearly a quarter of all sentencing guidelines cases, its sentencing patterns plays a significant role in the overall compliance trends. The compliance rate for larceny cases is 80% (Figure 28). This is the highest compliance rate of all the offense groups covered by the guidelines. Examining departures alone reveals that departures above and below the guidelines are proportional to one another.

Figure 28

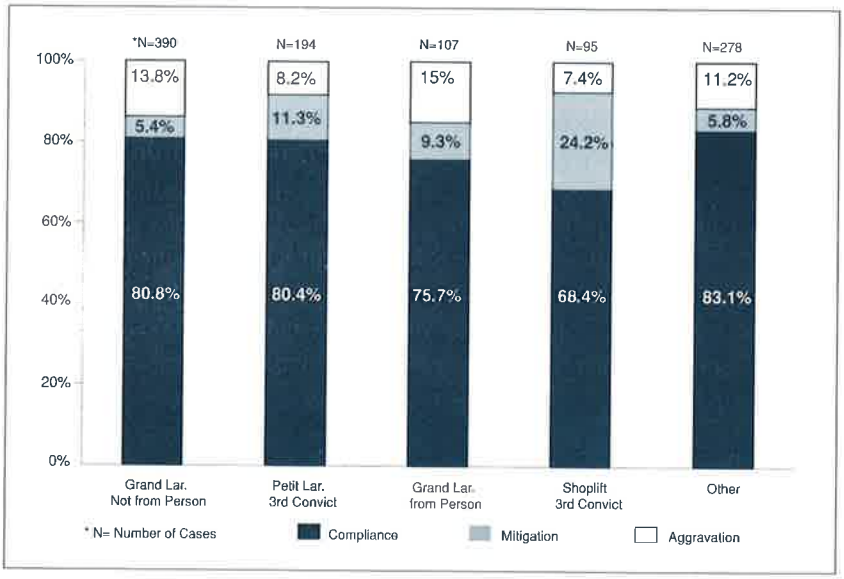
Compliance for Larceny Offenses



Nearly 37% of the larceny cases are convictions for grand larceny ($200 or more, not from a person). A significant number of larceny cases (18%) are third conviction offenses for petit larceny. Third conviction shoplifting offenses and grand larceny ($5 or more from a person) represent 9% and 10% of all the larceny cases, respectively. Analysis reveals that the compliance rate for third conviction shoplifting offenses (68%) is somewhat lower than the overall larceny compliance rate, and that judges tend to sentence below the guidelines for this particular offense (Figure 29). While the grand larceny (not from a person) and the petit larceny compliance rates are very similar, the departure patterns are exactly the opposite. When they depart, judges prefer to sentence above the guidelines in grand larceny cases and below the guidelines in petit larceny cases.

Figure 29

Compliance for Specific Larceny Offenses



When judges depart from the guidelines in larceny cases by imposing a sentence less than the guidelines recommendation, they typically cite minimal property loss and the rehabilitation potential of the offender. In many larceny cases, however, judges recorded only that they sentenced in accordance with a plea agreement or the sentence recommendation made by the Commonwealth's attorney or probation officer. Judges noted that the Commonwealth's evidence against the offender was weak in a number of larceny cases sentenced below the guidelines. Judges provided no mitigation reason in 24% of the larceny mitigation cases.

"Plea agreement" is the reason for departure cited most frequently in larceny cases given sentences more severe than the recommended sentence under the guidelines. Judges also reported that an aggravating circumstance or the flagrancy of the offense in the case was the basis for the upwards departure. When departing upward, judges frequently noted that the guidelines recommendation was too low. Judges also considered extreme monetary or property loss when sentencing above the guidelines. Judges failed to submit a reason for aggravation in 20% of these departures.

◆ Compliance by Circuit

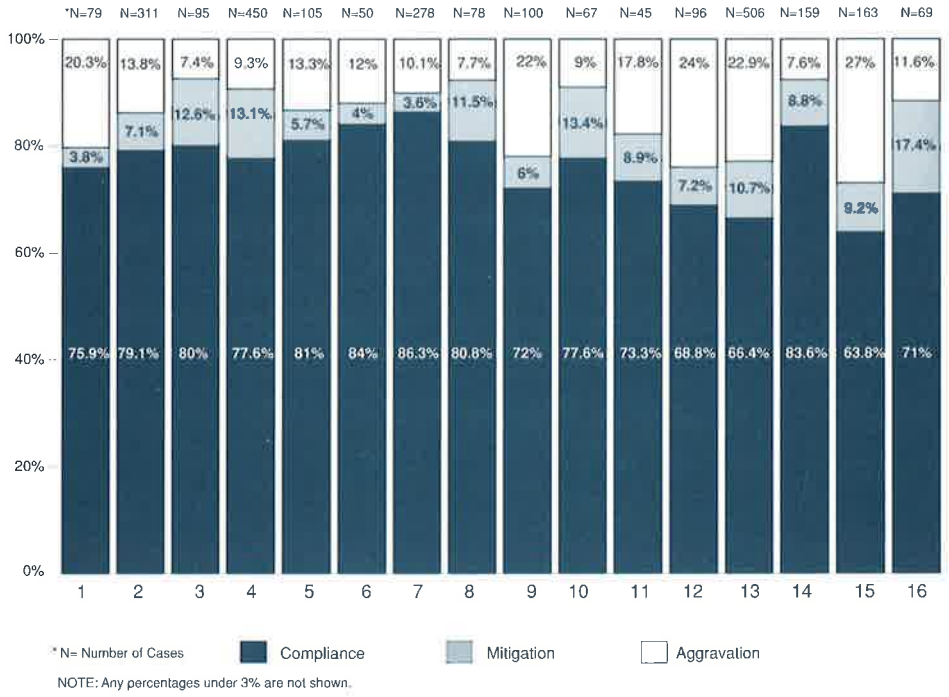
In Virginia, there are 31 circuits and 143 active circuit court judges. The map and accompanying table on the following pages detail the specific location of Virginia judicial circuits. Compliance rates across the circuits vary significantly. Only a small number of cases have been received from some of the circuits, and the compliance figures for those circuits should be approached with caution.

The highest compliance rates, 88% and 86%, are in the 20th Circuit (Fauquier, Loudoun and Rappahannock counties) and the 7th Circuit (Newport News), respectively (Figure 30). However, the Commission has received only 60 cases from the 20th Circuit. Of the seven circuits which have submitted highest numbers of work sheets to date (Richmond, Norfolk, Virginia Beach, Fairfax, Newport News, Roanoke, and Lynchburg), Newport News and Fairfax County (Circuit 19) have the highest compliance rates (86% and 79%).

The lowest compliance rates were found in Circuit 29 in Southwest Virginia (56%) and Circuit 18, the City of Alexandria (60%). Among the largest seven work sheet submitters, the Lynchburg area (Circuit 24) has a 65% compliance rate, while Richmond (Circuit 13) registers a rate of compliance of approximately 66%.

Figure 30

Compliance by Judicial Circuit



Of all the circuits, Alexandria (Circuit 18) and Circuit 27 in Southwest Virginia hold the highest rate of mitigated sentences, nearly 20%. Neither of these circuits represents a large portion of the total 1995 cases received. Among the largest work sheet submitters, Roanoke (Circuit 23) has the highest mitigation rate, with 18%. Chesterfield County (Circuit 12) and the 15th Circuit (the Northern Neck area and Stafford, Spotsylvania, Caroline and Hanover counties) have rates of aggravated sentences of 24% and 27%, respectively, among the highest in the state, and these high rates of aggravation are coupled with relatively low compliance rates in these jurisdictions. The City of Richmond has the highest rate of aggravated sentences (23%) among the circuits which submit the largest number of work sheets.

Both high and low compliance circuits were found in close geographic proximity. The degree to which judges follow guidelines recommendations does not seem primarily related to geography. There are likely many reasons for the variations in compliance across circuits. Certain localities may see atypical cases not reflected well in statewide averages. In addition, the availability of intermediate sanctioning programs differs from locality to locality.

Appendix 3 presents compliance figures for judicial circuits by each of the 12 sentencing guidelines offense groups.

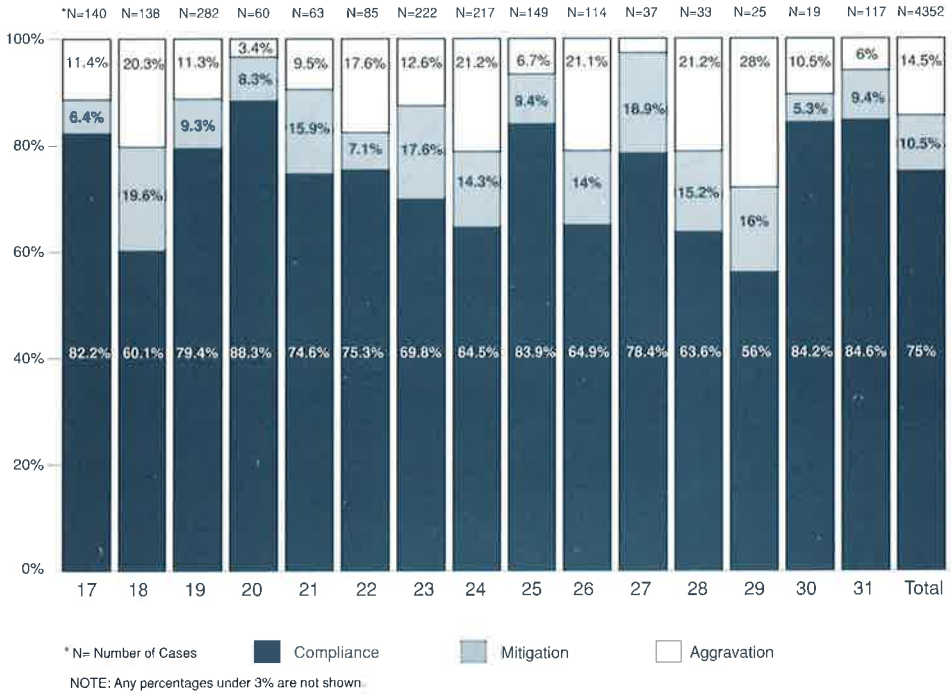
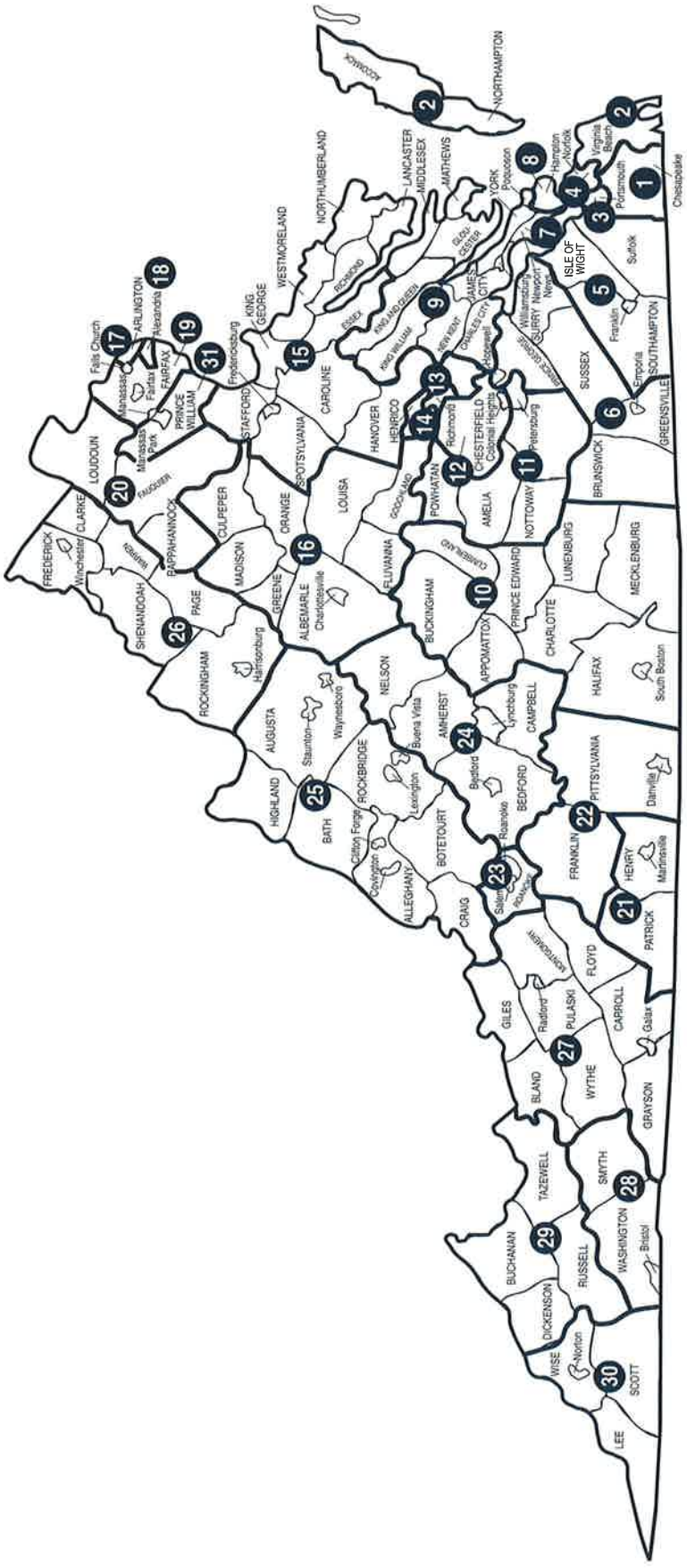


