

# VIRGINIA CRIMINAL SENTENCING COMMISSION



2011 Annual Report



# **Virginia Criminal Sentencing Commission**



## **2011 Annual Report**

**December 1, 2011**

**Virginia  
Criminal Sentencing  
Commission  
Members**

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

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Chairman, Nellysford

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Judge Joanne F. Alper, Arlington  
Judge Junius P. Fulton, Norfolk  
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Robert C. Hagan, Jr., Daleville  
The Honorable Marsha L. Garst, Rockingham  
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# Commonwealth of Virginia

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## Supreme Court of Virginia Virginia Criminal Sentencing Commission

December 1, 2011

To: The Honorable Cynthia D. Kinser, Chief Justice of Virginia  
The Honorable Robert F. McDonnell, Governor of Virginia  
The Honorable Members of the General Assembly of Virginia  
The Citizens of Virginia

Section 17.1-803 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 *2011 Annual Report* of the Criminal Sentencing Commission.

This report summarizes the work of the Criminal Sentencing Commission over the past year. The report presents a comprehensive examination of judicial compliance with the felony sentencing guidelines for fiscal year 2011. Additionally, this chapter includes some analysis of the use of the sentencing revocation reports and probation violation sentencing guidelines. The Commission's recommendations to the 2012 Session of the Virginia General Assembly are also contained in this report.

I would like to use this opportunity to express our utmost gratitude to two Commission members who have completed their full terms and are not eligible for re-appointment. They are Judge Joanne F. Alper, of Arlington and Judge Junius P. Fulton, of Norfolk. These individuals have performed their duties in an exemplary fashion and our work is far better due to their insights and valuable contributions.

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

Sincerely,

A handwritten signature in blue ink, appearing to read "F. Bruce Bach".

F. Bruce Bach  
Chairman

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## INTRODUCTION

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### Overview

The Virginia Criminal Sentencing Commission is required by § 17.1-803 of the *Code of Virginia* to report annually to the General Assembly, the Governor, and the Chief Justice of the Supreme Court of Virginia. To fulfill its statutory obligation, the Commission respectfully submits this report.

The report is organized into four chapters. The remainder of the Introduction chapter provides a general profile of the Commission and an overview of its various activities and projects during 2011. The Guidelines Compliance chapter that follows provides a comprehensive analysis of compliance with the sentencing guidelines during fiscal year (FY) 2011. The third chapter describes the Commission's current study to revalidate the risk assessment instrument for nonviolent offenders sentenced in circuit court. In the report's final chapter, the Commission presents its recommendations for revisions to the felony sentencing guidelines system.

### Commission Profile

The Virginia Criminal Sentencing Commission is comprised of 17 members, as authorized in the *Code of Virginia* § 17.1-802. 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 judges or justices to serve on the Commission. The Governor appoints four members, at least one of whom must be a victim of crime or a representative of a crime victim's organization. In the original legislation, five members of the Commission were to be appointed by the General Assembly, with the Speaker of the House of Delegates designating three members and the Senate Committee on Privileges and Elections selecting two members. The 2005 General Assembly modified this provision. Now, the Speaker of the House of Delegates appoints two members, while the Chairman of the House Courts of Justice Committee, or another member of the Courts Committee appointed by the chairman, must serve as the third House appointment. Similarly, the Senate Committee on Rules appoints only one member, and the other appointment must be filled by the Chairman of the Senate Courts of Justice Committee or a designee from

that committee. The 2005 amendment did not affect existing members whose appointed terms had not expired; instead, this provision became effective when the terms of two legislative appointees expired on December 31, 2006. The Chairman of the Senate Courts of Justice Committee joined the Commission in 2007, as did a member of the House Courts of Justice Committee. The final member of the Commission, Virginia's Attorney General, serves by virtue of his office.

The Virginia Criminal Sentencing Commission is an agency of the Supreme Court of Virginia. The Commission's offices and staff are located on the Fifth Floor of the Supreme Court Building, at 100 North Ninth Street, in downtown Richmond.

### **Commission Meetings**

The full membership of the Commission meets four times annually. In 2011, these meetings were held on March 21, June 13, September 12, and November 14. Minutes for each of these meetings are available on the Commission's website ([www.vcsc.virginia.gov](http://www.vcsc.virginia.gov)).

Throughout the year, staff compiles information, analyzes data, and drafts recommendations for action by the full Commission. The Commission's Chairman appoints subcommittees, when needed, to allow more extensive discussion on special topics.

### **Monitoring and Oversight**

Section 19.2-298.01 of the *Code of Virginia* requires that sentencing guidelines worksheets be completed in all felony cases covered by the guidelines. The guidelines cover approximately 95% of felony sentencing events in Virginia. This section of the *Code* also requires judges to announce, during court proceedings for each case, that the guidelines forms have been reviewed. After sentencing, the guidelines worksheets are signed by the judge and become a part of the official record of each case. The clerk of the circuit court is responsible for sending the completed and signed worksheets to the Commission.

The sentencing guidelines worksheets 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. As a result of the review process, errors or omissions are detected and resolved.

Once the guidelines worksheets are reviewed and determined to be complete, they are automated and compiled into a guidelines database. These data are analyzed to determine judicial compliance with sentencing guidelines recommendations. This analysis is conducted and presented to the Commission on a semiannual basis. The most recent study of judicial concurrence with the sentencing guidelines is presented in the next chapter.

## Training and Education

The Commission provides sentencing guidelines assistance in a variety of forms: training and education seminars, training materials and publications, a website, and assistance via the "hotline" phone system. Training and education are on-going activities of the Commission. The Commission offers training and educational opportunities in an effort to promote the accurate completion of worksheets that provide judges with the range of sentencing options recommended by the guidelines. Training seminars are designed to meet the needs of attorneys for the Commonwealth and probation officers, the two groups authorized by statute to prepare the official worksheets for the court. The seminars also provide defense attorneys with a knowledge base to challenge the accuracy of recommendations submitted to the court. In addition, the Commission conducts sentencing guidelines seminars for new members of the judiciary and other criminal justice system professionals. Having all sides equally versed in the completion of guidelines worksheets is essential to a system of checks and balances, ensuring the accuracy of sentencing recommendations.

In 2011, the Commission offered 16 training seminars across the Commonwealth for nearly 500 attorneys and probation officers new to Virginia's sentencing guidelines system. The six-hour seminars introduce participants to the sentencing guidelines and provide instruction on correct scoring of the guidelines worksheets. The seminars also introduce new users to the probation violation guidelines and the two offender risk assessment instruments that are incorporated into Virginia's guidelines system. Seminars for experienced guidelines users also are provided. These courses are approved by the Virginia State Bar, enabling participating attorneys to earn Continuing Legal Education credits. The Commission continues to provide a guidelines-related ethics class for attorneys, conducted in partnership with the Virginia State Bar. The Virginia State Bar has approved this class for one hour of Continuing Legal Education Ethics credit. Finally, the Commission regularly conducts sentencing guidelines training at the Department of Corrections' Training Academy, as part of the curriculum for new probation officers.

Commission staff travel throughout Virginia in an attempt to offer training that is convenient to most guidelines users. Staff continues to seek out facilities designed for training, forgoing the typical courtroom environment for the Commission's training programs. The sites for these seminars include a combination of colleges and universities, libraries, state and local facilities, and criminal justice academies. Many sites, such as the Southwest Virginia Higher Education Center in Abingdon, are selected in an effort to provide comfortable and convenient locations, at little or no cost to the Commission.

The Commission will continue to place a priority on providing sentencing guidelines training, upon request, to any group of criminal justice professionals. The Commission also is willing to provide an education program on guidelines and the no-parole sentencing system to any interested group or organization. Individuals who are interested in learning more about Virginia's sentencing guidelines may contact the Commission and provide contact information for a future training opportunity. Once a sufficient number of people have expressed interest, a seminar is presented in a locality convenient to the majority of individuals on the list.

In addition to providing training and education programs, the Commission maintains a website and a "hotline" phone system. By visiting the website, a user can learn about upcoming training sessions, access Commission reports, look up Virginia Crime Codes (VCCs), and use on-line versions of the sentencing guidelines forms. The "hotline" phone (804.225.4398) is staffed from 7:45 a.m. to 5:15 p.m., Monday through Friday, to respond quickly to any questions or concerns regarding the sentencing guidelines. The hotline continues to be an important resource for guidelines users around the Commonwealth.

### **Projecting the Impact of Proposed Legislation**

Section 30-19.1:4 of the *Code of Virginia* requires the Commission to prepare fiscal impact statements for any proposed legislation that may result in a net increase in periods of imprisonment in state correctional facilities. These impact statements must include details as to the impact on adult, as well as juvenile, offender populations and any necessary adjustments to sentencing guideline recommendations. Any impact statement required under § 30-19.1:4 also must include an analysis of the impact on local and regional jails, as well as state and local community corrections programs.

During the 2011 General Assembly session, the Commission prepared 211 impact statements on proposed legislation. These proposals fell into five categories: 1) legislation to increase the felony penalty class of a specific crime; 2) legislation to increase the penalty class of a specific crime from a misdemeanor to a felony; 3) legislation to add a new mandatory minimum penalty for a specific crime; 4) legislation to expand or clarify an existing crime; and 5) legislation that would create a new criminal offense. The Commission uses its computer simulation forecasting program to estimate the projected impact of these proposals on the prison system. The estimated impact on the juvenile offender population is provided by Virginia's Department of Juvenile Justice. In most instances, the projected impact and accompanying analysis of a bill is given to the General Assembly within 48 hours after the Commission is notified of the proposed legislation. When requested, the Commission provides pertinent oral testimony to accompany the impact analysis. Additional impact analyses may be conducted at the request of the House Appropriations Committee, the Senate Finance Committee or the Department of Planning and Budget.