Figure 30

Compliance by Judicial Circuit

◆ Virginia Judicial Circuits



◆ Virginia Localities and Their Judicial Circuits

Accomack	2
Albemarle	16
Alexandria	18
Alleghany	25
Amelia	11
Amherst	24
Appomattox	10
Arlington	17
Augusta	25
Bath	25
Bedford City	24
Bedford County	24
Bland	27
Botetourt	25
Bristol	28
Brunswick	6
Buchanan	29
Buckingham	10
Buena Vista	25
Campbell	24
Caroline	15
Carroll	27
Charles City	9
Charlotte	10
Charlottesville	16
Chesapeake	1
Chesterfield	12
Clarke	26
Clifton Forge	25
Colonial Heights	12
Covington	25
Craig	25
Culpeper	16
Cumberland	10
Danville	22
Dickerson	29
Dinwiddie	11
Emporia	6
Essex	15
Fairfax City	19
Fairfax County	19
Falls Church	17
Fauquier	20
Floyd	27
Fluvanna	16
Franklin City	5
Franklin County	22
Frederick	26
Fredericksburg	15
Galax	27
Giles	29
Gloucester	9
Goochland	16
Grayson	27
Greene	16
Greensville	6
Halifax	10
Hampton	8
Hanover	15
Harrisonburg	26
Henrico	14
Henry	21
Highland	25
Hopewell	6
Isle of Wight	5
James City	9
King and Queen	9
King George	15
King William	9
Lancaster	15
Lee	30
Lexington	25
Loudoun	20
Louisa	16
Lunenburg	10
Lynchburg	24
Madison	16
Manassas	31
Martinsville	21
Mathews	9
Mecklenburg	10
Middlesex	9
Montgomery	27
Nelson	24
New Kent	9
Newport News	7
Norfolk	4
Northampton	2
Northumberland	15
Norton	30
Nottoway	11
Orange	16
Page	26
Patrick	21
Petersburg	11
Pittsylvania	22
Poquoson	9
Portsmouth	3
Powhatan	11
Prince Edward	10
Prince George	6
Prince William	31
Pulaski	27
Radford	27
Rappahannock	20
Richmond City	13
Richmond County	15
Roanoke City	23
Roanoke County	23
Rockbridge	25
Rockingham	26
Russell	29
Salem	23
Scott	30
Shenandoah	26
Smyth	28
South Boston	10
Southampton	5
Spotsylvania	15
Stafford	15
Staunton	25
Suffolk	5
Surry	6
Sussex	6
Tazewell	29
Virginia Beach	2
Warren	26
Washington	28
Waynesboro	25
Westmoreland	15
Williamsburg	9
Winchester	26
Wise	30
Wythe	27
York	9

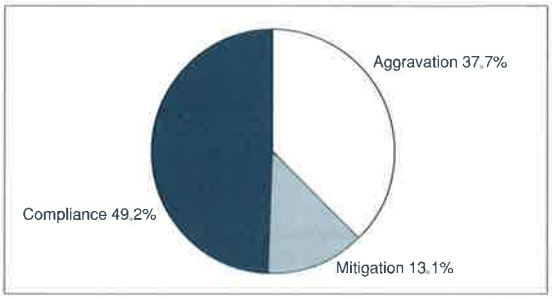
◆ Juries and the Sentencing Guidelines

Virginia is one of only six states that currently use juries to determine sentence length in non-capital offenses. Jury sentences have traditionally not been in compliance with the sentencing guidelines. Juries composed of Virginia's citizens typically hand down sentences that are more severe than the sentencing guidelines recommendations in the cases heard by juries. With the conversion to a truth in sentencing system, the sentencing guidelines have been adjusted to recommended sentences based on time served and not historical sentences imposed. Juries are not allowed to receive any information regarding the sentencing guidelines to assist them in their sentencing decisions, and many citizens may be unaware of the full impact of the new sentencing system. It is anticipated that juries will continue to sentence above the guidelines in many cases.

In Virginia, a sentence decided by a jury is not necessarily the ultimate sentence. The trial judge has the right, by statute, to suspend any part of the jury sentence. Generally, judges do not exercise this right. Some judges have argued that jury sentences should remain unchanged because they are an expression of the current values and standards of the community.

Figure 31

Compliance by Jury Cases



Among the 1995 cases studied, there have been guidelines work sheets submitted for 61 jury trials. The offenses in these jury trials have been very diverse, including drug possession, larceny, assault, murder and robbery. The sentences handed down in jury cases fell within the guidelines in only 49% of the cases (Figure 31). Sentences in jury cases fell above the guidelines nearly three times as often as they fell below the guidelines.

Judges chose to modify the jury sentences in only 12 of the 61 cases. Four of the modifications brought the final effective sentence into compliance with the guidelines recommendation for the case. Although the judge suspended a portion of the jury sentence, the ultimate sentence in four cases still exceeded the guidelines range. In one case, both the jury sentence and the judicially modified sentence fell below the guidelines recommendation. Finally, one judicial modification changed a jury sentence that was above the guidelines range into an effective sentence that was lower than that recommended by the guidelines, and another modification changed a jury sentence that was in compliance to a final sentence less than what the guidelines recommended in that case.

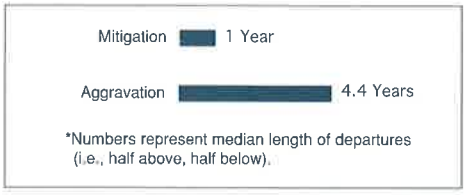


Figure 32

Median Guidelines Durational Departures in Jury Cases*

In jury cases where the ultimate sentence imposed fell short of the guidelines, it did so by a median value of 1 year (Figure 32). In those cases where the ultimate sentence resulted in a sanction more severe than the guidelines recommendation, the sentence exceeded the guidelines maximum recommendation by a median value of almost 4.4 years.

◆ Compliance under Midpoint Enhancements: Longer Sentence Recommendations for Violent Offenders

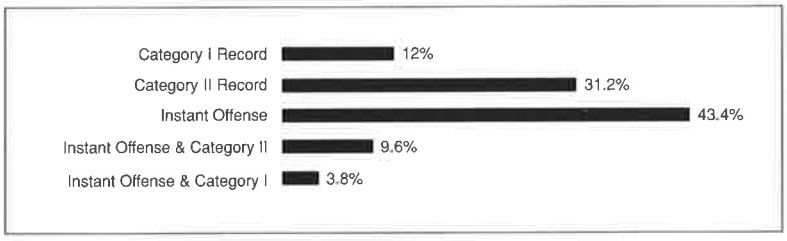
The no parole legislation alters guidelines recommendations for certain categories of crimes, prescribing prison sentence recommendations that are significantly greater than historical time served for these crimes. These normative adjustments were implemented by increasing the new sentencing guidelines midpoint recommendation: the sentencing guidelines score for the primary (most serious) offense in a case was raised, or "enhanced."

Midpoint enhancements were specified for certain instant or current offenses and also for certain types of offenses in an offender's prior criminal history. Midpoint enhancements for the current most serious offense are given for certain assaults, burglaries, murder, robbery, rape and sexual assault offenses. Also, there are specified degrees of enhancements for prior record based on the nature and seriousness of the offender's criminal history. The most serious prior record receives the most extreme enhancement. A Category II prior record contains at least one violent prior felony which carries a statutory maximum penalty of less than 40 years. A Category I prior record contains at least one violent offense with a statutory maximum penalty of 40 years or more. See *Development of the New Sentencing Guidelines* (page 7) for more information about the methodology and development of the new sentencing guidelines.

So far in 1995, 79% of the cases have not involved midpoint enhancements at all. Only 21% of the offenders have been subjected to increased sentence recommendations through these midpoint enhancements. Of the 936 cases involving midpoint enhancements, 43% of the offenders have received these upward adjustments due to the violent nature of the current offense. Another 31% received an enhancement because of criminal history that was determined to be a Category II prior record, while only 12% received enhancements due to a Category I prior record (Figure 33).

Figure 33

Type of Midpoint Enhancement Received



The compliance rate for cases receiving midpoint enhancements is less than 67%, which is lower than the overall compliance rate of 75%. Low compliance in cases involving midpoint enhancements is bringing down the overall compliance rate. When departing from the sentencing guidelines in these cases, judges are choosing to mitigate the guidelines recommendation in nearly 70% of the departures. This departure pattern is the reverse of the general departure pattern seen when the cases are examined in total (42% mitigation to 58% aggravation).

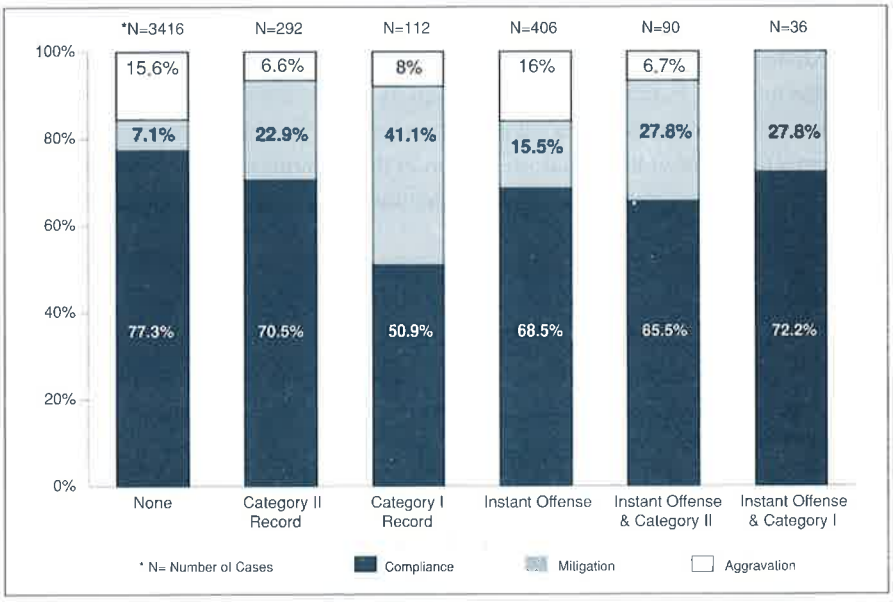


Figure 34

Sentencing Guidelines Compliance by Type of Midpoint Enhancement

Compliance by type of midpoint enhancement varies between a high of 72% in cases receiving the most extreme type of enhancement, that for a combination of a current violent offense and a violent prior record, to a low of 51% for those cases receiving enhancements for just a Category I prior record (Figure 34). In nearly half of the cases given a Category I prior record enhancement, the offender has been convicted of a larceny as his current offense.

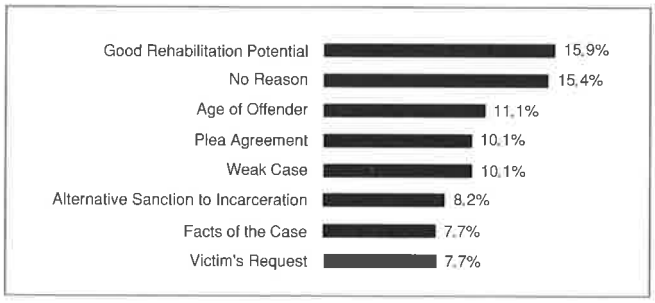
The majority of offenders receiving midpoint enhancements, however, received them for the violent nature of the current offense or for a Category II prior record. Compliance for current offense midpoint enhancements is 69%, while compliance for Category II midpoint enhancements is almost 71%.

Analysis of departure reasons in cases involving midpoint enhancements and downward departures from the guidelines reveals that judges sentenced based on the perceived potential for rehabilitation more often than any other reason for departure (16%). In numerous instances involving mitigated departures in midpoint enhancement cases, judges cited the offender's young age (11%). In 10% of the mitigated cases, judges indicated that the evidence against the offender was weak, while in another 10% they simply noted that the offender was sentenced according to a plea agreement. Judges frequently reported that mitigating facts in the case were the basis of the downward departure (8%) or that the offender was sentenced to an intermediate punishment treatment program as an alternative to incarceration (8%). The judge imposed a shorter sentence by request of the victim, a circumstance which sometimes arises in cases of sexual assault, in nearly 8% of these cases. Judges have neglected to provide a departure reason to the Commission in 15% of midpoint enhancement cases sentenced below the guidelines recommendation (Figure 35).

The Commission will be examining compliance in enhancement cases on a continual basis. With only 4,352 cases received so far, the Commission feels that it is too early to make judgments about the midpoint enhancements incorporated into the guidelines by the legislature. More information is needed before the Commission can make recommendations regarding revisions to the midpoint enhancements of the new sentencing guidelines system.

Figure 35

Mitigating Departure Reasons in Cases Involving Midpoint Enhancements



RECOMMENDATIONS OF THE COMMISSION

◆ Legislative Recommendations

▶ Recommendation 1

The General Assembly should develop legislation which would allow for jury instructions on the abolition of parole and the 85% minimum time served requirement for offenders sentenced under the new truth in sentencing system.

▶ Recommendation 2

§19.2-389.1 of the Code of Virginia should be revised to allow Commonwealth's attorneys access to the statewide automated reporting of juvenile adjudications for felonies, while §16.1-305(4)of the Code should be revised to provide Commonwealth's attorneys with clear and direct access to juvenile records maintained in the juvenile court files.

▶ Recommendation 3

Juvenile records should be maintained to support the complete scoring of sentencing guidelines work sheets, as stipulated in §17-237B of the Code of Virginia.

▶ Recommendation 4

Statutory language should be enacted requiring all state-supported data systems that report offense information to do so using the Virginia Crime Codes.

▶ Recommendation 5

§19.2-298.01 of the Code of Virginia relating to the completion of sentencing guidelines work sheets should be amended to clarify that circuit court clerks should submit the blue version (original) of the guidelines work sheet, and not a photocopy, to the Commission.

▶ Recommendation 6

The General Assembly should adopt a resolution requesting the Commission to study the effects of mandatory minimum felony sentences in Virginia.

▶ Recommendation 7

The Commission will undertake a systematic review of all felony offenses specified in Title 18.2 of the Code of Virginia in order to develop recommendations regarding the revision of general criminal offenses statutes to provide more specific offense definitions and more narrowly prescribed ranges of punishment.

◆ Guidelines Recommendations

At this time, it is the Commission's position that there is not enough experience with the new sentencing system to justify making any recommendations regarding revisions.

◆ Legislative Recommendations

Whether under the new or old sentencing system, instances will occur where jurors will ask the trial judge questions regarding how long the offender will serve in prison on particular sentences.

▶ Recommendation 1

The General Assembly should develop legislation which would allow for jury instructions on the abolition of parole and the 85% minimum time served requirement for offenders sentenced under the new truth in sentencing system. The exact language of the jury instruction should be developed by the existing Committee of the Judicial Conference on model jury instructions.

§19.2-295 of the Code of Virginia (Ascertainment of punishment) authorizes juries to set sentences. Once a jury fixes a sentence, the presiding judge is authorized to suspend all or part of the term set by the jury, but is never allowed to increase the sentence imposed by the jury.

§19.2-298.01 (Use of discretionary sentencing guidelines) forbids the jury from being presented with any information regarding sentencing guidelines. Under the previous sentencing system (with parole and generous allowances for good conduct credit), jury sentences were seldom modified by judges. Under the provisions of the new no-parole legislation, there is no indication of trends on judicial modification of jury sentences since, to date, very few offenders have been sentenced by a jury with the new guidelines in place.

Whether under the new or old sentencing system, instances will occur where jurors will ask the trial judge questions regarding how long the offender will serve in prison on particular sentences. Historically, Virginia case law has evolved which explicitly forbids judges from providing the jury with information on parole eligibility. In Hinton v. Commonwealth, 219 Va. 492 (1978) the Virginia Supreme Court noted: *"In response to the often-asked question concerning parole eligibility, the trial judge should only tell the jurors that if they find the accused guilty, they must impose such sentence, within the limits fixed by law, as appears to be just and proper, and that what might afterwards happen is of no concern to them."* In this same opinion the Court went on to say: *"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. The aim of the rule followed in Virginia is to preserve, as effectively as possible, the separation of those functions during the process when the jury is fixing the penalty, in full recognition of the fact that the average juror is aware that some type of further consideration will usually be given to the sentence imposed."*

In a subsequent case (Peterson v. Commonwealth, 225 Va. 289, 1983), the Supreme Court resolved a case involving a defendant who objected to the fact that the jury was not instructed as to his parole ineligibility on the grounds that he was not eligible for parole under a new three-time loser law. The Court ruled against Peterson saying: *"We need not consider the effect of this statutory amendment, because we rely upon and reaffirm the principle enunciated in Clanton and Hinton that it is improper to inform the jury as to the possibility of parole."*

Recently, the U.S. Supreme Court held that when future dangerousness is at issue in the sentencing phase of a capital murder case, the jury is entitled to be informed of the defendant's parole ineligibility (Simmons v. South Carolina, 512 U.S. __, 114 S.Ct. at 2189, 1994). Subsequently, the Virginia Supreme Court extended the Simmons logic to Virginia cases when future dangerousness is an issue in the sentencing phase of a capital murder trial (Mickens v. Commonwealth, 1995).

Given the sweeping legislative changes to Virginia's sentencing system, it is not clear how historical case law forbidding jury instruction on parole ineligibility applies today.

Given the sweeping legislative changes to Virginia's sentencing system, it is not clear how this historical case law precedent applies today. Anecdotal evidence reveals there is considerable disparity in opinion among Virginia judges on whether or not they can instruct the jury about the new truth in sentencing system. There appears to be three positions on this issue: 1) that trial judges can inform the jury that the parole has been abolished and that offenders will serve at least 85% of any incarceration sentence imposed by the court; 2) that trial judges should not voluntarily provide information regarding the abolition of parole but provide such information in those instances where the jury specifically asks; and 3) that trial judges are restricted by existing case law from providing any such information on the truth in sentencing system to the jurors. Consequently, various practices may be being applied by circuit court judges around the Commonwealth.

Many judges have argued that parole ineligibility information should be provided so that jurors can make more informed sentence decisions. It is felt by some that most jurors are not aware of the impact of the new legislation and may be setting long prison terms in the mistaken belief that only a small portion will actually be served, as occurred under the old parole system. Thus, as uninformed juries pronounce sentences, it is argued that judges will be put in the position of often adjusting long jury sentences downward. Some also believe that jury sentences would be more closely aligned with judge sentences if jurors were informed that at least 85% of the term would be served. Currently, jury sentences are usually significantly longer than those imposed by judges.

The Legislative Subcommittee agreed that the instructions provided to juries relating to the abolition of parole should be uniform around the state. The Commission resolved to recommend that the General Assembly develop legislation which would allow for jury instructions on the abolition of parole and the 85% minimum time served requirement for offenders sentenced under the new truth in sentencing system. The exact language of the jury instruction should be developed by the existing Committee of the Judicial Conference of Virginia on model jury instructions.

Prosecutors have statutory authority to prepare guidelines forms which include the scoring of juvenile adjudications but no statutory authority to access juvenile record.

▶ Recommendation 2

§19.2-389.1 of the Code of Virginia should be modified to allow Commonwealth's attorneys access to the statewide automated reporting of juvenile adjudications for felonies, while §16.1-305(4) of the Code should be revised to provide Commonwealth's attorneys with clear and direct access to juvenile records maintained in the juvenile court files.

§17-237 of the Code of Virginia covers the adoption of sentencing guidelines midpoints and enhancements for prior violent offenses. §17-237(B) specifically defines prior convictions (for sentencing guidelines purposes) to include "prior adult convictions and juvenile convictions and adjudications of delinquency based on an offense which would have been at the time of conviction a felony if committed by an adult under the laws of any state, the District of Columbia, the United States or its territories."

§19.2-298.01 authorizes the attorney for the Commonwealth to prepare the sentencing guidelines work sheets in felony cases tried upon a plea of guilty, with the concurrence of the accused, the court and the attorney for the Commonwealth. Thus, the Commonwealth's attorney has statutory authority to prepare the sentencing guidelines forms and statutory instruction to include the scoring of prior juvenile convictions and adjudications of delinquency for felony-level crimes on the guidelines work sheets.

§16.1-299(4) requires the juvenile court clerk to report juvenile adjudication dispositions for felonies to the Central Criminal Records Exchange (CCRE - State Police). However, §19.2-389.1 (dissemination of juvenile record information) does not provide for dissemination of juvenile adjudication information collected pursuant to §16.1-299 to Commonwealth's attorneys. This Code section does allow for dissemination of this information to probation and parole officers to aid in the preparation of a pre-sentence or post-sentence investigation report pursuant to §19.2-264.5 or §19.2-299. The Commonwealth's attorneys should have such access, which would require statutory revision to §19.2-389.1.

While the revision of §19.2-389.1 would address Commonwealth's attorneys access to the statewide automated reporting of juvenile adjudications for felonies, it does not assure a reliable method of gathering this information. The Governor's Commission on Juvenile Justice Reform has found a serious problem in the under-reporting or lack of reporting by court clerks of juvenile adjudications for felonies. Consequently, a sole reliance on the CCRE system for this information would likely miss important prior offenses that get scored on the guidelines forms. A more reliable method to score an offender's juvenile record would require accessing the juvenile court files directly. §16.1-305(4) would appear to provide the prosecutor with such access but only upon a court order. The Commission recommends this statute be revised to give Commonwealth's attorneys clear and direct access to juvenile records maintained in the juvenile court clerk's offices in order to ascertain any prior adjudications for felonies for purposes of guidelines scoring.

▶ Recommendation 3

Juvenile records should be maintained to support the complete scoring of sentencing guidelines work sheets, as stipulated in §17-237B of the Code of Virginia.

The expungement requirement for juvenile records is inconsistent with the new legislation that authorizes the guidelines scoring of this information.

§17-237B of the Code of Virginia defines what constitutes previous convictions for purposes of scoring prior record under the discretionary sentencing guidelines. This section states: "For purposes of this chapter, previous convictions shall include prior adult convictions and juvenile convictions and adjudications of delinquency based on an offense which would have been at the time of conviction a felony if committed by an adult under the laws of any state, the District of Columbia, the United States or its territories. However, for purposes of subdivision A4 of this section, only convictions or adjudications (i) occurring within sixteen years prior to the date of the offense upon which the current conviction or adjudication is based or (ii) resulting in an incarceration from which the offender was released within sixteen years prior to the date of the offense upon which the current conviction or adjudication is based, shall be deemed to be previous convictions."

Thus, juvenile felony adjudications and convictions are to be scored on the guidelines. There is an allowance for not scoring prior convictions and adjudications for those offenders whose instant crime is non-violent and where the prior offense is more than 16 years old.

§16.1-306 (Expungement of court records) requires juvenile court clerks to destroy its files, papers and records connected with any juvenile felony adjudication when the juvenile has attained the age of 29. This section also notes that upon destruction of the juvenile records as authorized, the violation of law shall be treated as if it never occurred.

Some guidelines users have pointed out that the expungement requirement for juvenile records is inconsistent with the new legislation that authorizes the guidelines scoring of this information. For those convicted of designated violent crimes or Schedule I/II drug dealing, the new legislation allows the scoring of juvenile record information regardless of the length of time that has passed. For those convicted of other non-violent offenses, the so-called "16 year rule" is in effect to determine whether prior crimes are scored. In either case, the requirement for expungement of juvenile felony adjudications at age 29 would not allow for the complete scoring of criminal record as envisioned in the new legislation.

Therefore, the Commission suggests that §16.1-306 be modified to allow that juvenile records be maintained to support the complete scoring of sentencing guidelines work sheets, as stipulated in §17-237B of the Code of Virginia.

The method of reporting and recording criminal history information is too general and often leads to an understatement of the gravity of an offender's record on the guidelines work sheets.

▶ Recommendation 4

Statutory language should be enacted requiring all state-supported data systems that report offense information to do so using the Virginia Crime Codes (VCC).

§17-237 of the Code of Virginia (Adoption of initial discretionary sentencing guideline midpoints) details a schedule for guideline midpoint enhancements up to 500% based on the seriousness of designated violent crimes. The degree of the midpoint enhancement is specifically tied to the statutory seriousness of the violent crimes as measured by the maximum penalty allowed by law. This section also identifies, by statute number, the offenses which will be considered violent felony offenses for the purposes of scoring the sentencing guidelines. The largest of these midpoint enhancements are reserved for offenders with prior convictions for violent felonies carrying a statutory maximum penalty of 40 years or more.

Many prosecutors and probation officers have informed the Commission that, in practice, it is very difficult to apply the midpoint enhancements tied to the nature of prior criminal record. The reporting of criminal offense information by local jurisdictions to the State Police for purposes of recordation on the Central Criminal History Record Exchange (CCRE) "rap sheet" system is done using the Virginia Code Section and a brief offense description.

This method of reporting and recording offense information has been subjected to repeated criticism from officials who must use the criminal histories of offenders to make important decisions. Succinctly stated, this method of reporting criminal violations is not detailed enough and does not allow one to accurately understand the true nature of an offender's criminal background. For example, there are four unique variations of §18.2-91, Statutory Burglary--two of these versions carry maximum penalties of life in prison while the other two carry maximums of 20 years.

Most of the reports concerning convictions for these crimes simply provide the statute number and the words "burglary." This information does not allow the guidelines user to determine the exact nature of the burglary. In such situations, the guidelines user is instructed to score the ambiguous offense at its lowest possible seriousness level--a decision rule which, in many instances, understates the gravity of an offender's criminal history.

Because the Code of Virginia refers to many distinct criminal acts with reference to the same exact Code section, the statute number is an inadequate method to record offense seriousness. The inclusion of an offense description provided in the field usually does not provide enough additional information to match the crime to its specific statutory penalty. These offense descriptions are non-uniform, subjectively assigned, and often lack the elements of the crime needed to make critical distinctions between discrete offenses.

What is needed is a set of standardized offense codes that accurately identify each unique crime in the Code of Virginia and which, when entered into a data base, is capable of generating the statutory reference number as well as a literal offense description keyed to the critical offense elements. This offense code system should then be required to be used on every state supported data system that records crime information.

How offense information is recorded on state-supported data systems has important implications for the sentencing guidelines.

Such an offense coding system already exists and it is known as the Virginia Crime Codes (VCC) System. The VCC codes already have been in use on the presentence investigation reports and data system since 1985 and have been used on the sentencing guidelines data base since 1990. Recently, the Department of Youth and Family Services has decided to adopt the VCC codes as its method of offense reporting for all of their juvenile record keeping systems.

Unfortunately, not all state-supported criminal justice data systems use the VCC system. The manner in which offense information is recorded on our state-supported data systems obviously has important implications for those who rely on such data to make both individual and system-wide decisions. Accordingly, it is imperative that all state data systems record offense information in a uniform fashion.

Therefore, the Commission recommends that there be statutory language requiring all state-supported data systems that report offense information to do so using the VCC codes.

Submission by clerks of original guidelines forms will facilitate reliable and expeditious data automation and provide for unique sentencing case identifiers.

▶ Recommendation 5

§19.2-298.01 of the Code of Virginia relating to the completion of sentencing guidelines work sheets should be amended to clarify that circuit court clerks should submit the blue version (original) of the guidelines work sheet, and not a photocopy, to the Commission.

§19.2-298.01 of the Code of Virginia (Use of discretionary sentencing guidelines) details the specific procedures for guidelines form completion, review and dissemination. Subsection E of this section states : "Following the entry of a final order of conviction and sentence in a felony case, the clerk of the circuit court in which the case was tried shall cause a copy of such order or orders, a copy of the discretionary sentencing guidelines worksheets prepared in the case, and a copy of any departure explanation prepared pursuant to subsection B to be forwarded to the Virginia Criminal Sentencing Commission within five days." In the Sentencing Guidelines Manual (page 14), the Commission requests that court clerks send the blue copy (original) to the Commission.

The rationale for the request for the blue work sheet is twofold. First, the Commission has purchased computer scanning and imaging equipment which will enable Commission staff to automatically scan the work sheets into the computer data base without the need for manual data entry by a clerk. This scanning process will improve the reliability of the data base and will allow for more expeditious computer automation of the work sheet data than is the case with manual data entry. The accuracy of the scanning process, however, can only be ensured if the original form is being scanned. Photocopies can be scanned but information will be lost depending on the quality of the copy.

Secondly, it is important for our data base that each sentencing event have a unique identifier. Each of the blue work sheet forms has a unique pre-printed number (document control number) which is used for this identification purpose. Unfortunately, the Commission has discovered that some Commonwealth's attorneys offices and some probation offices have been copying the blue forms and using the copies as though they were originals. As a result, the Commission has cases on the data base with the same document control numbers. The only definitive method to ensure that each case has a unique identifier is to insist that the blue forms serve as originals and be mailed to the Commission after sentencing.

The Commission, therefore, recommends that §19.2-298.01(B) be modified to make it clear that the original version of the work sheet is to be sent to the Commission, with the clerk maintaining a copy for the court files.