## Prison and Jail Population Forecasting

Forecasts of offenders confined in state and local correctional facilities are essential for criminal justice budgeting and planning in Virginia. The forecasts are used to estimate operating expenses and future capital needs and to assess the impact of current and proposed criminal justice policies. Since 1987, the Secretary of Public Safety has used a "consensus forecasting" approach to develop the offender population forecasts. This process brings together policy makers, administrators, and technical experts from all branches of state government. The process is structured through committees. The Technical Advisory Committee is comprised of experts in statistical and quantitative methods from several agencies. While individual members of this Committee generate the various prisoner forecasts, the Committee as a whole carefully scrutinizes each forecast according to the highest statistical standards. Select forecasts are presented to the Secretary's Liaison Work Group, which evaluates the forecasts and provides guidance and oversight for the Technical Advisory Committee. It includes deputy directors and senior managers of criminal justice and budget agencies, as well as staff of the House Appropriations and Senate Finance Committees. Forecasts accepted by the Work Group then are presented to the Policy Advisory Committee. Led by the Secretary of Public Safety, this committee reviews the various forecasts, making any adjustments deemed necessary to account for emerging trends or recent policy changes, and selects the official forecast for each prisoner population. The Policy Committee is made up of agency directors, lawmakers and other top-level officials from Virginia's executive, legislative, and judicial branches, as well as representatives of Virginia's law enforcement, prosecutor, sheriff, and jail associations.

While the Commission is not responsible for generating the prison or jail population forecast, it participates in the consensus forecasting process. In years past, Commission staff members have served on the Technical Advisory Committee and the Commission's Deputy Director has served on the Policy Advisory Committee. Since 2006, the Commission's Deputy Director has chaired the Technical Advisory Committee at the request of the Secretary of Public Safety. The Secretary submitted the most recent prisoner forecasts to the General Assembly in October 2011.

## Re-validation of the Nonviolent Offender Risk Assessment Instrument

In 1994, as part of the reform legislation that instituted truth-in-sentencing, the General Assembly directed the Commission to study the feasibility of using an empirically-based risk assessment instrument to select 25% of the lowest risk, incarceration-bound, drug and property offenders, for possible diversion into alternative (non-prison) sanctions. By 1996, the Commission had developed such an instrument and implementation began in pilot sites in 1997. The National Center for State Courts conducted an independent evaluation of nonviolent risk assessment in the pilot sites for the period from 1998 to 2001. Evaluators concluded that the risk assessment instrument is an effective tool for predicting recidivism. Further, cost-benefit analysis conducted by the National Center for State Courts suggested that the risk assessment instrument produced a cost-savings for the Commonwealth, through the reduced use of prison and jail. In 2001, the Commission conducted a validation study of the original risk assessment instrument to test and refine the instrument for possible use statewide. In July 2002, the nonviolent risk assessment instrument was implemented statewide for all felony larceny, fraud, and drug cases.

Because it had been a number of years since the risk assessment instrument was last examined, the Commission, in 2010, directed staff to begin the process of re-validating its risk assessment tool. This is a complex, multi-stage project. The third chapter of this report describes the progress made in this important study during 2011.

## Study of Crimes Committed in the Presence of Children

In 2008, the Commission embarked upon a multi-year research project likely to be one of the first of its kind in the nation. Members of the Commission approved a comprehensive study of crimes committed in the presence of children, noting that crimes can have a profound effect on the health and welfare of the children who witness them, even when they are not the direct victims. The goals are to identify crimes witnessed by children, to describe the nature of such crimes, and to determine whether and how courts consider information concerning the presence of children during the commission of the crime when sentencing the offender. This project entails unique and groundbreaking research. Based on analysis of the data, the Commission may consider revising the sentencing guidelines to account for the presence of children during the commission of an offense.

Because criminal justice databases available in the Commonwealth lack sufficient detail to identify offenses witnessed by children, this research requires a special data collection process. In 2009, the Commission contacted Commonwealth's Attorneys around the state for help in identifying cases that meet the study's criteria. By going to the Commission's website, prosecutors are able to enter the offender's identifying information and electronically transmit it to Commission staff for data storage and analysis. In 2010, the Commission modified the sentencing guidelines cover sheet by adding a check box for

individuals preparing the guidelines forms to indicate if a case involved a child witness. It is hoped that this will increase reporting of such cases to the Commission.

Commission staff will examine each case in detail and record pertinent information, including the number of witnesses, the age of the witness, the relationship between the witness and the offender, the location of the offense, the most serious injury sustained by the victim, if applicable, and the location of the witness relative to the offense.

Because of the uniqueness of this study, the data collection phase has been lengthy. The Commission, however, is evaluating whether a sufficient number of cases has been identified to proceed with the study in 2012.

### Assistance to the Fairfax County Circuit Court

In 2011, the Bureau of Justice Assistance (BJA) and the National Institute of Justice (NIJ) announced the availability of grant funds for jurisdictions and agencies interested in implementing a new approach for handling technical probation violators based on a program originally developed in Honolulu, Hawaii. The Hawaii Opportunity Probation with Enforcement (HOPE) program was created by Judge Steven Alm of Hawaii's First Circuit with the goal of enhancing public safety and improving compliance with probation supervision conditions. The program uses a swift and certain (but mild) sanctions model to discourage probation violations. In Hawaii, the judge gives probationers "warning hearings" to tell them that probation terms will be strictly enforced. The program includes frequent, unannounced drug testing. An expedited process for dealing with violations was established. Offenders who violate the terms of probation are immediately arrested and are brought before the judge within 72 hours. The judge applies sanctions in a certain, swift, and consistent manner for every infraction. The sentence is modest (usually only a few days in jail) but it is served immediately. A recent evaluation (Hawken & Kleiman, 2009) found that the HOPE program resulted in lower violation rates and fewer revocations than traditional probation.

Lawmakers in Virginia have become interested in the HOPE program. Judge Alm, who created HOPE in Honolulu, spoke to a delegation of Virginia's legislators in 2009. The 2010 Virginia General Assembly adopted legislation supporting the HOPE concept and authorizing up to two HOPE pilot sites; however, state budget shortfalls have prevented implementation of a pilot project in the Commonwealth. Nonetheless, Virginia officials continue to be committed to launching a HOPE-style program, if funding is made available.

The BJA/NIJ grant program announced earlier this year was designed to support a multisite replication of the HOPE program to rigorously test the Hawaii model in several jurisdictions across the United States. Under the leadership of Chief Judge Dennis J. Smith, the Fairfax County Circuit Court was keenly interested in applying for federal grant

funds. Judge Smith received commitments from the Chief Probation Officer in Fairfax County, the Public Defender, the Fairfax County Sheriff and Police Chief, and other local officials, and had garnered support from the Virginia Supreme Court, the Virginia Criminal Sentencing Commission, and the Center for Advancing Correctional Excellence at George Mason University. At the request of Judge Smith, Sentencing Commission staff assisted in the preparation of the BJA grant application package. Fairfax County was one of the eight finalists considered for grant funding. In August 2011, BJA representatives conducted a site visit. Fairfax County, however, was not one of the four localities ultimately selected to receive a BJA grant award.

### Assistance to the Governor's Office and the Secretary of Public Safety

Although Fairfax County was not selected by the Bureau of Justice Assistance (BJA) to receive grant funds to implement a HOPE program, the Governor and his Secretary of Public Safety remain interested in the possibility of implementing a version of the HOPE program here in the Commonwealth. During 2011, this topic was taken up by the Governor's Task Force on Alternatives for Nonviolent Offenders, a group chaired by the Secretary of Public Safety. The Secretary requested assistance from the Commission's director, Dr. Richard Kern, in the development of a HOPE-style program that could be pilot tested in four or five Virginia localities. During the late summer and fall of 2011, the director met with numerous officials around the Commonwealth to discuss potential aspects of such a program. In addition, the director gave several presentations to stakeholders regarding this type of program. Virginia's adaptation of the HOPE program is being called Sanctions with Unified Rapid Enforcement, or SURE. Under the direction of the Secretary of Public Safety, details of the pilot program are being worked out. The Commission's director will continue to provide assistance as requested.

### Assistance to the Virginia State Crime Commission

The Virginia State Crime Commission, a legislative branch agency, is charged by the General Assembly with several studies each year. The Crime Commission often requests assistance from a variety of other agencies, including the Virginia Criminal Sentencing Commission.

During 2011, the Sentencing Commission provided data and analysis on topics including: child abuse, domestic assault, animal abuse, rape and other sexual crimes, and offenses related to concealing or failing to report a dead body.



# GUIDELINES COMPLIANCE

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## Introduction

On January 1, 2012, Virginia's truth-in-sentencing system will reach its seventeenth anniversary. Beginning January 1, 1995, the practice of discretionary parole release from prison was abolished and the existing system of sentence credits awarded to inmates for good behavior was eliminated. Under Virginia's truth-in-sentencing laws, convicted felons must serve at least 85% of the pronounced sentence and they may earn, at most, 15% off in sentence credits, regardless of whether their sentence is served in a state facility or a local jail. The Commission was established to develop and administer guidelines in an effort to provide Virginia's judiciary with sentencing recommendations for felony cases under the new truth-in-sentencing laws. Under the current no-parole system, guidelines recommendations for nonviolent offenders with no prior record of violence are tied to the amount of time they served during a period prior to the abolition of parole. In contrast, offenders convicted of violent crimes, and those with prior convictions for violent felonies, are subject to guidelines recommendations up to six times longer than the historical time served in prison by similar offenders. In about 390,000 felony cases sentenced under truth-in-sentencing laws, judges have agreed with guidelines recommendations in more than three out of four cases.