▶ Recommendation 6

The General Assembly should adopt a resolution requesting the Commission to study the effects of mandatory minimum felony sentences in Virginia, to include, but not be limited to a cataloguing of all existing mandatory minimum sentences for felony offenses, any deviations that their use causes from otherwise applicable sentencing guidelines, the number of inmates currently serving such sentences and a projected population of such prisoners over the next ten years, and the fiscal impact, if any, of the imposition of these sentences rather than sentences recommended under the new sentencing guidelines system.

When parole was abolished, the penalty, as measured by incarceration time to be served, for felonies with mandatory minimum provisions, was increased significantly.

There are currently 54 instances in the Code of Virginia where the statutes mandate a minimum term of imprisonment, without suspension, for a conviction. Most of these statutory mandatory minimum penalties apply to felony level crimes. Appendix 4 provides a listing of the statutory mandatory minimum penalties as of July 1, 1995. An offender convicted under one of these statutes must receive the specified minimum incarceration term. For those offenders convicted of felony crimes carrying mandatory minimums which occurred before 1995, the sentence still could be reduced significantly by both good conduct credit and by parole. Thus, the time actually served on the mandatory minimum terms was often significantly less than the actual mandatory minimum penalty.

When the General Assembly abolished parole and the old good-conduct earning system, truth in sentencing was achieved in that felons, who formerly served on average about one-fourth to one-third of their sentences, now must serve at least 85% of their prison term. Despite these changes, the General Assembly did not amend the general criminal statutes that delineate mandatory minimum penalties. As a result, the actual penalty, as measured by time served, for felonies with mandatory minimum provisions occurring after January 1, 1995, has increased significantly.

Because the methodology for the new sentencing guidelines is one that calibrates the sentence recommendation on historical time served for most of the felony crimes with mandatory minimum penalties, the guidelines often result in a sentence range which is below the statutory mandatory minimum. For example, for an offender convicted of selling cocaine for profit while possessing a firearm, §18.2-308.4(B), the guidelines recommendation is a sentence with a midpoint of 1 year 5 months and a range between 9 months and 1 year 7 months. However, the conviction for possession of a firearm while selling a Schedule I or II drug requires the imposition of a mandatory minimum sentence of three years.

The Sentencing Guidelines Manual (page 61) notes that when a sentencing event includes a conviction for an offense with a mandatory minimum sentence, the guideline recommendation should reflect the statutory mandates. When the guidelines recommendation for a particular crime is less than the statutory mandatory minimum, the work sheet preparer is instructed to enter the statutory mandatory minimum penalty for any part of the guideline sentence range that falls below the mandatory minimum. Consequently, for the example cited above, the guidelines range would be amended to a midpoint of three years with the range of a minimum of three years to a maximum of three years. This administrative resolution to the

contradictions between statutory law and the guidelines is cumbersome and presents face validity problems for the sentencing guidelines system. Many guidelines users complain that they make no sense when they recommend a period of incarceration less than that required by the law.

Therefore, the Commission recommends that the General Assembly adopt a resolution requesting the Commission to study the effects of mandatory minimum felony sentences. The study should include, but not be limited to, a cataloguing of all existing mandatory minimum sentences for felony offenses, any deviations that their use causes from otherwise applicable sentencing guidelines, the number of inmates currently serving such sentences and a projected population of such prisoners over the next ten years, and the fiscal impact, if any, of the imposition of these sentences rather than sentences recommended under the new sentencing guidelines system.

▶ Recommendation 7

The Commission will undertake a systematic review of all felony offenses specified in Title 18.2 of the Code of Virginia in order to develop recommendations regarding the revision of general criminal offenses statutes to provide more specific offense definitions and more narrowly prescribed ranges of punishment.

Some have argued that the statutory penalty structures for felony crimes should be revised to complement the other truth in sentencing changes.

§17-235 of the Code of Virginia details the powers and duties of the Virginia Criminal Sentencing Commission. Subsection 9 of this section empowers the Commission to study felony statutes in the context of judge-sentencing and jury-sentencing patterns as they evolve after January 1, 1995, and make recommendations for the revision of general criminal offense statutes to provide more specific offense definitions and more narrowly prescribed ranges of punishment.

When the General Assembly abolished parole and strictly limited inmate sentence credits for good behavior, truth in sentencing was established in that felons, who formerly served on average about 25%-33% of their sentences, would now be expected to serve at least 85% of their incarceration term. The General Assembly did not, however, make any modifications to the statutory penalty structure that specifies the minimum and maximum periods of incarceration for felony crimes. These penalty structures have evolved over the past few decades and were established during a time when it was understood that felons were rarely serving more than 50% of the imposed sentence.

Given these circumstances, some have argued that the statutory penalty structures for felony crimes should be revised to complement the other truth in sentencing changes. Perhaps the most pertinent aspect of this issue concerns the specified statutory minimums in the Code of Virginia. In most situations, these statutory minimums are not real minimums since judges can suspend all or a portion of incarceration time so that the effective or active time is less than the statutory minimum. For example, the statutory penalty range for possession of a Schedule I/II drug is 1-10 years (§18.2-250(a)). A typical sentence for this crime is a prison term of one to two years which is all suspended on the condition of a period of supervised probation. Under such a sentence there is no active incarceration time but the offender has some suspended time hanging over his head.

Since the previous sentencing guidelines system was based on historical effective sentences after any suspended time, there were already conflicts where the guidelines would recommend an active sentence that fell below the statutory minimum. In the above example, the previous sentencing guidelines would recommend probation even though the statutory minimum term is one year or a jail sentence of up to 12 months.

This situation will become more pronounced under the new guidelines system, which is largely premised on historical time served. For example, the statutory penalty range for sale, distribute, manufacture, or possess with intent etc. of a Schedule I/II drug is five to 40 years (§18.2-248(c)). For a first offender, the previous sentencing guidelines recommend a midpoint sentence of five years and, if so sentenced, he would have served, on average, about 10 months (17% of the sentence). Under the

Now that parole has been abolished, post-release supervision violations will be administratively handled by the judiciary.

new guidelines, the same offender receives a guidelines midpoint of one year and will have to serve a minimum of 85% of that time—about 10 months. However, the judge must by law impose a five year sentence (statutory minimum) and, if he wishes to sentence at the guidelines midpoint, suspend four years resulting in an active term of one year. Such a sentence will result in the offender having at least a four year suspended sentence hanging over his head, which is a period longer than has been historical practice. The periods of suspended time (or "come back" time) will now be longer because the gap between the active sentence recommendations and the statutory minimums has been greatly expanded.

Judges will now be dealing with cases that are the equivalent of parole revocations which were historically handled by the Parole Board. If an offender is revocated on post-release supervision or probation, the judge can reimpose any or all suspended time and the bigger the gap between the guidelines sentences and the statutory minimums, the larger the potential time period that a judge can reimpose. Any time reimposed on imposition of a suspended sentence is subject to the 85% minimum time served criterion. Since there are currently no guidelines for judges in cases involving imposition of suspended sentences, it is not possible now to predict what judges will do in these cases. These types of cases are expected to represent a significant share of the criminal caseloads and the method in which they are handled will have to be accounted for in the forecast of future bedspace requirements.

The last aspect of this issue concerns the length of the statutory maximums. Some have argued that the maximums are too long in light of the fact that offenders will now have to serve at least 85% of their terms. For example, the maximum penalty for selling a Schedule I/II drug is 40 years in prison--the same maximum as that for second degree murder. Suggested resolution to this issue could involve the modification of these maximums to better reflect both proportionality in the relative seriousness of the offenses as well as the realities of the truth in sentencing system.

The Commission has charged the Legislative Subcommittee to further study the issues of statutory offense definitions, statutory penalty ranges, and the reimposition of suspended time in the context of the truth in sentencing guidelines. The Commission feels that there is a need to address this matter but that it needs to be accomplished in a holistic, rather than piecemeal, manner. A holistic approach would require, at a minimum, a systematic review of all felony offenses specified in Title 18.2 of the Code of Virginia to determine recommendations regarding more specific offenses definitions and more narrowly prescribed punishment ranges. The Commission believes that such an effort will require more time than has been available in its first year and will defer any recommendations on this matter until next year.

◆ Guidelines Recommendations

The process used by the Commission for arriving at recommendations regarding adjustments to the sentencing guidelines is guided by a detailed analysis of judicial compliance rates, departure patterns, and reasons for departures. In addition, the Commission's decisions on modifications are informed by comments, both verbal and written, from guidelines users and well as from the citizens of the Commonwealth.

Concern has been expressed about the failure of the guidelines to explicitly consider the quantity of drugs.

At this time, it is the Commission's position that there is not enough experience with the new sentencing system to justify making any recommendations regarding revisions.

The overall compliance rate of 75% does indicate a generally high level of judicial acceptance of the current guidelines. The overall compliance rate also is encouraging evidence that our judiciary is making a successful transition from the old felony sanctioning system to the new one.

Compliance rates for the violent offenses and for those cases receiving midpoint enhancements are, however, much lower than the overall average. Since these compliance figures are based on a relatively small number of cases, it is simply too early to determine if guidelines adjustments are justified in these instances. Most of the violent cases in the Commission's data base are those which were resolved by the courts at a pace somewhat quicker than the norm. Accordingly, it is possible that these cases are not completely representative of the violent cases typically processed in our courts. Significantly more sentencing data on violent offenses will be required in order to determine if the guidelines in these cases are not being routinely accepted.

One area of the guidelines in which the Commission has received a moderate amount of feedback from judges and prosecutors has been in drug cases. Specifically, concern has been expressed about the failure of the guidelines to explicitly consider the quantity of drugs. Whether an offender sells one gram of cocaine or 100 grams, the guidelines recommendation remains unaffected. Critics argue that drug sales which involve larger amounts deserve longer prison term recommendations and that the guidelines should be modified in some fashion to accommodate this concern. Analysis presented earlier revealed that there was an 17% aggravation departure rate for drug sale cases. The most frequently cited reason for an upward departure in these cases was the amount of drugs involved (cited in 27% of these departure cases).

Consequently, the Commission decided to take a closer look at the issue of drug quantity and its impact on sentencing. Virginia is fortunate in having the only statewide data base in the nation that provides detailed information on drug type and quantity in felony conviction cases. The most recent time period for which this data is available was fiscal year 1994. In FY94, there were 2261 conviction cases where the primary offense was the sale, distribution, manufacture or possession with intent to sell a Schedule I or II drug (§18.2-248(c)). Among these cases, 95% involved cocaine (54% crack cocaine, 41% powder cocaine). Accordingly, the analysis focused specifically on cocaine sale cases.

There were no significant differences in prison terms between cocaine cases characterized with smaller quantities and those involving larger amounts.

A detailed analysis of cocaine sale cases reveals that the great majority involve relatively small amounts of the drug. Among crack cocaine sales, about one-third of the cases involved a quarter of a gram or less. Approximately 75% of the crack sales involved three grams or less. As a point of reference, three grams of crack cocaine sold on the street costs between $150 and $450 (based on Federal Drug Enforcement Agency estimates of price per gram). Only 15% of all crack cocaine sales included an amount that exceeded six grams. Powder cocaine sales exhibited a similar pattern although slightly larger quantities prevailed. Among powder cocaine sales, about one-third of the cases involved 0.4 of a gram or less. Approximately 75% of the powder sales involved six grams or less. Six grams of powder cocaine sold on the street costs between $400 and $600. The upper 15th percentile of powder cocaine sales included amounts exceeding 18 grams.

Figure 36

Sell, Distribute, Manufacture, Possess with Intent, a Schedule I/II Drug (§18.2-248(c))

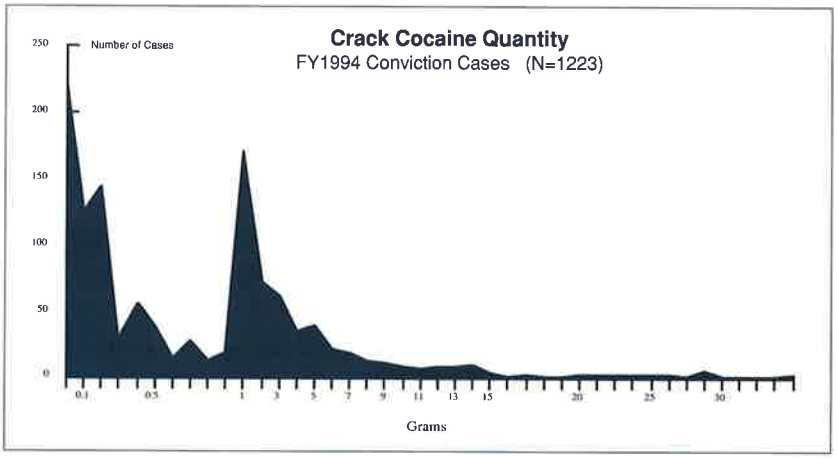
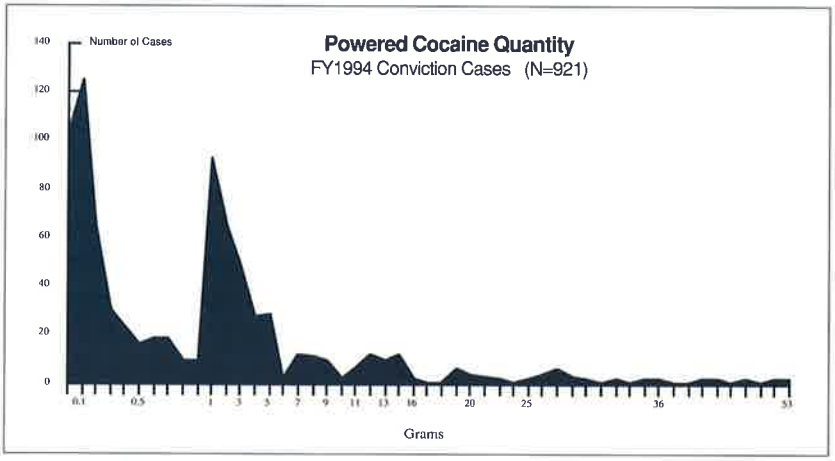


Figure 37

Sell, Distribute, Manufacture, Possess with Intent, a Schedule I/II Drug (§18.2-248(c))



The fact that most of these drug sales involve small quantities is a function of the manner in which cocaine is packaged and marketed on the street. A great deal of crack cocaine sales involve single-dosage units in plastic vials or baggies weighing between 0.1 and 0.5 gram apiece and affordably priced at between $5 and $20 (Cocaine and Federal Sentencing Policy, U.S. Sentencing Commission, February, 1995). Thus, the vast majority of drug sale convictions in our circuit courts involve street-level amounts measured in grams rather than in pounds.