This report focuses on cases sentenced from the most recent year of available data, fiscal year (FY) 2011 (July 1, 2010, through June 30, 2011). Compliance is examined in a variety of ways in this report, and variations in data over the years are highlighted throughout.

### Case Characteristics

In FY2011, nine judicial circuits contributed more guidelines cases than any of the other judicial circuits in the Commonwealth. Those circuits, which include the Fredericksburg area (Circuit 15), the Harrisonburg area (Circuit 26), Fairfax County (Circuit 19), the Radford area (Circuit 27), Richmond City (Circuit 13), Virginia Beach (Circuit 2), Norfolk (Circuit 4), Chesterfield County (Circuit 12), and Henrico County (Circuit 14) comprised nearly half (46%) of all worksheets received in FY2011 (Figure 1).

FIGURE 1

**Number and Percentage of Cases Received by Circuit - FY2011**

During FY2011, the Commission received 24,596 sentencing guideline worksheets. Of these, 626 worksheets contained errors or omissions that affect the analysis of the case. For the purposes of conducting a clear evaluation of sentencing guidelines in effect for FY2011, the remaining sections of this chapter pertaining to judicial concurrence with guidelines recommendations focus only on those 23,970 cases for which guidelines recommendations were completed and calculated correctly.

**Circuit Number Percent**

Circuit	Number	Percent
15	1,724	7.0%
26	1,372	5.6
19	1,345	5.5
27	1,221	5.0
13	1,176	4.8
2	1,168	4.7
4	1,129	4.6
12	1,073	4.4
14	1,024	4.2
1	960	3.9
24	939	3.8
25	892	3.6
16	819	3.3
23	817	3.3
29	757	3.1
7	699	2.8
28	682	2.8
22	662	2.7
31	636	2.6
3	618	2.5
10	605	2.5
9	585	2.4
20	585	2.4
5	484	2.0
30	476	1.9
6	457	1.9
8	384	1.6
11	383	1.6
17	354	1.4
18	299	1.2
21	271	1.1
Total	24,596	100.0%

### Compliance Defined

In the Commonwealth, judicial compliance with the truth-in-sentencing guidelines is voluntary. A judge may depart from the guidelines recommendation and sentence an offender either to a punishment more severe or less stringent than called for by the guidelines. In cases in which the judge has elected to sentence outside of the guidelines recommendation, he or she must, as stipulated in § 19.2-298.01 of the *Code of Virginia*, provide a written reason for departure on the guidelines worksheet.

The Commission measures judicial agreement with the sentencing guidelines using two classes of compliance: strict and general. Together, they comprise the overall compliance rate. For a case to be in strict compliance, the offender must be sentenced to the same type of sanction that the guidelines recommend (probation, incarceration for up to six months, incarceration for more than six months) and to a term of incarceration that falls exactly within the sentence range recommended by the guidelines. When risk assessment for nonviolent offenders is applicable, a judge may sentence a recommended offender to an alternative punishment program or to a term of incarceration within the traditional guidelines range and be considered in strict compliance. A judicial sentence also would be considered in general agreement with the guidelines recommendation if the sentence 1) meets modest criteria for rounding, 2) involves time already served (in certain instances), or 3) complies with statutorily-permitted diversion options in habitual traffic offender cases.

Compliance by rounding provides for a modest rounding allowance in instances when the active sentence handed down by a judge or jury is very close to the range recommended by the guidelines. For example, a judge would be considered in compliance with the guidelines if he or she sentenced an offender to a two-year sentence based on a guidelines recommendation that goes up to 1 year 11 months. In general, the Commission allows for rounding of a sentence that 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 an offender to post-sentence incarceration time, the Commission typically considers this type of case to be in compliance. Conversely, a judge who sentences an offender to time served when the guidelines call for probation also is regarded as being in compliance with the guidelines, because the offender was not ordered to serve any incarceration time after sentencing.

Compliance through the use of diversion options in habitual traffic cases resulted from amendments to § 46.2-357(B2 and B3) of the *Code of Virginia*, effective July 1, 1997. The amendment allows judges to suspend the mandatory minimum 12-month incarceration term required in felony habitual traffic cases if they sentence the offender to a Detention Center or Diversion Center Incarceration Program. For cases sentenced since the effective date of the legislation, the Commission considers either mode of sanctioning of these offenders to be in compliance with the sentencing guidelines.

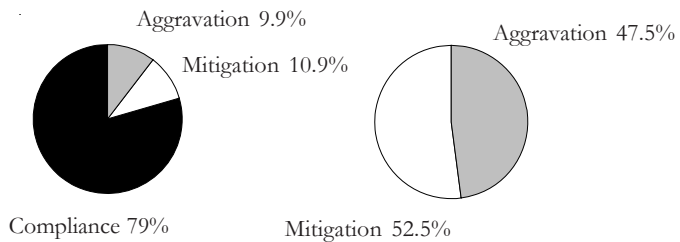
## Overall Compliance with the Sentencing Guidelines

The overall compliance rate summarizes the extent to which Virginia's judges concur with recommendations provided by the sentencing guidelines, both in type of disposition and in length of incarceration. Between FY1995 and FY1998, the overall compliance rate remained around 75%, increased steadily between FY1999 and FY2001, and then decreased slightly in FY2002. For the past eight fiscal years, the compliance rate has hovered around 80%. During FY2011, judges continued to agree with the sentencing guidelines recommendations in approximately 79% of the cases (Figure 2).

In addition to compliance, the Commission also studies departures from the guidelines. The rate at which judges sentence offenders to sanctions more severe than the guidelines recommendation, known as the "aggravation" rate, was 9.9% for FY2011. The "mitigation" rate, or the rate at which judges sentence offenders to sanctions considered less severe than the guidelines recommendation, was 10.9% for the fiscal year. Thus, of the FY2011 departures, 47.5% were cases of aggravation while 52.5% were cases of mitigation.

FIGURE 2

### Overall Guidelines Compliance and Direction of Departures - FY2011



## Dispositional Compliance

Since the inception of truth-in-sentencing in 1995, the correspondence between dispositions recommended by the guidelines, and the actual dispositions imposed in Virginia's circuit courts, has been quite high. Figure 3 illustrates judicial concurrence in FY2011 with the type of disposition recommended by the guidelines. For instance, of all felony offenders recommended for more than six months of incarceration during FY2011, judges sentenced over 86% to terms in excess of six months (Figure 3). Some offenders recommended for incarceration of more than six months received a shorter term of incarceration (one day to six months), but very few of these offenders received probation with no active incarceration.

Judges have also typically agreed with guidelines recommendations for other types of dispositions. In FY2011, 76% of offenders received a sentence resulting in confinement of six months or less when such a penalty was recommended. In some cases, judges felt probation to be a more appropriate sanction than the recommended jail term and, in other cases, offenders recommended for short-term incarceration received a sentence of more than six months. Finally, 73% of offenders whose guidelines recommendation called for no incarceration were given probation and no post-dispositional confinement. Some offenders with a "no incarceration" recommendation received a short jail term, but rarely did these offenders receive an incarceration term of more than six months.

Since July 1, 1997, sentences to the state's former Boot Camp and the current Detention Center and Diversion Center programs have been defined as incarceration sanctions for the purposes of the sentencing guidelines. Although the state's Boot Camp program was discontinued in 2002, the Detention and Diversion Center programs have continued as sentencing options for judges. The Commission recognized that these programs are more restrictive than probation supervision in the community. In 2005, the Virginia Supreme Court concluded that participation in the Detention Center program is a form of incarceration (*Charles v. Commonwealth*). Because the Diversion Center program also involves a period of confinement, the Commission defines both the Detention Center and the Diversion Center programs as incarceration terms under the sentencing guidelines. Since 1997, the Detention and Diversion Center programs have been counted

FIGURE 3

Recommended and Actual Dispositions - FY2011

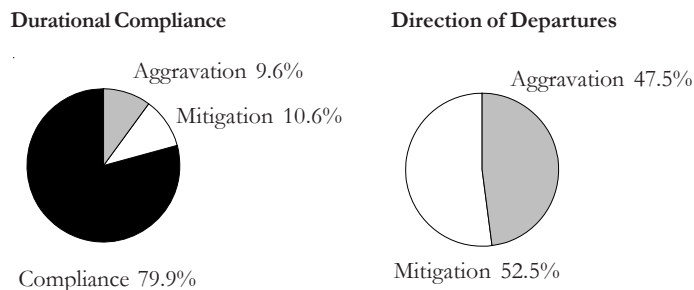
Recommended Disposition	Actual Disposition		
	Probation	Incarceration 1 day-6 mos.	Incarceration >6 mos.
Probation	72.8%	21.9%	5.3%
Incarceration 1 day-6 months	12.1%	76.4%	11.5%
Incarceration > 6 months	5.7%	8.0%	86.2%

as six months of confinement. However, effective July 1, 2007, the Department of Corrections extended these programs by an additional four weeks. Therefore, beginning in FY2008, a sentence to either the Detention or Diversion Center program counted as seven months of confinement for sentencing guideline purposes.

Finally, youthful offenders sentenced under the provisions of § 19.2-311, and given an indeterminate commitment to the Department of Corrections, are considered as having a four-year incarceration term for the purposes of sentencing guidelines. Under § 19.2-311, a first-time offender who was less than 21 years of age at the time of the offense may be given an indeterminate commitment to the Department of Corrections with a maximum length-of-stay of four years. Offenders convicted of capital murder, first-degree or second-degree murder, forcible rape (§ 18.2-61), forcible sodomy (§ 18.2-67.1), object sexual penetration (§ 18.2-67.2) or aggravated sexual battery of a victim less than age 13 (§ 18.2-67.3(A,1)) are not eligible for the program. For sentencing guidelines purposes, offenders sentenced solely as youthful offenders under § 19.2-311 are considered as having a four-year sentence.

FIGURE 4

**Durational Compliance and Direction of Departures - FY2011\***



\*Cases recommended for and receiving an active jail or prison sentence.

**⌘ Durational Compliance**

In addition to examining the degree to which judges concur with the type of disposition recommended by the guidelines, the Commission also studies durational compliance, which is defined as the rate at which judges sentence offenders to terms of incarceration that fall within the recommended guidelines range. Durational compliance analysis only considers cases for which the guidelines recommended an active term of incarceration and the offender received an incarceration sanction consisting of at least one day in jail.

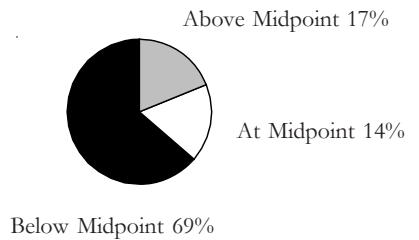
Durational compliance among FY2011 cases was approximately 80%, indicating that judges, more often than not, agree with the length of incarceration recommended by the guidelines in jail and prison cases (Figure 4). Among FY2011 cases not in durational compliance, departures tended slightly more toward mitigation than aggravation.

For cases recommended for incarceration of more than six months, the sentence length recommendation derived from the guidelines (known as the midpoint) is accompanied by a high-end and low-end recommendation. The sentence ranges recommended by the guidelines are relatively broad, allowing judges to use their discretion in sentencing offenders to different incarceration terms, while still remaining in compliance with the guidelines. When the guidelines recommended more than six months of incarceration, and judges sentenced within the recommended range, only a small share (14% of offenders in FY2011) were given prison terms exactly equal to the midpoint recommendation (Figure 5). Most of the cases (69%) in durational compliance with recommendations over six months resulted in sentences below the recommended midpoint. For the remaining 17% of these incarceration cases sentenced within the guidelines range, the sentence exceeded the midpoint recommendation. This pattern of sentencing within the range has been consistent since the truth-in-sentencing guidelines took effect in 1995, indicating that judges, overall, have favored the lower portion of the recommended range.

Overall, durational departures from the guidelines are typically no more than one year above or below the recommended range, indicating that disagreement with the guidelines recommendation, in most cases, is not extreme. Offenders receiving incarceration, but less than the recommended term, were given effective sentences (sentences less any suspended time) short of the guidelines by a median value of 10 months (Figure 6). For offenders receiving longer than recommended incarceration sentences, the effective sentence also exceeded the guidelines range by a median value of 10 months.

FIGURE 5

**Distribution of Sentences within Guidelines Range - FY2011\***



\*Cases recommended for and receiving more than 6 months incarceration.

FIGURE 6

**Median Length of Durational Departures - FY2011\***



\*Cases recommended for and receiving an active jail or prison sentence.

## Reasons for Departure from the Guidelines

Compliance with the truth-in-sentencing guidelines is voluntary. Although not obligated to sentence within guidelines recommendations, judges are required by § 19.2-298.01 of the *Code of Virginia* to submit to the Commission their written reason(s) for sentencing outside the guidelines range. Each year, as the Commission deliberates upon recommendations for revisions to the guidelines, the opinions of the judiciary, as reflected in their departure reasons, are an important part of the analysis. Virginia's judges are not limited by any standardized or prescribed reasons for departure and may cite multiple reasons for departure in each guidelines case.

In FY2011, 10.9% of guidelines cases resulted in sanctions below the guidelines recommendation. The most frequently cited reasons for sentencing below the guidelines recommendation were: the acceptance of a plea agreement, the defendant's cooperation with law enforcement, mitigating offense circumstances, judicial discretion, the defendant's minimal prior record, a sentence to a less-restrictive sanction and a sentence recommendation provided by the Commonwealth's Attorney. Although other reasons for mitigation were reported to the Commission in FY2011, only the most frequently cited reasons are noted here. For 501 of the 2,611 mitigating cases, a departure reason could not be discerned.

Judges sentenced 9.9% of the FY2011 cases to terms that were more severe than the sentencing guidelines recommendation, resulting in "aggravation" sentences. The most frequently cited reasons for sentencing above the guidelines recommendation were: the acceptance of a plea agreement, the severity or degree of prior record, the flagrancy of the offense, the defendant's poor potential for being rehabilitated, a sentence recommended by a jury, and the number of counts in the sentencing event. For 448 of the 2,367 cases sentenced above the guidelines recommendation, the Commission could not ascertain a departure reason.

*Appendices 1 and 2 contain detailed summaries of the reasons for departure from guidelines recommendations for each of the 15 guidelines offense groups.*



## Compliance by Circuit

Since the onset of truth-in-sentencing, compliance rates and departure patterns have varied across Virginia's 31 judicial circuits. FY2011 continues to show differences among judicial circuits in the degree to which judges concur with guidelines recommendations (Figure 7). The map and accompanying table on the following pages identify the location of each judicial circuit in the Commonwealth.

In FY2011, just over half (52%) of the state's 31 circuits exhibited compliance rates at or above 79%, while the remaining 48% reported compliance rates between 72% and 78%. There are likely many reasons for the variations in compliance across circuits. Certain jurisdictions may see atypical cases not reflected in statewide averages. In addition, the availability of alternative or community-based programs currently differs from locality to locality. The degree to which judges agree with guidelines recommendations does not seem to be related primarily to geography. The circuits with the lowest compliance rates are scattered across the state, and both high and low compliance circuits can be found in close geographic proximity.

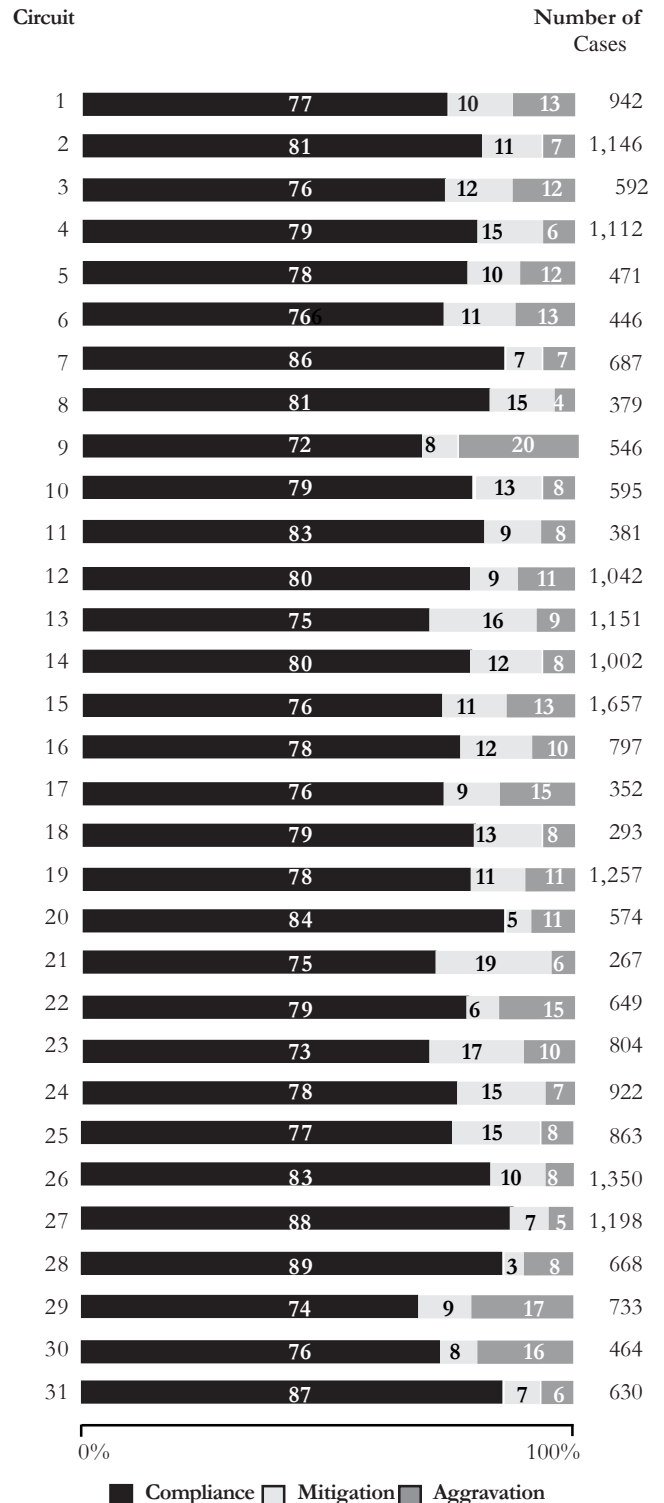
In FY2011, the highest rate of judicial agreement with the sentencing guidelines (89%) was in Circuit 27 (Radford area). Concurrence rates of 86% or higher were found in Circuit 28 (Bristol area), Circuit 31 (Prince William County area), and Circuit 7 (Newport News). The lowest compliance rates among judicial circuits in FY2011 were reported in Circuit 9 (Williamsburg area) and Circuit 23 (Roanoke area).