In examining the relationship between the quantity of cocaine sold and the severity of the sentence imposed, there were no significant differences in prison terms between cases characterized with smaller quantities and those involving larger amounts.

There are likely two explanations for this finding. First, as seen above, there is a heavy concentration of cocaine cases involving relatively small differences in drug quantity and street dollar value. These small differences across drug cases do not translate into variations in sentences. Second, when there are cases in the circuit courts involving relatively large drug amounts, these sometimes involve individuals acting as couriers or "mules" who are not drug kingpins running a huge trafficking operation. The sentences handed down in these situations often are not significantly different than those typically imposed in street-level sales cases. Thus, while there were instances where drug dealers who sold relatively large quantities of cocaine received longer terms, they occurred very infrequently. When these situations do occur, because the guidelines are voluntary, judges are free to exercise their discretion and depart upward.

Accordingly, at this time the Commission believes there is no compelling evidence to justify modifying the drug guidelines by adding explicit consideration of the type and quantity of drug involved in a case. However, in recognition that drug trafficking patterns are not static, the Commission will continue to study this issue.

There is no compelling evidence to justify modifying the drug guidelines by adding explicit consideration of the type and quantity of drug involved in a case.

FUTURE PLANS

◆ Future Plans

Plans for 1996 and Beyond

The Commission is prepared to perform legislative impact assessments.

To fulfill its mission the Commission will continue to perform a wide array of functions and pursue an assortment of very diverse activities in 1996 and the years beyond. In its inaugural year, the Commission launched the Commonwealth's new criminal sentencing system and successfully implemented an entirely redesigned system of sentencing guidelines. In the coming year, the Commission will be engaged in the analysis of sentencing and compliance under the new guidelines system, training and education services, as well as monitoring and oversight functions. The Commission's subcommittees will be active, and pursue their work in the areas of research and legislative issues. The Commission is prepared to perform legislative impact assessments for the 1996 General Assembly. Throughout 1996, the Commission will conduct vital research and analysis for the development of an offender risk assessment instrument, pursuant to §17-235(5,6) of the Code of Virginia. In all, the Commission expects 1996 to be a very busy year for its members and staff.

Revisions of the Sentencing Guidelines

For its first annual report, the Commission elected to defer any recommendations regarding revisions to the initial set of truth in sentencing guidelines enacted by the General Assembly. It is anticipated that the full impact of the new sentencing guidelines system will not be realized until sometime in 1996. The Commission believes that not enough experience is currently available to recommend revisions or amendments to the guidelines for the coming year. One important and as yet unknown aspect of the new sentencing system is how judges will sentence offenders who fail community supervision. Under the new system, offenders will have to serve at least 85% of any suspended time reimposed by the judge in all cases in which the original offense occurred on or after January 1, 1995. How judges reimpose suspended time may have a serious impact on future correctional resource needs.

Throughout the next year, the Commission will continue to study compliance issues, departure patterns, and sentencing data. Detailed analysis of guidelines work sheets and other criminal justice information will allow the Commission to examine potential revisions to the guidelines in the context of actual data. Such information and analysis will be very important to the Commission as it considers revisions to the guidelines in 1996.

Training and Education

Training and education will be on-going activities of the Commission. The Commission gives high priority to educating probation officers, Commonwealth's attorneys, members of the judiciary, public defenders, defense attorneys and the citizens of the Commonwealth about the new criminal sentencing system and the sentencing guidelines.

In 1996, Commission staff will pursue its very active training and education services in part by conducting semi-annual training seminars across the various regions of the Commonwealth and by providing other training seminars by special request. The

The Commission will holistically and systematically review all felony offenses specified in Title 18.2 of the Code of Virginia to develop recommendations for specific offense definitions and more narrowly prescribed ranges of punishments.

Commission would like to continue to participate in the annual conference for public defenders, the Commonwealth's attorneys training institutes, the Department of Corrections' Training Academy curriculum for new probation and parole officers, and various Bar association meetings. In addition, the Commission will gladly consider presenting information to any group or organization interested in learning more about Virginia's new sentencing system and the new sentencing guidelines. The Commission will continue its support of the hot line phone service for anyone who has questions or concerns regarding the sentencing guidelines.

Monitoring and Oversight

The Commission will be monitoring the completion of the sentencing guidelines work sheets and the submission of those work sheets to the Commission. The guidelines work sheets are reviewed by the Commission staff as they are received. The Commission staff will continue to perform this check to ensure that the guidelines forms are being completed accurately and properly.

Judicial compliance with sentencing guidelines recommendations will be monitored carefully. While the data in this, the Commission's first annual report, should be considered preliminary, the Commission will conduct detailed analysis of compliance and departures from the sentencing guidelines over the next year.

Legislative Activities

The Commission is required by §30-19.1:5 of the Code of Virginia to perform legislative impact assessments on all proposed legislation which would affect the inmate population. The Commission is prepared to conduct legislative impact assessments for the 1996 General Assembly.

Per the recommendations presented in this report, the Commission will utilize a holistic approach to systematically review all felony offenses specified in Title 18.2 of the Code of Virginia, in order to develop recommendations for more specific offense definitions and more narrowly prescribed ranges of punishment. The Commission believes that such an effort requires more time than the Commission has had available in its first year and has deferred any recommendations until next year.

If the General Assembly follows the recommendation of the Commission regarding mandatory minimum penalties, the Commission will be charged with cataloguing and examining the effects of mandatory minimum felony sentences in Virginia. This study would include the projection of prisoners affected by these minimums and the fiscal impact of the imposition of mandatory minimum penalties instead of sentences falling within the sentencing guidelines.

The Commission will also follow up other legislative recommendations made in this report relating to instructions to juries on the abolition of parole and the 85% minimum time served requirement, the revision of §19.2-389.1 of the Code of Virginia allowing Commonwealth's attorneys access to automated juvenile records, the maintenance of juvenile records to support the scoring of the guidelines, and the application of VCC codes to report offense information on all state-supported data systems.

The Risk Assessment Instrument: §17-235(5,6)

In §17-235, paragraphs 5 and 6 of the Code of Virginia, the Commission is charged with developing an offender risk assessment instrument for use in all felony cases. The purpose of this legislation and the goal of the risk assessment instrument is to determine, with due regard for public safety needs, the feasibility of placing 25% of non-violent offenders, who otherwise would be incarcerated, in alternative (non-incarceration) sanctions. The application of a risk assessment instrument grounded in research and data and officially incorporated into a system of sentencing guidelines which supports a range of alternative sanctions as well as traditional incarceration would be the first of its kind in the nation.

The application of a risk assessment instrument grounded in research and data and officially incorporated into a system of sentencing guidelines which supports a range of alternative sanctions as well as traditional incarceration would be the first of its kind in the nation.

The Commission will utilize grant monies received from the Byrne Memorial Federal Grant Program to fund the extensive field research and data collection effort that will be necessary to obtain detailed prior record information, particularly juvenile record data.

The tentative time line for the risk assessment project calls for data collection to be finished in summer of 1996. Following that work, analysis will be completed during the fall, and a risk assessment tool prepared. A pilot test of the risk assessment instrument is currently scheduled to be conducted beginning in early 1997. The Commission will evaluate the results of the pilot program. The Research Subcommittee and the Commission will then make judgments regarding the appropriateness of this tool and the logistics of employing it.

After conducting thorough research and analysis, the Commission will report to the General Assembly about the feasibility of using a risk assessment tool to achieve the goal of diverting 25% of non-violent offenders from incarceration into alternative punishment programs.

APPENDICES

◆ Appendix 1 TABLE I Category I - Violent Felony Offenses

A Category I offense must have a maximum penalty of forty years or more. Any attempted capital murder conviction has a maximum penalty of life. Conspired capital murder and all other attempted or conspired convictions for crimes listed in this table have maximum penalties of less than forty years and are classified as Category II crimes.

DESCRIPTION	VCC	STATUTE	PENALTY
ARSON, EXPLOSIVES, BOMBS			
Occupied dwelling, burn	ARS-2003-F9	18.2-77(A,i)	5Y-Life (I)
Occupied dwelling, aid or procure burning	ARS-2004-F9	18.2-77(A,ii)	5Y-Life (I)
ASSAULT			
Stab, cut, wound w/malicious intent victim perm. impaired	ASL-1336-F2	18.2-51.2	20Y-Life (I)
BURGLARY			
Entering bank armed with intent to commit larceny	BUR-2207-F2	18.2-93	20Y-Life (I)
• Breaking & Entering			
Occup. dwelling, enter, intent to commit misd.-deadly weapon	BUR-2220-F2	18.2-92	20Y-Life (I)
• Common Law			
Dwelling at night w/intent to commit fel. or larc-deadly wpn	BUR-2222-F2	18.2-89	20Y-Life (I)
• Statutory			
Dwelling house with intent to murder, etc.-deadly weapon	BUR-2212-F2	18.2-90	20Y-Life (I)
Dwelling with intent to commit larceny, etc.-deadly weapon	BUR-2214-F2	18.2-91	20Y-Life (I)
Other structure with intent to murder, etc.-deadly weapon	BUR-2215-F2	18.2-90	20Y-Life (I)
Other structure w/ intent to commit larceny, etc.-deadly weapon	BUR-2217-F2	18.2-91	20Y-Life (I)
KIDNAPPING			
Abduct child under 16 yrs. of age for immoral purpose	KID-1003-F2	18.2-48	20Y-Life (I)
Abduction of person with intent to defile	KID-1004-F2	18.2-48	20Y-Life (I)
Extortion, abduct with intent to gain pecuniary benefit	KID-1012-F2	18.2-48	20Y-Life (I)

TABLE I continued

DESCRIPTION	VCC	STATUTE	PENALTY
MURDER			
First degree	MUR-0925-F2	18.2-32	20Y-Life (I)
Second degree	MUR-0935-F9	18.2-32	5Y-40Y (I)
• Capital			
Abduction for extortion	MUR-0913-F1	18.2-31(1)	Life-Death (I)
Drug distribution involv. Sch. I or II, In furtherance of	MUR-0921-F1	18.2-31(9)	Life-Death (I)
During rape or forcible sodomy or attempt to do same	MUR-0914-F1	18.2-31(5)	Life-Death (I)
Killing for hire	MUR-0922-F1	18.2-31(2)	Life-Death (I)
Law enforcement officer	MUR-0923-F1	18.2-31(6)	Life-Death (I)
More than one person	MUR-0924-F1	18.2-31(7)	Life-Death (I)
Prisoner	MUR-0932-F1	18.2-31(3)	Life-Death (I)
Robbery with weapon or attempted robbery with weapon	MUR-0933-F1	18.2-31(4)	Life-Death (I)
Victim under age 12, in commission of abduction	MUR-0960-F1	18.2-31(8)	Life-Death (I)
ROBBERY			
Bank with use of gun or simulated gun	ROB-1210-F9	18.2-58	5Y-Life (I)
Banking type institution	ROB-1211-F9	18.2-58	5Y-Life (I)
Business	ROB-1213-F9	18.2-58	5Y-Life (I)
Business with use of gun or simulated gun	ROB-1201-F9	18.2-58	5Y-Life (I)
Carjacking	ROB-1225-F9	18.2-58.1(A)	15Y-Life (I)
Residence	ROB-1215-F9	18.2-58	5Y-Life (I)
Residence with use of gun or simulated gun	ROB-1207-F9	18.2-58	5Y-Life (I)
Street	ROB-1214-F9	18.2-58	5Y-Life (I)
Street with use of gun or simulated gun	ROB-1204-F9	18.2-58	5Y-Life (I)
SEXUAL ASSAULT			
Object Sexual Penetration			
By force,threat,intim. or via mental incap/helpless of victm	RAP-1135-F9	18.2-67.2(2)	5Y-Life (I)
Victim under age 13	RAP-1136-F9	18.2-67.2(1)	5Y-Life (I)

TABLE I continued

DESCRIPTION	VCC	STATUTE	PENALTY
• Rape, Forcible			
Intercourse w/female thru her mental incapacity/helplessness	RAP-1128-F9	18.2-61(ii)	5Y-Life (I)
Intercourse with female by force, threat or intimidation	RAP-1129-F9	18.2-61(i)	5Y-Life (I)
Intercourse with female under age 13	RAP-1130-F9	18.2-61(iii)	5Y-Life (I)
• Sodomy, Forcible			
By force,threat, mental incap/ helpless of victm age 13+	RAP-1132-F9	18.2-67.1(2)	5Y-Life (I)
Victim under age 13	RAP-1133-F9	18.2-67.1(1)	5Y-Life (I)
VANDALISM, DAMAGE PROPERTY			
• Elec., Oil, Phone, Gas, Water Facility			
Radioactive damage resulting in death	VAN-2915-F2	18.2-162	20Y-Life(I)
WEAPONS			
• Machine Guns			
Possession in perpetration of crime	WPN-5227-F2	18.2-289	20Y-Life (I)
• Sawed-off Shotguns			
Possession in perpetration of violent crime	WPN-5261-F2	18.2-300	20Y-Life (I)

TABLE II Category II - Violent Felony Offenses

A Category II offense must have a maximum penalty of less than forty years. Conspired capital murder and all other attempted or conspired offenses listed in Table I have maximum penalties of less than forty years and are classified as Category II crimes. Any attempted or conspired offenses listed in this table are also Category II crimes.

DESCRIPTION	VCC	STATUTE	PENALTY
ARSON, EXPLOSIVES, BOMBS			
• Building, Other			
Occupied	ARS-2001-F3	18.2-80	5Y-20Y (II)
Building, Public	ARS-2008-F3	18.2-79	5Y-20Y (II)
ASSAULT			
During commission of a felony	ASL-1318-F6	18.2-53	1Y-5Y (II)
Prisoner, probationer, parolee, by	ASL-1333-F5	18.2-55	1Y-10Y (II)
• Caustic Substance			
Malicious injury by caustic substance	ASL-1327-F9	18.2-52	5Y-30Y (II)
Non-malicious injury by caustic substance	ASL-1331-F6	18.2-52	1Y-5Y (II)
• Firearm			
Firearm use in commission of felony-(first offense)	ASL-1319-F9	18.2-53.1	3Y-3Y (II)
Firearm use in commission of felony-(subsequent offense)	ASL-1323-F9	18.2-53.1	5Y-5Y (II)
• Law Enforcement			
Malicious bodily injury to law enforcement officer	ASL-1326-F3	18.2-51.1	5Y-20Y (II)
Non-malicious bodily injury to law enforcement officer	ASL-1330-F6	18.2-51.1	1Y-5Y (II)
• Malicious Wounding			
Stab, cut, wound with malicious intent	ASL-1334-F3	18.2-51	5Y-20Y (II)
• Mob			
Shoot, cut, stab	ASL-1328-F3	18.2-41	5Y-20Y (II)
• Poisoning			
Adulteration of food, drug, etc. w/intent injure or kill	ASL-1317-F3	18.2-54.2	5Y-20Y (II)
Poison food, drugs, water, drinks w/intent injure or kill	ASL-1332-F3	18.2-54.1	5Y-20Y (II)

TABLE II continued

DESCRIPTION	VCC	STATUTE	PENALTY
ASSAULT			
• Simple Assault			
Simple assault, against family member, 3rd/subsqnt convict.	ASL-1316-F6	18.2-57.2(B)	1Y-5Y (II)
• Unlawful Injury			
Stab, cut, wound without malicious intent	ASL-1335-F6	18.2-51	1Y-5Y (II)
BURGLARY			
• Breaking & Entering			
Occupied dwelling, enter, intent to commit misd.	BUR-2219-F6	18.2-92	1Y-5Y (II)
• Common Law			
Dwelling at night with intent to commit felony or larceny	BUR-2221-F3	18.2-89	5Y-20Y (II)
• Statutory			
Dwelling house with intent to murder, rape, rob	BUR-2211-F3	18.2-90	5Y-20Y (II)
Dwelling house with intent to commit larceny, etc.	BUR-2213-F9	18.2-91	1Y-20Y (II)
Other structure with intent to murder, rape, rob	BUR-2218-F3	18.2-90	5Y-20Y (II)
Other structure with intent to commit larceny, etc.	BUR-2216-F9	18.2-91	1Y-20Y (II)
COMPUTER CRIME			
• Computer Trespass			
Malicious computer use -intent physical injury to indiv.	COM-2965-F3	18.2-152.7	5Y-20Y (II)
ESCAPES			
Escape from secure juvenile det. facility by force or violence	ESC-4927-F6	18.2-477.1(B)	1Y-5Y (II)
Escape by force or violence from jail	ESC-4908-F6	18.2-477	1Y-5Y (II)
Escape from a correctional facility	ESC-4921-F6	53.1-203(1)	1Y-5Y (II)
Escape or attempted escape by setting fire to jail	ESC-4910-F4	18.2-480	2Y-10Y (II)
Not convicted, escape from jail by force or violence	ESC-4911-F6	18.2-478	1Y-5Y (II)
Possess an instrument to aid escape	ESC-4922-F6	53.1-203(3)	1Y-5Y (II)

TABLE II continued

DESCRIPTION	VCC	STATUTE	PENALTY
EXTORTION			
Threaten governor or family	EXT-2108-F6	18.2-60.1	1Y-5Y (II)
• Stalking			
3rd conviction/subsequent conv. w/in 5 years of 1st conviction	STK-2112-F6	18.2-60.3(c)	1Y-5Y (II)
FAMILY OFFENSE			
• Adults			
Incapacitated adult, abuse or neglect-serious injury/disease	FAM-3802-F6	18.2-369(a)	1Y-5Y (II)
• Minors			
Child abuse and neglect	FAM-3806-F4	18.2-371.1(A)	2Y-10Y (II)
KIDNAPPING			
Abduct by force without justification	KID-1010-F5	18.2-47	1Y-10Y (II)
Abduction by prisoner	KID-1016-F3	18.2-48.1	5Y-20Y (II)
Assist or threaten	KID-1011-F5	18.2-49	1Y-10Y (II)
MURDER			
Felony	MUR-0934-F3	18.2-33	5Y-20Y (II)
• Manslaughter			
Voluntary manslaughter	MUR-0944-F5	18.2-35	1Y-10Y (II)
OBSCENITY			
• Minors			
Electronic means to facilitate offenses involving minors	OBS-3730-F6	18.2-374.3	1Y-5Y (II)
Finance sexually explicit visual material	OBS-3717-F5	18.2-374.1(C)	1Y-10Y (II)
Permit minors in obscene performances (subsequent offense)	OBS-3720-F6	18.2-379	1Y-5Y (II)
Subsequent pornography conviction under §18.2-374	OBS-3734-F6	18.2-381	1Y-5Y (II)
Possess obscene material, (subsequent offense)	OBS-3732-F6	18.2-374.1:1	1Y-5Y (II)
Produce, sale, distrib, or possess materials invol. minor	OBS-3721-F5	18.2-374.1(B)	1Y-10Y (II)

TABLE II continued

DESCRIPTION	VCC	STATUTE	PENALTY
OBSTRUCTION OF JUSTICE			
• Resisting Arrest			
Intimidation of police, judges etc. by bodily harm, force	JUS-4820-F5	18.2-460(C)	1Y-10Y (II)
PRISONERS			
Break, cut, damage any part of facility to aid escape	PRI-3258-F6	53.1-203(2)	1Y-5Y (II)
Burn or destroy with explosive any personal property	PRI-3263-F6	53.1-203(8)	1Y-5Y (II)
Conspiracy to commit any act specified in §53.1 - 203	PRI-3264-F6	53.1-203(9)	1Y-5Y (II)
Make, possess unauthor. weapon capable of death, injury	PRI-3259-F6	53.1-203(4)	1Y-5Y (II)
• Drugs, etc.			
Delivery of narcotics to prisoner	PRI-3241-F5	18.2-474.1	1Y-10Y (II)
Possess, sell, secrete unlawful chemical compound	PRI-3260-F6	53.1-203(5)	1Y-5Y (II)
Possess, sell, secrete Sch. III drug or Marijuana	PRI-3261-F5	53.1-203(6)	1Y-10Y (II)
• Weapons			
Delivery of weapons to prisoner	PRI-3242-F3	18.2-474.1	5Y-20Y (II)
Introduce or possess firearms or ammunition in facility	PRI-3262-F6	53.1-203(7)	1Y-5Y (II)
RIOT AND UNLAWFUL ASSEMBLY			
Conspire with, incite others to riot	RUA-5315-F5	18.2-408	1Y-10Y (II)
Governor's order, fail to disperse	RUA-5316-F5	18.2-413	1Y-10Y (II)
Injury to another, damage to property	RUA-5318-F6	18.2-414	1Y-5Y (II)
Participate in riot with firearm or weapon	RUA-5321-F5	18.2-405	1Y-10Y (II)
Participate in unlawful assembly w/firearm or weapon	RUA-5324-F5	18.2-406	1Y-10Y (II)
SEX OFFENSES			
• Adultery and Fornication			
With own child/grandchild age 13 to 17 (incest)	SEX-3642-F3	18.2-366(B)	5Y-20Y (II)
With own child or grandchild (incest)	SEX-3616-F5	18.2-366(B)	1Y-10Y (II)
• Indecent Liberties			
Take indecent liberties with child	SEX-3634-F6	18.2-370	1Y-5Y (II)
Take indecent liberties with child-custodian	SEX-3635-F6	18.2-370.1	1Y-5Y (II)

TABLE II continued

DESCRIPTION	VCC	STATUTE	PENALTY
• Prostitution			
Compel to marry by force or threats	SEX-3624-F4	18.2-355(2)	2Y-10Y (II)
Detain in bawdy place	SEX-3625-F4	18.2-358	2Y-10Y (II)
Parent permitting child	SEX-3629-F4	18.2-355(3)	2Y-10Y (II)
Place or leave wife for prostitution (pandering)	SEX-3630-F4	18.2-368	2Y-10Y (II)
• Sodomy			
Family member to family member	SEX-3641-F5	18.2-361(B)	1Y-10Y (II)
Parent/grandparent to child/grandchild age 13 to 17	SEX-3640-F3	18.2-361(B)	5Y-20Y (II)
SEXUAL ASSAULT			
Marital sexual assault	RAP-1134-F9	18.2-67.2:1	1Y-20Y (II)
• Aggravated Sexual Battery			
By force,threat,intim. or via mental incap/helpless of victm	RAP-1120-F9	18.2-67.3(2)	1Y-20Y (II)
Victim under age 13	RAP-1121-F9	18.2-67.3(1)	1Y-20Y (II)
• Carnal Knowledge/Statutory Rape No Force			
Age of victim 13, 14	RAP-1124-F4	18.2-63	2Y-10Y (II)
Person providing service under purview of court, corrections	RAP-1125-F6	18.2-64.1	1Y-5Y (II)
TREASON			
Inciting one race to insurrection against another	TRE-0110-F4	18.2-485	2Y-10Y (II)
VANDALISM, DAMAGE PROPERTY			
Injure railroad signal maliciously	VAN-2917-F4	18.2-155	2Y-10Y (II)
Obstruct or injure canal, railroad - malicious	VAN-2929-F4	18.2-153	2Y-10Y (II)
Shoot or throw missle at train, car, vessel w/malice	VAN-2939-F4	18.2-154	2Y-10Y (II)
Shoot or throw missile at law enforc./emerg. veh. w/malice	VAN-2905-F4	18.2-154	2Y-10Y (II)
• Electric, Oil, Phone, Gas, Water Facility			
Damage over $200	VAN-2911-F4	18.2-162	2Y-10Y (II)
Damage threat release of radioactive materials-No inj.	VAN-2912-F4	18.2-162	2Y-10Y (II)
Radioactive damage resulting in damage or injury	VAN-2914-F3	18.2-162	5Y-20Y (II)

TABLE II continued

DESCRIPTION	VCC	STATUTE	PENALTY
VIOLENT ACTIVITIES			
Paramilitary activity to cause disorder, teach, assemble for	VIO-5331-F5	18.2-433.2	1Y-10Y (II)
WEAPONS			
Brandish or point firearm; 3rd conviction	WPN-5274-F6	18.2-282(A)	1Y-5Y (II)
Convicted felon, poss.,transp. firearm or concealed weap.	WPN-5220-F6	18.2-308.2	1Y-5Y (II)
Discharge firearm from motor vehicle	WPN-5248-F5	18.2-286.1	1Y-10Y (II)
Malicious firearm, missile discharge in/at occupied bldg.	WPN-5229-F4	18.2-279	2Y-10Y (II)
Provide firearms to ineligible person through purchase/trans.	WPN-5285-F5	18.2-308.2:2(M)	5Y-10Y (II)
Restricted firearm ammunition use in crimes	WPN-5233-F5	18.2-308.3	1Y-10Y (II)
Sell, give firearm to designated felon	WPN-5218-F6	18.2-308.2:1	1Y-5Y (II)
Spring gun or deadly weapon, remotely controlled	WPN-5238-F6	18.2-281	1Y-5Y (II)
Stungun, taser, non-firearm poss. on school prop. 3rd conv	WPN-5270-F6	18.2-308.1	1Y-5Y (II)
Unlawful firearm, missile discharge in/at occupied bldg	WPN-5242-F6	18.2-279	1Y-5Y (II)
• Criminal History Checks			
Purchase firearm- provide to ineligible person	WPN-5283-F5	18.2-308.2:2(M,i)	1Y-10Y (II)
Solicit by ineligible person, violation of §18.2-308.2:2(M)	WPN-5286-F5	18.2-308.2:2(N)	5Y-10Y (II)
Transport firearm out of state - provide to ineligible person	WPN-5284-F5	18.2-308.2:2(M,ii)	1Y-10Y (II)
• Machine Guns			
Possession for offensive or aggressive purposes	WPN-5226-F4	18.2-290	2Y-10Y (II)
• Schools			
Brandish/point firearm on school property or within 1000ft	WPN-5258-F6	18.2-282(A)	1Y-5Y (II)
Discharge firearm, within or at occupied school	WPN-5255-F4	18.2-279	2Y-10Y (II)
Discharge firearm on school property or within 1000 feet	WPN-5254-F4	18.2-280(B)	2Y-10Y (II)
Firearm, possess on school property	WPN-5252-F6	18.2-308.1	1Y-5Y (II)
• Tear Gas			
Malicious release of dangerous gas resulting in injury	WPN-5239-F3	18.2-312	5Y-20Y (II)
Unlawful release of dangerous gas resulting in injury	WPN-5240-F6	18.2-312	1Y-5Y (II)

◆ Appendix 2 Judicial Reasons for Departure from Sentencing Guidelines Recommendations for Property, Drug and Miscellaneous Offenses

◆ Reasons for Mitigation	Burglary of Dwelling	Burglary of Other Structure	Drugs	Fraud	Larceny	Miscellaneous
No reason given	17.1%	0.0%	20.3%	9.8%	24.2%	37.5%
Minimal property or monetary loss	0.0	12.5	0.0	7.3	14.3	0.0
Minimal circumstances/facts of the case	2.9	6.3	4.2	6.1	4.4	8.3
Small amount of drugs involved in the case	0.0	0.0	4.2	0.0	0.0	4.2
Offender and victim are related or friends	8.6	0.0	0.0	8.5	1.1	0.0
Little or no victim injury/offender did not intend to harm; victim requested lenient sentence	8.6	6.3	0.0	2.4	1.1	0.0
Offender has no prior record	5.7	0.0	2.5	4.9	0.0	0.0
Offender has minimal prior criminal record	8.6	18.8	5.1	3.7	4.4	8.3
Offender's criminal record overstates his degree of criminal orientation	5.7	0.0	2.5	0.0	1.1	0.0
Offender cooperated with authorities or aided law enforcement	5.7	25.0	6.8	11.0	4.4	4.2
Offender is mentally or physically impaired	0.0	0.0	3.4	4.9	2.2	0.0
Offender has drug or alcohol problems	5.7	6.3	0.8	3.7	3.3	4.2
Offender has good potential for rehabilitation	17.1	31.3	10.2	32.9	14.3	16.7
Age of offender	22.9	31.3	4.2	4.9	4.4	0.0
Multiple charges are being treated as one criminal event	0.0	6.3	0.8	6.1	1.1	0.0
Sentence was recommended by Commonwealth's attorney or probation officer	0.0	6.3	5.1	9.8	6.6	0.0
Weak evidence or weak case against the offender	11.4	0.0	3.4	9.8	9.9	12.5
Plea agreement	8.6	0.0	10.2	12.2	9.9	8.3
Sentencing consistency with codefendant or with other similar cases in the jurisdiction	0.0	6.3	0.8	3.7	3.3	8.3
Offender sentenced to time already served in jail awaiting trial and/or sentencing	2.9	0.0	1.7	1.2	3.3	4.2
Offender already sentenced by another court or in previous proceeding for other offenses	0.0	6.3	5.9	11.0	5.5	8.3
Offender will likely have his probation revoked	2.9	6.3	0.8	2.4	2.2	0.0
Offender is sentenced to an alternative punishment to incarceration	14.3	18.8	27.1	4.9	5.5	0.0
Guidelines recommendation is too harsh	0.0	6.3	2.5	1.2	2.2	0.0
Other reason for mitigation	5.8	6.3	6.7	9.7	17.6	4.2