In FY2011, the highest mitigation rates were found in Circuit 21 (Martinsville area), Circuit 23 (Roanoke area), and Circuit 13 (Richmond City). Circuit 21 (Martinsville area) had a mitigation rate of nearly 19% while Circuit 23 (Roanoke area) had a mitigation rate of 17% for the fiscal year; Circuit 13 (Richmond City) recorded a mitigation rate of 16%. With regard to high mitigation rates, it would be too simplistic to assume that this reflects areas with lenient sentencing habits. Intermediate punishment programs are not uniformly available throughout the Commonwealth, and jurisdictions with better access to these sentencing options may be using them as intended by the General Assembly. These sentences generally would appear as mitigations from the guidelines. Inspecting aggravation rates reveals that Circuit 9 (Williamsburg area) had the highest aggravation rate (over 20%), followed by Circuit 29 (Buchanan County area) at 17.1%. Lower compliance rates in these latter circuits are a reflection of the relatively high aggravation rates.

*Appendix 3 presents compliance figures for judicial circuits by each of the 15 sentencing guidelines offense groups.*

FIGURE 7

### Compliance by Circuit - FY2011

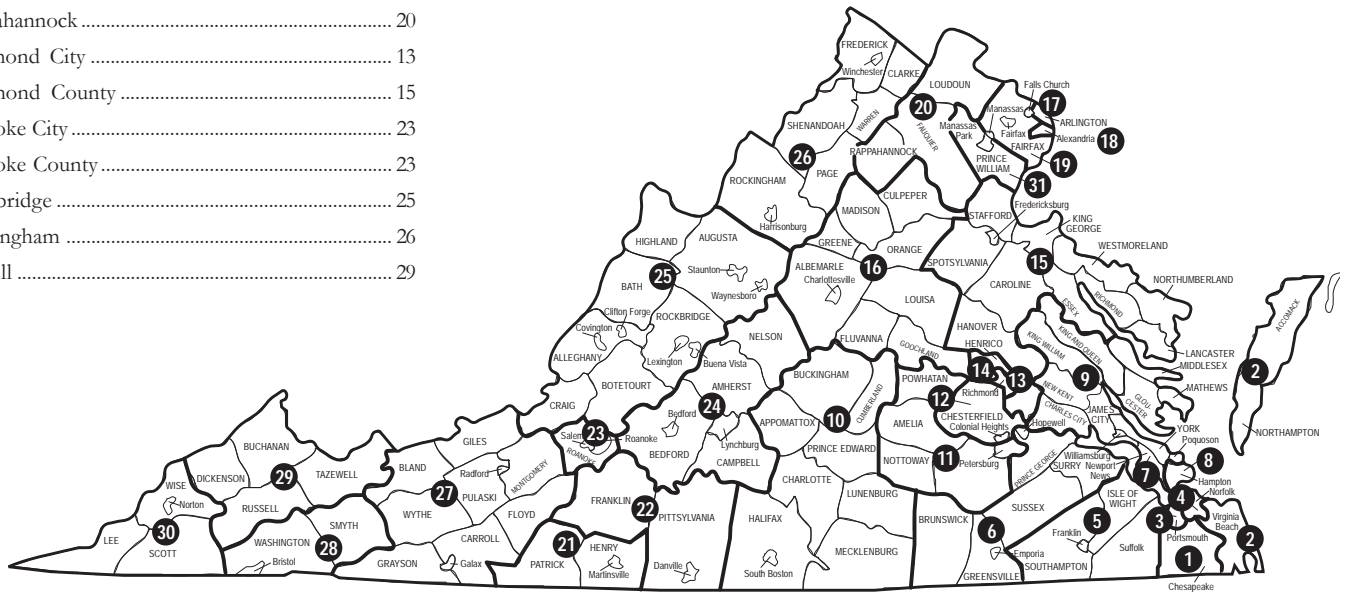


## Virginia Localities and Judicial Circuits

Accomack .....	2	Fairfax City .....	19
Albemarle .....	16	Fairfax County .....	19
Alexandria .....	18	Falls Church .....	17
Alleghany .....	25	Fauquier .....	20
Amelia .....	11	Floyd .....	27
Amherst .....	24	Fluvanna .....	16
Appomattox .....	10	Franklin City .....	5
Arlington.....	17	Franklin County .....	22
Augusta .....	25	Frederick.....	26
Bath .....	25	Fredericksburg .....	15
Bedford City .....	24	Galax .....	27
Bedford County .....	24	Giles .....	27
Bland .....	27	Gloucester .....	9
Botetourt.....	25	Goochland .....	16
Bristol .....	28	Grayson .....	27
Brunswick .....	6	Greene.....	16
Buchanan .....	29	Greensville .....	6
Buckingham .....	10	Halifax .....	10
Buena Vista .....	25	Hampton .....	8
Campbell.....	24	Hanover.....	15
Caroline .....	15	Harrisonburg .....	26
Carroll .....	27	Henrico .....	14
Charles City .....	9	Henry .....	21
Charlotte .....	10	Highland .....	25
Charlottesville .....	16	Hopewell .....	6
Chesapeake .....	1	Isle of Wight .....	5
Chesterfield .....	12	James City .....	9
Clarke .....	26	King and Queen .....	9
Clifton Forge .....	25	King George .....	15
Colonial Heights .....	12	King William .....	9
Covington .....	25	Lancaster .....	15
Craig.....	25	Lee .....	30
Culpeper .....	16	Lexington .....	25
Cumberland .....	10	Loudoun .....	20
Danville .....	22	Louisa .....	16
Dickenson .....	29	Lunenburg .....	10
Dinwiddie .....	11	Lynchburg .....	24
Emporia .....	6	Madison .....	16
Essex .....	15		

Manassas .....	31	Salem .....	23
Martinsville .....	21	Scott .....	30
Mathews .....	9	Shenandoah .....	26
Mecklenburg .....	10	Smyth .....	28
Middlesex .....	9	South Boston .....	10
Montgomery .....	27	Southampton .....	5
Nelson .....	24	Spotsylvania .....	15
New Kent .....	9	Stafford .....	15
Newport News .....	7	Staunton .....	25
Norfolk .....	4	Suffolk .....	5
Northampton .....	2	Surry .....	6
Northumberland .....	15	Sussex .....	6
Norton .....	30	Tazewell .....	29
Nottoway .....	11	Virginia Beach .....	2
Orange .....	16	Warren .....	26
Page .....	26	Washington .....	28
Patrick .....	21	Waynesboro .....	25
Petersburg .....	11	Westmoreland .....	15
Pittsylvania .....	22	Williamsburg .....	9
Poquoson .....	9	Winchester .....	26
Portsmouth .....	3	Wise .....	30
Powhatan .....	11	Wythe .....	27
Prince Edward .....	10	York .....	9
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		

### Virginia Judicial Circuits



## Compliance by Sentencing Guidelines Offense Group

In FY2011, as in previous years, judicial agreement with the guidelines varied when comparing the 15 offense groups (Figure 8). For FY2011, compliance rates ranged from a high of 85% in the drug other than Schedule I/II offense group to a low of 59% in murder cases. In general, property and drug offenses exhibit higher rates of compliance than the violent offense categories. The violent offense groups (assault, rape, sexual assault, robbery, homicide, and kidnapping) had compliance rates at or below 73%, whereas many of the property and drug offense categories had compliance rates above 82%.

During the past fiscal year, judicial concurrence with guidelines recommendations remained relatively stable, fluctuating three percent or less for most offense groups. However, compliance on the kidnapping worksheets increased by 8.5 percentage points from FY2010 to FY2011, result of a decrease in the rate of aggravation. On the murder worksheet, the increase rate of aggravation resulted in almost an 8-percentage decrease in compliance. Because of the small number of kidnapping and murder sentencing events in a given year (132 kidnapping cases and 214 murder cases in FY2011), compliance rates are much more susceptible to year-to-year fluctuations. In addition, compliance for the robbery offense group dropped by nearly four percentage points between FY2010 and FY2011. However, the current rate is more typical for this offense and is similar to the compliance rates of the preceding two fiscal years (FY2008 and FY2009).

FIGURE 8  
Guidelines Compliance by Offense - FY2011

	Compliance	Mitigation	Aggravation	Number of Cases
Drug Other	85.3%	4.8%	9.9%	1,562
Fraud	84.7%	9.8%	5.4%	2,413
Larceny	82.3%	9.7%	8.0%	5,336
Drug Schedule I/II	82.2%	9.4%	8.5%	6,239
Traffic	81.6%	7.1%	11.3%	1,965
Miscellaneous	74.7%	10.5%	14.7%	570
Weapon	73.9%	10.5%	15.6%	628
Assault	72.9%	15.3%	11.8%	1,534
Burglary Other	72.9%	15.6%	11.4%	569
Burglary Dwelling	68.4%	17.2%	14.3%	1,144
Rape	68.2%	19.0%	12.8%	211
Sexual Assault	67.8%	12.2%	20.0%	574
Kidnapping	65.2%	17.4%	17.4%	132
Robbery	61.8%	28.2%	10.0%	879
Murder	59.3%	13.1%	27.6%	214

Five new offenses were added to the miscellaneous guidelines effective July 1, 2010: arson of an occupied dwelling or church (§ 18.2-77(A,i)), participation in an offense for the benefit of, or at the direction of, a gang, participation in an offense for the benefit of, or at the direction of, a gang that has at least one member who is a juvenile (§ 18.2-46.2), hit and run with property damage of \$1000 or more (§ 46.2-894) and sale, etc. of a Schedule III drug (§ 18.2-248 (E1)). As historically has been the case, compliance rates for the drug and traffic offenses, were higher than the compliance rates for arson of an occupied dwelling and the gang offenses.

Compliance with recommendations on the Drugs/Other worksheet was above 80%. The addition of possession of a Schedule III drug follows the same pattern. Compliance in the first year was 81%, with a slightly greater tendency to go above the guidelines recommendation (12% aggravation) than below (7% mitigation). Hit and run with property damage of \$1,000 or more has a similar pattern. The compliance rate was 76%, with an aggravation rate of 14% and mitigation rate of 10%.

The compliance rate for the newly added arson offense during FY2011 was 62%, with a mitigation rate of 14% and an aggravation rate of approximately 24%. Judges were in concurrence with the recommendation for the gang offense that did not involve a juvenile in 56% of the sentencing events and were just as likely to go below (22% mitigation) the guidelines recommendation as above (22% aggravation). If the gang included a juvenile member, the compliance rate was 67%, with a 33% aggravation rate. The compliance rates for these crimes were lower than expected. The lower compliance rates, in part, may be due to the low number of convictions, ranging from six cases to 32 cases in FY2011. The Commission will continue to monitor sentencing patterns for these offenses and recommend modifications, if needed.

Since 1995, departure patterns have differed across offense groups, and FY2011 was no exception. During this time period, the robbery and rape offense groups showed the highest mitigation rates with over one-quarter of the robbery cases (28%), and nearly one-fifth of the rape cases (19%) resulting in sentences below the guidelines. This mitigation pattern has been consistent with both rape and robbery offenses since the abolition of parole in 1995. The most frequently cited mitigation reasons provided by judges in robbery cases include the involvement of a plea agreement, the defendant's cooperation with law enforcement, the recommendation of the Commonwealth's Attorney, that the defendant would be serving a sentence in another jurisdiction or (because of the defendant's age) a commitment to the Department of Juvenile Justice. The most frequently cited mitigation reasons provided by judges in rape cases included: the acceptance of a plea agreement, mitigating facts of the case, the recommendation of a jury, the defendant's health, or the defendant's minimal prior record.

In FY2011, the offense groups with the highest aggravation rates were murder/homicide, at 28%, sexual assault, at 20%, and kidnapping, at 17%. As the most frequently cited aggravating departure reasons in murder/homicide cases, the influence of jury trials and extreme case circumstances have historically contributed to higher aggravation rates. The most frequently cited aggravating departure reasons in sexual assault cases in FY2011 included the acceptance of a plea agreement, the flagrancy of the offense, the type of victim involved (such as a child), the poor rehabilitation potential of the offender, and the recommendation of a jury. Reasons cited in kidnapping cases included the flagrancy of the offense, a jury recommendation, the defendant's extensive prior record, and the type of victim involved (such as a child).

### Compliance Under Midpoint Enhancements

Section 17.1-805, formerly § 17-237, of the *Code of Virginia* describes the framework for what are known as "midpoint enhancements," significant increases in guidelines scores for violent offenders that elevate the overall guidelines sentence recommendation. Midpoint enhancements are an integral part of the design of the truth-in-sentencing guidelines. By design, midpoint enhancements produce sentence recommendations for violent offenders that are significantly greater than the time that was served by offenders convicted of such crimes prior to the enactment of truth-in-sentencing laws. Offenders who are convicted of a violent crime or who have been previously convicted of a violent crime are recommended for incarceration terms up to six times longer than the terms served by offenders fitting similar profiles under the parole system. Midpoint enhancements are triggered for homicide, rape, or robbery offenses, most felony assaults and sexual assaults, and certain burglaries, when any one of these offenses is the current most serious offense, also called the "primary offense." Offenders with a prior record containing at least one conviction for a violent crime are subject to degrees of midpoint enhancements based on the nature and seriousness of the offender's criminal history. The most serious prior record receives the most extreme enhancement. A prior record labeled "Category II" contains at least one prior violent felony conviction carrying a statutory maximum penalty of less than 40 years, whereas a "Category I" prior record includes at least one violent felony conviction with a statutory maximum penalty of 40 years or more. Category I and II offenses are defined in § 17.1-805.

Because midpoint enhancements are designed to target only violent offenders for longer sentences, enhancements do not affect the sentence recommendation for the majority of guidelines cases. Among the FY2011 cases, 77% of the cases did not involve midpoint enhancements of any kind (Figure 9). Only 23% of the cases qualified for a midpoint enhancement because of a current or prior conviction for a felony defined as violent under § 17.1-805. The proportion of cases receiving midpoint enhancements has fluctuated very little since the institution of truth-in-sentencing guidelines in 1995.

Of the FY2011 cases in which midpoint enhancements applied, the most common midpoint enhancement was for a Category II prior record. Approximately 46% of the midpoint enhancements were of this type and were applicable to offenders with a nonviolent instant offense but a violent prior record defined as Category II (Figure 10). In FY2011, another 14% of midpoint enhancements were attributable to offenders with a more serious Category I prior record. Cases of offenders with a violent instant offense but no prior record of violence represented 26% of the midpoint enhancements in FY2011. The most substantial midpoint enhancements target offenders with a combination of instant and prior violent offenses. Over 9% qualified for enhancements for both a current violent offense and a Category II prior record. Only a small percentage of cases (5%) were targeted for the most extreme midpoint enhancements triggered by a combination of a current violent offense and a Category I prior record.

Since the inception of the truth-in-sentencing guidelines, judges have departed from the guidelines recommendation more often in midpoint enhancement cases than in cases without enhancements. In FY2011, compliance was 69% when enhancements applied, which is significantly lower than compliance in all other cases (82%). Thus, compliance in midpoint enhancement cases is suppressing the overall compliance rate. When departing from enhanced guidelines recommendations, judges are choosing to mitigate in three out of every four departures.

Among FY2011 midpoint enhancement cases resulting in incarceration, judges departed from the low end of the guidelines range by an average of 24 months (Figure 11). The median departure (the middle value, where half of the values are lower and half are higher) was 13 months.

FIGURE 9  
**Application of  
Midpoint Enhancements - FY2011**

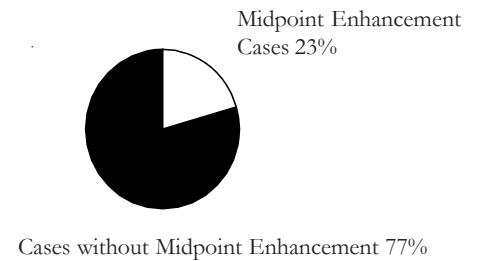


FIGURE 10  
**Type of Midpoint  
Enhancements Received - FY2011**

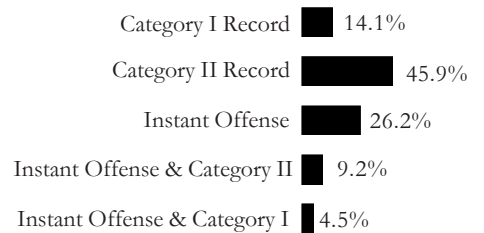


FIGURE 11  
**Length of Mitigation Departures  
in Midpoint Enhancement  
Cases - FY2011**



Compliance, while generally lower in midpoint enhancement cases than in other cases, varies across the different types and combinations of midpoint enhancements (Figure 12). In FY2011, as in previous years, enhancements for a Category II prior record generated the highest rate of compliance of all midpoint enhancements (73%).

Compliance in cases receiving enhancements for a Category I prior record was significantly lower (63%). Compliance for enhancement cases involving a current violent offense, but no prior record of violence, was 68%. Cases involving a combination of a current violent offense and a Category II prior record yielded a compliance rate of 64%, while those with the most significant midpoint enhancements, for both a violent instant offense and a Category I prior record, yielded a lower compliance rate of 52%.

Because of the high rate of mitigation departures, analysis of departure reasons in midpoint enhancement cases focuses on downward departures from the guidelines. Judges sentence below the guidelines recommendation in one out of every four midpoint enhancement cases. The most frequently cited reasons for departure include the acceptance of a plea agreement, the defendant's cooperation with law enforcement, mitigating offense circumstances, and the defendant's minimal prior record.

FIGURE 12

**Compliance by Type of Midpoint Enhancement - FY2011**

	Compliance	Mitigation	Aggravation	Number of Cases
None	82.40%	6.90%	10.70%	18,517
Category I Prior Record	63.20%	33.70%	3.10%	771
Category II Prior Record	72.80%	21.10%	6.10%	2,501
Instant Offense	68.40%	21.50%	10.10%	1,430
Instant & Category I	52.40%	36.70%	10.90%	248
Instant & Category II	63.80%	27.60%	8.50%	50
Total	79.20%	10.90%	9.90%	23,970



## Juries and the Sentencing Guidelines

There are three methods by which Virginia's criminal cases are adjudicated: guilty pleas, bench trials, and jury trials. Felony cases in circuit courts are overwhelmingly resolved through guilty pleas from defendants, or plea agreements between defendants and the Commonwealth. During the last fiscal year, 89% of guideline cases were sentenced following guilty pleas (Figure 13). Adjudication by a judge in a bench trial accounted for 10% of all felony guidelines cases sentenced. During FY2011, 1.5% of cases involved jury trials. In a small number of cases, some of the charges were adjudicated by a judge, while others were adjudicated by a jury, after which the charges were combined into a single sentencing hearing.