◆ Reasons for Aggravation	Burglary of Dwelling	Burglary of Other Structure	Drugs	Fraud	Larceny	Miscellaneous
No reason given	15.4%	5.0%	14.8%	14.7%	20.3%	10.3%
Extreme property or monetary loss	0.0	5.0	0.0	0.0	6.5	0.0
Aggravating circumstances/flagrancy of offense	15.4	35.0	6.0	0.0	14.6	8.8
Offender used a weapon in commission of the offense	3.8	0.0	1.8	0.0	0.8	1.5
Offender's true offense behavior was more serious than offenses at conviction	3.8	0.0	5.3	14.7	4.9	11.8
Extraordinary amount of drugs or purity of drugs involved in the case	0.0	0.0	13.1	0.0	0.0	0.0
Aggravating circumstances relating to sale of drugs	0.0	0.0	3.5	0.0	0.0	0.0
Offender immersed in drug culture	0.0	0.0	4.9	0.0	0.0	0.0
Community has a drug problem	0.0	0.0	3.2	0.0	0.0	0.0
Victim injury	3.8	0.0	0.4	0.0	3.3	4.4
Previous punishment of offender has been ineffective	0.0	15.0	2.5	2.9	4.9	5.9
Offender was under some form of legal restraint at time of offense	0.0	0.0	1.8	0.0	2.4	1.5
Offender's record understates the degree of his criminal orientation	11.5	5.0	8.1	8.8	4.1	5.9
Offender has previous conviction(s) or other charges for the same type of offense	0.0	15.0	13.4	11.8	4.9	14.7
Offender failed to cooperate with authorities	0.0	10.0	3.5	0.0	4.1	11.8
Offender has drug or alcohol problems	0.0	0.0	2.5	0.0	1.6	5.9
Offender has poor rehabilitation potential	3.8	0.0	3.2	5.9	3.3	8.8
Jury sentence	3.8	10.0	2.1	2.9	2.4	5.9
Plea agreement	23.1	10.0	11.7	20.6	18.7	10.3
Community sentiment	3.8	0.0	2.1	0.0	0.8	0.0
Sentencing consistency with codefendant or with other similar cases in the jurisdiction	3.8	0.0	18.0	2.9	1.6	1.5
Judge wanted to teach offender a lesson	3.8	5.0	1.8	0.0	2.4	1.5
Guidelines recommendation is too low	7.7	10.0	12.4	11.8	14.6	11.8
Mandatory minimum penalty is required in the case	0.0	0.0	1.8	0	0.8	8.8
Other reason for aggravation	22.8	20.0	7.2	32.2	19.4	20.6

Note: Percentages indicate the percent of mitigation (or aggravation) cases in which judges cite a particular reason for the mitigation (or aggravation) departure. The percentages will not add to 100% since more than one departure reason may be cited in each case.

◆ Appendix 2 Judicial Reasons for Departure from Sentencing Guidelines Recommendations for Offenses Against the Person

◆ Reasons for Mitigation	Assault	Homicide	Kidnapping	Robbery	Rape	Sexual Assault
No reason given	17.2%	0.0%	0.0%	28.6%	17.6%	0.0%
Minimal circumstances/facts of the case	0.0	50.0	0.0	10.7	11.8	16.7
Offender was not the leader or active participant in offense	3.4	0.0	0.0	7.1	0.0	0.0
Offender and victim are related or friends	6.9	50.0	100.0	0.0	17.6	0.0
Little or no victim injury/offender did not intend to harm; victim requested lenient sentence	13.8	0.0	0.0	3.6	23.5	16.7
Victim was a willing participant or provoked the offense	6.9	0.0	0.0	0.0	23.5	0.0
Offender has minimal prior criminal record	0.0	0.0	0.0	3.6	5.9	16.7
Offender's criminal record overstates his degree of criminal orientation	0.0	0.0	100.0	0.0	0.0	0.0
Offender cooperated with authorities or aided law enforcement	3.4	0.0	0.0	10.7	11.8	0.0
Offender is mentally or physically impaired	10.3	0.0	0.0	7.1	0.0	0.0
Offender has drug or alcohol problems	6.9	0.0	0.0	3.6	5.9	16.7
Offender has good potential for rehabilitation	10.3	50.0	0.0	3.6	17.6	33.3
Age of offender	10.3	0.0	0.0	7.1	17.6	0.0
Multiple charges are being treated as one criminal event	0.0	0.0	0.0	3.6	0.0	0.0
Offender plead guilty rather than go to trial	0.0	0.0	0.0	3.6	0.0	0.0
Jury sentence	0.0	0.0	0.0	3.6	11.8	0.0
Sentence was recommended by Commonwealth's attorney or probation officer	0.0	0.0	0.0	7.1	0.0	0.0
Weak evidence or weak case against the offender	17.2	0.0	0.0	7.1	5.9	16.7
Plea agreement	6.9	50.0	0.0	7.1	5.9	33.3
Sentencing consistency with codefendant or with other similar cases in the jurisdiction	3.4	0.0	0.0	0.0	0.0	0.0
Offender already sentenced by another court or in previous proceeding for other offenses	3.4	0.0	0.0	7.1	5.9	0.0
Offender is sentenced to an alternative punishment to incarceration	17.2	0.0	0.0	10.7	0.0	0.0
Other reason for mitigation	17.0	0.0	0.0	3.6	5.9	0.0

◆ Reasons for Aggravation

	Assault	Homicide	Kidnapping	Robbery	Rape	Sexual Assault
No reason given	9.1%	20.0%	0.0%	12.5%	33.3%	0.0%
Aggravating circumstances/flagrancy of offense	22.7	20.0	0.0	33.4	0.0	6.7
Offender used a weapon in commission of the offense	4.5	0.0	0.0	16.7	0.0	0.0
Offender's true offense behavior was more serious than offenses at conviction	9.1	0.0	0.0	8.3	33.3	13.3
Offender is related to or is the caretaker of the victim	0.0	0.0	0.0	0.0	0.0	20.0
Offense was an unprovoked attack	9.1	0.0	0.0	0.0	0.0	0.0
Offender knew of victim's vulnerability	18.2	20.0	0.0	16.7	0.0	40.0
Victim injury	9.1	0.0	0.0	20.8	0.0	13.3
Extreme violence or severe victim injury	27.3	20.0	0.0	16.7	0.0	6.7
Previous punishment of offender has been ineffective	0.0	0.0	0.0	0.0	0.0	6.7
Offender was under some form of legal restraint at time of offense	4.5	0.0	0.0	4.2	0.0	0.0
Offender has a serious juvenile record	4.5	0.0	0.0	0.0	0.0	0.0
Offender's record understates the degree of his criminal orientation	0.0	0.0	0.0	0.0	33.3	0.0
Offender has previous conviction(s) or other charges for the same type of offense	9.1	0.0	0.0	0.0	33.3	0.0
Offender failed to cooperate with authorities	9.1	0.0	0.0	0.0	0.0	6.7
Offender has drug or alcohol problems	0.0	40.0	0.0	0.0	0.0	6.7
Offender has poor rehabilitation potential	9.1	0.0	0.0	12.5	0.0	6.7
Offender shows no remorse	18.2	20.0	0.0	12.5	33.3	13.3
Jury sentence	4.5	60.0	100.0	4.2	0.0	0.0
Plea agreement	4.5	0.0	0.0	0.0	0.0	20.0
Guidelines recommendation is too low	9.1	0.0	0.0	12.5	0.0	6.7
Mandatory minimum penalty is required in the case	0.0	0.0	0.0	8.3	0.0	0.0
Other reason for aggravation	9.0	0.0	0.0	12.5	0.0	20.1

Note: Percentages indicate the percent of mitigation (or aggravation) cases in which judges cite a particular reason for the mitigation (or aggravation) departure. The percentages will not add to 100% since more than one departure reason may be cited in each case.

◆ Appendix 3 Sentencing Guidelines Compliance by Judicial Circuit for Property, Drug

◆ Burglary of Dwelling

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	50%	0%	50%	2
2	76.8	10.7	10.7	28
3	72.7	27.3	0	11
4	66.7	26.7	6.6	15
5	66.7	0	33.3	3
6	100	0	0	3
7	100	0	0	7
8	62.5	25	12.5	8
9	100	0	0	1
10	83.3	0	16.7	6
11	50	0	50	2
12	66.7	33.3	0	3
13	50	28.6	21.4	14
14	88.9	11.1	0	9
15	60	13.3	26.7	15
16	28.6	71.4	0	7
17	66.7	33.3	0	3
18	75	0	25	4
19	81.2	18.8	0	16
20	100	0	0	6
21	80	20	0	5
22	75	25	0	4
23	100	0	0	8
24	66.7	0	33.3	6
25	87.5	0	12.5	8
26	64.3	14.3	21.4	14
27	100	0	0	6
28	0	0	100	1
29	0	0	100	1
30	66.7	0	33.3	3
31	75	25	0	8
Total	**73.1%**	**15.4%**	**11.5%**	**227**

◆ Burglary of Other Structure

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	100%	0%	0%	1
2	75	0	25	8
3	66.7	33.3	0	3
4	92.9	7.1	0	14
5	100	0	0	1
6	100	0	0	1
7	100	0	0	3
8	100	0	0	1
9	100	0	0	2
10	50	0	50	2
11	0	0	0	0
12	71.4	14.3	14.3	7
13	73.3	6.7	20	15
14	100	0	0	5
15	70	10	20	10
16	100	0	0	2
17	100	0	0	4
18	33.3	0	66.7	3
19	57.1	28.6	14.3	7
20	100	0	0	2
21	100	0	0	2
22	50	16.7	33.3	6
23	66.7	0	33.3	3
24	73.3	6.7	20	15
25	87.5	12.5	0	8
26	50	33.3	16.7	6
27	33.3	66.7	0	3
28	100	0	0	1
29	0	100	0	2
30	0	0	0	0
31	66.7	0	33.3	3
Total	**74.3%**	**11.4%**	**14.3%**	**140**

◆ Drugs

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	73.9%	8.7%	17.4%	23
2	83	4.5	12.5	88
3	90.2	0	9.8	41
4	80.8	6.6	12.6	182
5	82	6	12	50
6	81.2	0	18.8	16
7	91	1.7	7.3	177
8	82.1	7.2	10.7	28
9	63.6	4.6	31.8	44
10	78.9	15.8	5.3	19
11	75	10.7	14.3	28
12	60	4	36	25
13	64	9.8	26.2	286
14	83.1	5.1	11.8	59
15	49.3	4.5	46.2	67
16	81.3	6.2	12.5	16
17	85.7	1.8	12.5	56
18	62.8	27.9	9.3	43
19	82.9	8.6	8.5	70
20	92.3	7.7	0	13
21	80	6.7	13.3	15
22	68.4	0	31.6	19
23	79.4	8.8	11.8	68
24	61.5	8.3	30.2	96
25	87.5	5	7.5	40
26	58.6	10.4	31	29
27	100	0	0	7
28	50	33.3	16.7	12
29	71.4	14.3	14.3	7
30	75	25	0	4
31	92	6	2	50
Total	**75.7%**	**7.1%**	**17.2%**	**1678**

and Miscellaneous Offenses

◆ Fraud

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	75%	0%	25%	4
2	77.3	13.6	9.1	22
3	83.3	16.7	0	6
4	74.5	23.4	2.1	47
5	40	20	40	5
6	85.7	14.3	0	7
7	87.5	0	12.5	16
8	62.5	37.5	0	8
9	85.7	0	14.3	7
10	81.8	18.2	0	11
11	66.7	0	33.3	3
12	76.5	5.9	17.6	17
13	68.2	15.9	15.9	44
14	82.4	11.7	5.9	17
15	77.8	11.1	11.1	9
16	76.9	23.1	0	13
17	95	5	0	20
18	35.3	29.4	35.3	17
19	84.9	11.3	3.8	53
20	80	20	0	10
21	66.7	33.3	0	3
22	100	0	0	3
23	70.8	25	4.2	24
24	50	50	0	26
25	83.3	13.3	3.4	30
26	70	30	0	10
27	66.7	33.3	0	9
28	66.7	16.7	16.6	6
29	100	0	0	2
30	100	0	0	4
31	83.3	8.3	8.4	12
Total	75.1%	17.6%	7.3%	465

◆ Larceny

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	72.5%	2.5%	25%	40
2	84.9	4	11.1	99
3	69	20.7	10.3	29
4	77.2	15.9	6.9	145
5	96.6	0	3.4	29
6	100	0	0	10
7	93.8	0	6.2	32
8	84.2	5.3	10.5	19
9	85.8	7.1	7.1	28
10	92.3	7.7	0	13
11	100	0	0	3
12	67.7	6.5	25.8	31
13	75.4	4.1	20.5	73
14	81.8	11.4	6.8	44
15	85.7	3.6	10.7	28
16	90.9	9.1	0	11
17	79.2	8.3	12.5	48
18	67.9	7.1	25	56
19	83.1	5.2	11.7	77
20	83.3	5.6	11.1	18
21	72	24	4	25
22	78.6	7.1	14.3	28
23	69.1	12.7	18.2	55
24	82.1	12.8	5.1	39
25	84.8	6.1	9.1	33
26	77.8	22.2	0	18
27	75	25	0	4
28	83.3	0	16.7	6
29	71.4	0	28.6	7
30	100	0	0	1
31	86.7	13.3	0	15
Total	79.7%	8.6%	11.7%	1064

◆ Miscellaneous

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	100%	0%	0%	5
2	70.4	3.7	25.9	27
3	100	0	0	2
4	61.5	23.1	15.4	13
5	62.5	0	37.5	8
6	100	0	0	1
7	66.7	13.3	20	15
8	100	0	0	2
9	71.4	0	28.6	7
10	42.9	28.6	28.5	7
11	66.7	0	33.3	3
12	80	20	0	5
13	70.9	8.3	20.8	24
14	66.7	16.7	16.6	6
15	92.9	7.1	0	14
16	60	0	40	15
17	0	0	100	2
18	100	0	0	2
19	74	4.3	21.7	23
20	100	0	0	5
21	72.7	9.1	18.2	11
22	83.4	8.3	8.3	12
23	61.8	20.6	17.6	34
24	61.1	5.6	33.3	18
25	88.2	11.8	0	17
26	60	4	36	25
27	71.4	14.3	14.3	7
28	100	0	0	4
29	40	0	60	5
30	100	0	0	4
31	66.7	0	33.3	6
Total	70.5%	8.5%	21%	329

◆ Appendix 3 Sentencing Guidelines Compliance by Judicial Circuit for Offenses Against

◆ Assault

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	100%	0%	0%	3
2	57.1	0	42.9	7
3	0	100	0	1
4	50	16.7	33.3	6
5	83.3	16.7	0	6
6	75	25	0	4
7	77.8	11.1	11.1	9
8	75	25	0	4
9	66.7	0	33.3	3
10	83.3	16.7	0	6
11	66.7	33.3	0	3
12	50	0	50	4
13	82.4	17.6	0	17
14	75	25	0	4
15	70	20	10	10
16	100	0	0	1
17	66.7	33.3	0	3
18	50	37.5	12.5	8
19	50	0	50	10
20	100	0	0	3
21	100	0	0	1
22	57.1	14.3	28.6	7
23	57.1	35.7	7.1	14
24	100	0	0	5
25	25	50	25	4
26	80	20	0	5
27	100	0	0	1
28	0	0	100	1
29	0	100	0	1
30	100	0	0	2
31	84.6	7.7	7.7	13
Total	69.3%	17.5%	13.2%	166

◆ Homicide

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	0%	0%	0%	0
2	0	0	0	0
3	0	0	0	0
4	100	0	0	1
5	0	0	0	0
6	0	0	0	0
7	0	0	0	0
8	100	0	0	1
9	0	0	0	0
10	100	0	0	1
11	0	0	0	0
12	0	0	0	0
13	85.7	0	14.3	7
14	100	0	0	1
15	0	0	0	0
16	0	0	0	0
17	0	0	0	0
18	0	100	0	1
19	50	0	50	2
20	0	0	0	0
21	0	0	0	0
22	0	0	0	0
23	33.4	33.3	33.3	3
24	100	0	0	2
25	0	0	0	0
26	50	0	50	2
27	0	0	0	0
28	0	0	100	1
29	0	0	0	0
30	0	0	0	0
31	0	0	0	0
Total	68.2%	9.1%	22.7%	22

◆ Kidnap

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	0%	0%	0%	0
2	0	0	100	2
3	0	0	0	0
4	0	0	0	0
5	0	0	0	0
6	0	0	0	0
7	100	0	0	1
8	100	0	0	1
9	0	100	0	1
10	0	0	0	0
11	0	0	0	0
12	0	0	0	0
13	0	0	0	0
14	100	0	0	1
15	0	0	0	0
16	0	0	0	0
17	0	0	0	0
18	0	0	0	0
19	100	0	0	1
20	0	0	0	0
21	0	0	0	0
22	100	0	0	1
23	0	0	0	0
24	0	0	0	0
25	0	0	0	0
26	0	0	0	0
27	0	0	0	0
28	0	0	0	0
29	0	0	0	0
30	0	0	0	0
31	100	0	0	1
Total	66.7%	11.1%	22.2%	9

the Person

◆ Robbery

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	0%	0%	0%	0
2	81.8	18.2	0	22
3	100	0	0	1
4	73.7	15.8	10.5	19
5	0	100	0	1
6	71.4	0	28.6	7
7	33.3	20	46.7	15
8	100	0	0	4
9	50	25	25	4
10	50	0	50	2
11	100	0	0	2
12	100	0	0	1
13	52.6	21.1	26.3	19
14	100	0	0	8
15	75	25	0	4
16	100	0	0	1
17	50	25	25	4
18	0	0	0	0
19	87.4	6.3	6.3	16
20	0	100	0	1
21	0	0	0	0
22	100	0	0	3
23	54.5	45.5	0	11
24	33.3	16.7	50	6
25	100	0	0	5
26	100	0	0	1
27	0	0	0	0
28	0	0	0	0
29	0	0	0	0
30	0	0	100	1
31	60	40	0	5
Total	68.1%	17.2%	14.7%	163

◆ Rape

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	0%	0%	0%	0
2	33.3	66.7	0	3
3	0	0	0	0
4	66.7	33.3	0	3
5	0	0	0	0
6	0	0	0	0
7	66.7	33.3	0	3
8	0	0	0	0
9	0	0	100	1
10	0	0	0	0
11	0	0	0	0
12	100	0	0	1
13	66.7	33.3	0	3
14	0	100	0	1
15	0	100	0	2
16	0	100	0	2
17	0	0	0	0
18	0	100	0	1
19	25	75	0	4
20	0	0	0	0
21	0	0	0	0
22	100	0	0	2
23	0	100	0	1
24	0	100	0	1
25	0	50	50	2
26	50	0	50	2
27	0	0	0	0
28	0	0	0	0
29	0	0	0	0
30	0	0	0	0
31	0	0	0	0
Total	37.5%	53.1%	9.4%	32

◆ Sexual Assault

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	100%	0%	0%	1
2	40	20	40	5
3	100	0	0	1
4	80	0	20	5
5	50	0	50	2
6	0	0	100	1
7	0	0	0	0
8	100	0	0	2
9	100	0	0	2
10	0	0	0	0
11	0	0	100	1
12	100	0	0	2
13	25	25	50	4
14	100	0	0	4
15	25	25	50	4
16	100	0	0	1
17	0	0	0	0
18	66.7	33.3	0	3
19	33.3	0	66.7	3
20	100	0	0	2
21	0	0	100	1
22	0	0	0	0
23	0	100	0	1
24	0	50	50	2
25	100	0	0	2
26	100	0	0	2
27	0	0	0	0
28	100	0	0	1
29	0	0	0	0
30	0	0	0	0
31	75	0	25	4
Total	62.5%	10.7%	26.8%	56

◆ Appendix 4 Mandatory Minimum Laws in Virginia* (as of July 1, 1995)

OFFENSE	MANDATORY MINIMUM	STATUTE	VCC
ASSAULT			
Malicious Bodily Injury to Law Enforcement Officer	1 Year	18.2-51.1	ASL-1326-F3
Assault on Law Enforcement Officer	6 Months	18.2-57.1	ASL-1325-M1
DRUGS / FIREARM			
Sell 1 lb. or More Marijuana While Possessing A Firearm	3 Years	18.2-308.4(B)	WPN-5277-F9
Sell 1 lb. or More Marijuana While Poss. A Firearm - Subsq. Offense	5 Years	18.2-308.4(B)	WPN-5278-F9
Sell Schedule I or II Drug While Possessing A Firearm	3 Years	18.2-308.4(B)	WPN-5256-F9
Sell Schedule I or II Drug While Poss. A Firearm - Subsq. Offense	5 Years	18.2-308.4(B)	WPN-5257-F9
Sell Schedule I, II, or 1 oz. or More of Marijuana to Minor 3 yrs. his Junior	5 Years	18.2-255(A)	NAR-3062-F9
Sell Less Than 1 oz. of Marijuana to Minor 3 Years his Junior	2 Years	18.2-255(A)	NAR-3063-F9
DRUG KINGPINS			
Gross 500 Thousand Dollars or More Within 12 month period	20 Years	18.2-248 (H)	NAR-3046-F9
Heroin - Sell, Dist., etc., 100 kg or more	20 Years	18.2-248 (H)	NAR-3047-F9
Cocaine/Derivatives - Sell, Dist., etc., 500 kg or more	20 Years	18.2-248 (H)	NAR-3048-F9
Crack/Cocaine base - Sell, Dist., etc., 1.5 kg or more	20 Years	18.2-248 (H)	NAR-3049-F9
FIREARM			
Firearm Used In the Commission of a Felony	3 Years	18.2-53.1	ASL-1319-F9
Firearm Used In the Commission of a Felony Subsequent Offense	5 Years	18.2-53.1	ASL-1323-F9
Provide More Than One Firearm to Ineligible Person Through Purchase or Transportation	5 Years	18.2-308.2:2(M)	WPN-5285-F5
Solicit Person to Violate §18.2-308.2:2(M)	5 Years	18.2-308.2:2(N)	WPN-5286-F5
HATE CRIMES			
Simple Assault - Hate Crime	30 Days	18.2-57	ASL-1314-M1
Entering Property to Damage - Hate Crime	30 Days	18.2-121	TRS-5728-M1
KIDNAPPING - *See Subsequent Violent Felony Sexual Assault* ***§18.2-67.5:3***			
HOMICIDE			
Aggravated Vehicular Involuntary Manslaughter	1 Year	18.2-36.1(B)	MUR-0948-F9
MISCELLANEOUS			
Shoot/Throw Missile at Police etc. Vehicle With Malice	1 Year	18.2-154	VAN-2905-F4
Shoot/Throw Missile at Police etc. Vehicle Without Malice	1 Year	18.2-154	VAN-2906-F6
Escape From a Correctional Facility	1 Year	53.1-203(1)	ESC-4921-F6

OFFENSE	MANDATORY MINIMUM	STATUTE	VCC
SEXUAL ASSAULT SUBSEQUENT CONVICTIONS			
Subsequent Felony Sexual Assault §18.2-67.5:2			
Both the Instant and Prior Felonies Must be on This List			
Adultery or Fornication w/Own Child etc. Age 13 to 17	20 Years	18.2-366(B)	SEX-3642-F3
Adultery or Fornication w/Own Child/Grandchild	10 Years	18.2-366(B)	SEX-3616-F5
Aggravated Sexual Battery, Victim Under Age 13	20 Years	18.2-67.3(1)	RAP-1121-F9
Aggravated Sexual Battery, By Force, Threat, etc.	20 Years	18.2-67.3(2)	RAP-1120-F9
Carnal Knowledge, Victim Age *13-15 (Accused over 18)*	10 Years	18.2-63	RAP-1124-F4
Carnal Knowledge, Consenting Victim Age *13-15 (Accused over 18)*	5 Years	18.2-63	RAP-1123-F6
Carnal Knowledge, by Person Providing Services Under Purview of Court etc.	5 Years	18.2-64.1	RAP-1125-F6
Indecent Liberties With Child	5 Years	18.2-370	SEX-3634-F6
Indecent Liberties With Child - Custodian	5 Years	18.2-370.1	SEX-3635-F6
Sodomy, Family Member to Family Member	10 Years	18.2-361(B)	SEX-3641-F5
Sodomy, Parent/Grandparent etc. to Child/Grandchild etc. age 13 to 17			
Conspiracy to Commit any Offense Listed Above With 5 Year Maximum	5 Years	18.2-22	
Conspiracy to Commit any Offense Listed Above With 10 to 20 Year Maximum	10 Years	18.2-22	
Subsequent Violent Felony Sexual Assault §18.2-67.5:3			
Both the Instant and Prior Felonies Must be on This List			
Abduction of Person with the Intent to Defile	Life	18.2-48	KID-1004-F2
Object Sexual Penetration- Victim Under Age of 13	Life	18.2-67.2(1)	RAP-1136-F9
Object Sexual Penetration- By Force, Threat, etc.	Life	18.2-67.2(2)	RAP-1135-F9
Rape- Intercourse by Force, Threat or Intimidation	Life	18.2-61(i)	RAP-1129-F9
Rape- Intercourse Thru Victim's Mental Incapacity	Life	18.2-61(ii)	RAP-1128-F9
Rape- Intercourse with Victim Under the Age of 13	Life	18.2-61(iii)	RAP-1130-F9
Sodomy- Victim Under Age 13	Life	18.2-67.1(1)	RAP-1133-F9
Sodomy- By Force, Threat, Mental Incapacity	Life	18.2-67.1(2)	RAP-1132-F9
Conspiracy to Commit any Offense Listed Above	10 Years	18.2-22	
THIRD CONVICTION FOR A VIOLENT FELONY §19.2-297.1			
Three Strikes	Life	19.2-297.1	
TRAFFIC			
Driving While Intoxicated - 2nd Offense Within less than 5 yrs.	2 Days	18.2-270	DWI-5410-S9
Driving While Intoxicated - Third or Subsequent Offense Within Five to Ten Years	10 Days	18.2-270	DWI-5411-S9
Driving While Intoxicated - Third or Subsequent Offense Within less than Five Years	30 Days	18.2-270	DWI-5412-S9
Driving Commercial Vehicle While Intoxicated - Second Offense Within less than 5 years	2 Days	46.2-341.28	DWI-5418-S9
Driving Commercial Vehicle While Intoxicated - Third or Subsequent Offense Within Five to Ten Years	10 Days	46.2-341.28	DWI-5421-S9
Driving Commercial Vehicle While Intoxicated - Third or Subsequent Offense Within less than Five Years	30 Days	46.2-341.28	DWI-5420-S9
Operate Vehicle After Being Declared Habitual Offender			
Endangerment	12 Months	46.2-357(B)(2)	LIC-6832-F9
Second Offense	12 Months	46.2-357(B)(3)	LIC-6834-F9
No Endangerment	10 Days	46.2-357(B)(1)	LIC-6833-M9

* Sentences for these crimes can not be suspended