Since FY1986, there has been a generally declining trend in the percentage of jury trials among felony convictions in circuit courts (Figure 14). Under the parole system in the late 1980s, the percent of jury convictions of all felony convictions was as high as 6.5% before starting to decline in FY1989. In 1994, the General Assembly enacted provisions for a system of bifurcated jury trials. In bifurcated trials, the jury establishes the guilt or innocence of the defendant in the first phase of the trial and then, in a second phase, the jury makes its sentencing decision. When the bifurcated trials became effective on July 1, 1994 (FY1995), jurors in Virginia, for the first time, were presented with information on the offender's prior criminal record, to assist them in making a sentencing decision. During the first year of the bifurcated trial process, jury convictions dropped slightly, to fewer than 4% of all felony convictions. This was the lowest rate recorded up to that time.

FIGURE 13

Percentage of Cases Received by Method of Adjudication - FY2011

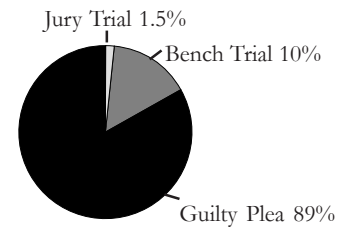
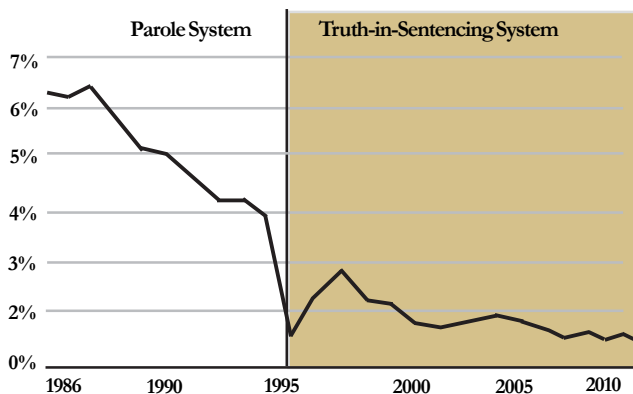


FIGURE 14

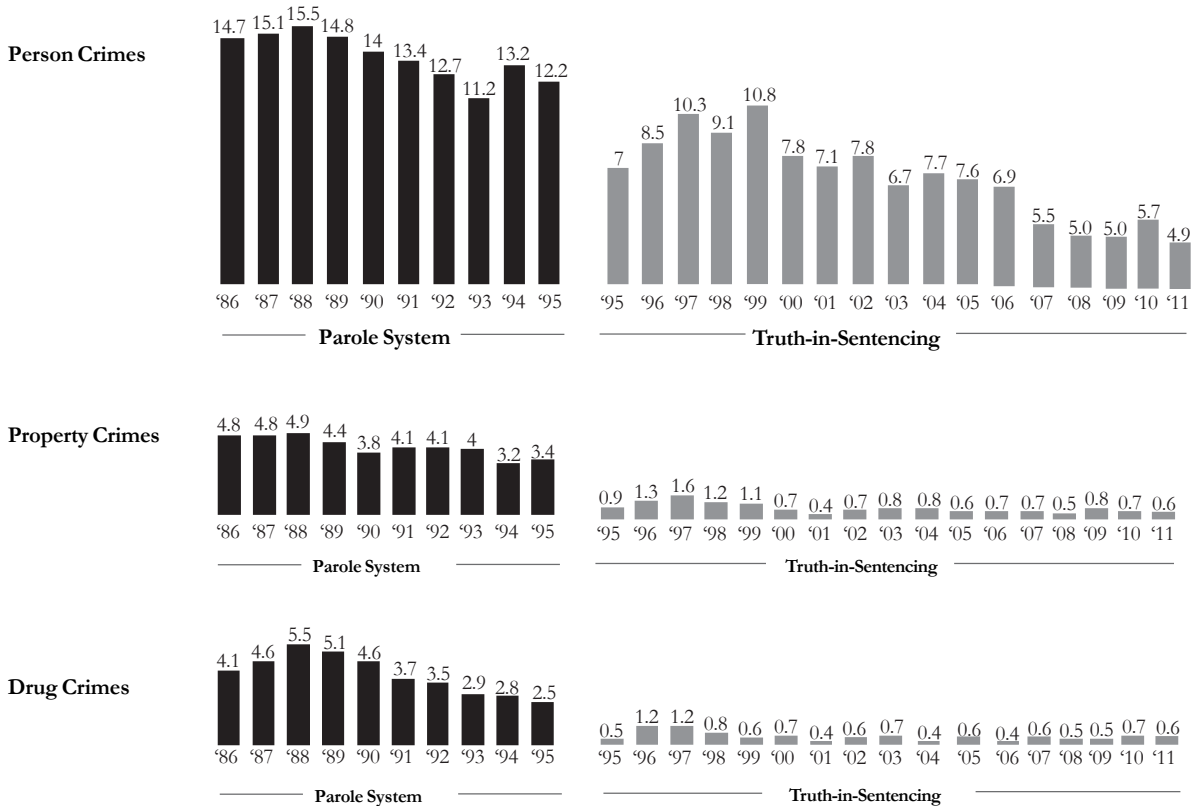
Percent of Felony Convictions Adjudicated by Juries FY1986-FY2011  
Parole System v. Truth-in-Sentencing (No Parole) System



Among the early cases subjected to the new truth-in-sentencing provisions, implemented during the last six months of FY1995, jury adjudications sank to just over 1%. During the first complete fiscal year of truth-in-sentencing (FY1996), just over 2% of the cases were resolved by jury trials, which was half the rate of the last year before the abolition of parole. Seemingly, the introduction of truth-in-sentencing, as well as the introduction of a bifurcated jury trial system, appears to have contributed to the reduction in jury trials. Since FY2000, the percentage of jury convictions has remained less than 2%.

Inspecting jury data by offense type reveals very divergent patterns for person, property, and drug crimes. Under the parole system, jury cases comprised 11% to 16% of felony convictions for person crimes. This rate was typically three to four times the rate of jury trials for property and drug crimes (Figure 15). However, with the implementation of bifurcated trials and truth-in-sentencing provisions, the percent of convictions decided by juries dropped dramatically for all crime types. Since FY2007, the rate of jury convictions for person crimes has been between 5% and 6%, the lowest rates since truth-in-sentencing was enacted. The percent of felony convictions resulting from jury trials for property and drug crimes has declined to less than 1% under truth-in-sentencing.

FIGURE 15  
**Percent of Felony Convictions Adjudicated by Juries FY1986-FY2011**  
**Parole System v. Truth-in-Sentencing (No Parole) System**



In FY2011, the Commission received 347 cases adjudicated by juries. While the compliance rate for cases adjudicated by a judge or resolved by a guilty plea was at 80% during the fiscal year, sentences handed down by juries concurred with the guidelines only 39% of the time (Figure 16). In fact, jury sentences were more likely to fall above the guidelines than within the recommended range (51%). This pattern of jury sentencing vis-à-vis the guidelines has been consistent since the truth-in-sentencing guidelines became effective in 1995. By law, however, juries are not allowed to receive any information regarding the sentencing guidelines.

In jury cases in which the final sentence fell short of the guidelines, it did so by a median value of 38 months (Figure 17). In 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 42 months.

In FY2011, fifteen of the jury cases involved a juvenile offender tried as an adult in circuit court. According to § 16.1-272 of the *Code of Virginia*, juveniles may be adjudicated by a jury in circuit court; however, any sentence must be handed down by the court without the intervention of a jury. Therefore, juries are not permitted to recommend sentences for juvenile offenders. Rather, circuit court judges are responsible for formulating sanctions for juvenile offenders. There are many options for sentencing these juveniles, including commitment to the Department of Juvenile Justice. Because judges, and not juries, must sentence in these cases, they are excluded from the previous analysis.

In cases of adults adjudicated by a jury, judges are permitted by law to lower a jury sentence. Typically, however, judges have chosen not to amend sanctions imposed by juries. In FY2011, judges modified 19% of jury sentences.

FIGURE 16

**Sentencing Guidelines Compliance in Jury Cases and Non-Jury - FY2011**

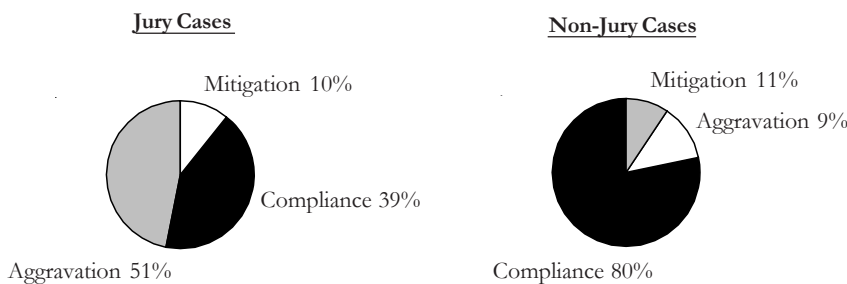


FIGURE 17

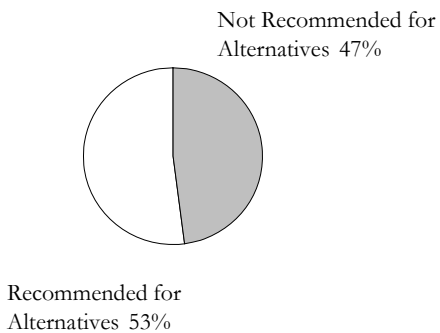
**Median Length of Durational Departures in Jury Cases - FY2011**



## Compliance and Nonviolent Offender Risk Assessment

FIGURE 18

### Percentage of Eligible Nonviolent Offenders Recommended for Alternatives through Risk Assessment, FY2011 (6,473 cases)



In 1994, as part of the reform legislation that instituted truth-in-sentencing, the General Assembly directed the Commission to study the feasibility of using an empirically-based risk assessment instrument to select 25% of the lowest risk, incarceration-bound, drug and property offenders for placement in alternative (non-prison) sanctions. By 1996, the Commission developed such an instrument and implementation of the instrument began in pilot sites in 1997. The National Center for State Courts (NCSC) conducted an independent evaluation of nonviolent risk assessment in the pilot sites for the period from 1998 to 2001. In 2001, the Commission conducted a validation study of the original risk assessment instrument to test and refine the instrument for possible use statewide. In July 2002, the nonviolent risk assessment instrument was implemented statewide for all felony larceny, fraud and drug cases.

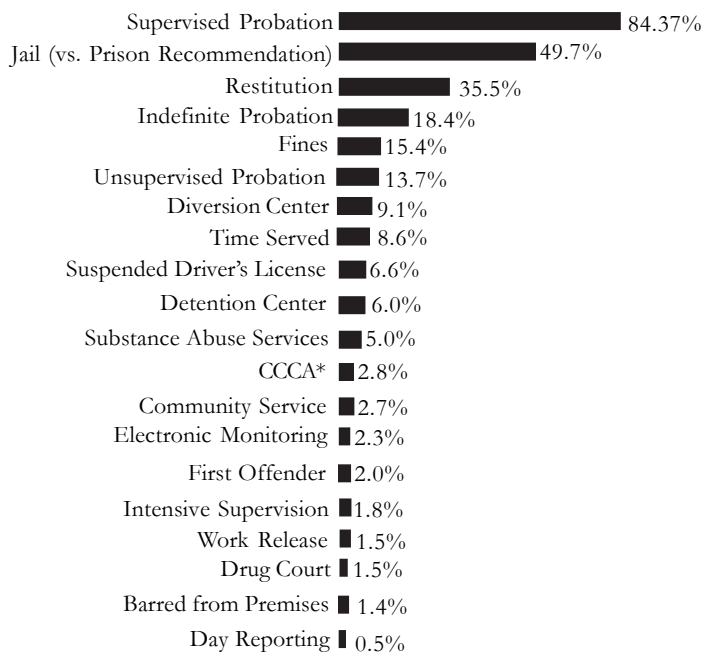
Nearly two-thirds of all guidelines received by the Commission for FY2011 were for nonviolent offenses. However, only 42% of these nonviolent offenders were eligible to be assessed for an alternative sanction recommendation. The goal of the nonviolent risk assessment instrument is to divert low-risk offenders who are recommended for incarceration on the guidelines to an alternative sanction other than prison or jail. Therefore, nonviolent offenders who are recommended for probation/no incarceration on the guidelines are not eligible for the assessment. Furthermore, the instrument is not to be applied to offenders convicted of distributing one ounce or more of cocaine, those who have a current or prior violent felony conviction, or those who must be sentenced to a mandatory minimum term of incarceration required by law. In addition to those not eligible for risk assessment, there were 2,545 nonviolent offense cases for which a risk assessment instrument was not completed and submitted to the Commission.

Among the eligible offenders in FY2011 for whom a risk assessment form was received (6,473 cases), 53% were recommended for an alternative sanction by the risk assessment instrument (Figure 18). A large portion of offenders recommended for an alternative sanction through risk assessment were given some form of alternative punishment by the judge. In FY2011, 41% of offenders recommended for an alternative were sentenced to an alternative punishment option.

Among offenders recommended for and receiving an alternative sanction through risk assessment, judges used supervised probation more often than any other option (Figure 19). In addition, in about half of the cases in which an alternative was recommended, judges sentenced the offender to a shorter term of incarceration in jail (less than twelve months) rather than the prison sentence recommended by the traditional guidelines range. Other frequent sanctions utilized were: restitution (36%), indefinite probation (18%), fines (15%), and unsupervised probation (14%). The Department of Corrections' Diversion and Detention Center programs were used in 9% and 6% of the cases, respectively. Other alternatives/sanctions included: time served, suspension of driver's license, substance abuse services, restrictions barring the defendant from certain premises, community service, programs under the Comprehensive Community Corrections Act (CCCA), electronic monitoring, intensive supervision, first offender status under § 18.2-251, work release, day reporting, and drug court.

FIGURE 19

**Types of Alternative Sanctions Imposed - FY2011**







\* Any program established through the Comprehensive Community Corrections Act  
 These percentages do not sum to 100% because multiple sanctions may be imposed in each case.

When a nonviolent offender is recommended for an alternative sanction using the risk assessment instrument, a judge is considered to be in compliance with the guidelines if he or she chooses to sentence the defendant to a term within the traditional incarceration period recommended by the guidelines or if he or she chooses to sentence the offender to an alternative form of punishment. For drug offenders eligible for risk assessment, the overall guidelines compliance rate is 86%, but a portion of this compliance reflects the use of an alternative punishment option as recommended by the risk assessment tool (Figure 20). In 25% of these drug cases, judges have complied with the recommendation for an alternative sanction. Similarly, in fraud cases, with offenders eligible for risk assessment, the overall compliance rate is 88%. In 38% of these fraud cases, judges have complied by utilizing alternative punishment, when it was recommended. Finally, among larceny offenders eligible for risk assessment, the compliance rate is 83%. Judges used an alternative, as recommended by the risk assessment tool, in 9% of larceny cases. The lower use of alternatives for larceny offenders is primarily because larceny offenders are recommended for alternatives at a lower rate than drug and fraud offenders. The National Center for State Courts, in its evaluation of Virginia's risk assessment tool, and the Commission, during the course of its validation study, found that larceny offenders are the most likely to recidivate among nonviolent offenders.

FIGURE 20

## Compliance Rates for Nonviolent Offenders Eligible for Risk Assessment - FY2011

	Mitigation	Compliance		Aggravation	Number of Cases	Overall Compliance
		Traditional Range	Adjusted Range			
Drug	5.5%	60.8%	25.4%	8.3%	3,242	 86%
Fraud	7.9%	50.6%	37.7%	3.8%	1,064	 88%
Larceny	9.3%	74.4%	8.9%	7.4%	2,167	 83%
Overall	7.2%	63.7%	21.9%	7.2%	6,473	 86%

## Compliance and Sex Offender Risk Assessment

In 1999, the Virginia General Assembly requested that the Virginia Criminal Sentencing Commission develop a sex offender risk assessment instrument, based on the risk of re-offense, that could be integrated into the state's sentencing guidelines system. Such a risk assessment instrument could be used as a tool to identify offenders who, as a group, represent the greatest risk for committing a new offense once released back into the community. The Commission conducted an extensive study of felony sex offenders convicted in Virginia's circuit courts and developed an empirical risk assessment tool based on the risk that an offender would be rearrested for a new sex offense or other crime against a person.

Effectively, risk assessment means developing profiles or composites based on overall group outcomes. Groups are defined by having a number of factors in common that are statistically relevant to predicting repeat offending. Groups exhibiting a high degree of re-offending are labeled high risk. Although no risk assessment model can ever predict a given outcome with perfect accuracy, the risk instrument produces overall higher scores for the groups of offenders who exhibited higher recidivism rates during the course of the Commission's study. In this way, the instrument developed by the Commission is indicative of offender risk.

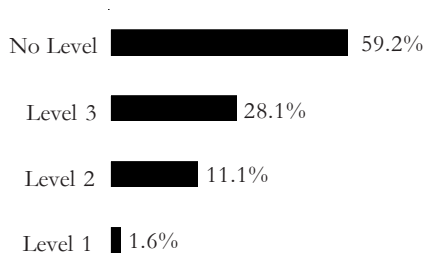
The risk assessment instrument was incorporated into the sentencing guidelines for sex offenders beginning July 1, 2001. For each sex offender identified as a comparatively high risk (those scoring 28 points or more on the risk tool), the sentencing guidelines have been revised such that a prison term will always be recommended. In addition, the guidelines recommendation range (which comes in the form of a low end, a midpoint and a high end) is adjusted. For offenders scoring 28 points or more, the high end of the guidelines range is increased based on the offender's risk score, as summarized below.

- For offenders scoring 44 or more, the upper end of the guidelines range is increased by 300%.
- For offenders scoring 34 through 43 points, the upper end of the guidelines range is increased by 100%.
- For offenders scoring 28 through 33 points, the upper end of the guidelines range is increased by 50%.

The low end and the midpoint remain unchanged. Increasing the upper end of the recommended range provides judges the flexibility to sentence higher risk sex offenders to terms above the traditional guidelines range and still be in compliance with the guidelines. This approach allows the judge to incorporate sex offender risk assessment into the sentencing decision, while providing the judge with the flexibility to evaluate the circumstances of each case.

FIGURE 21

**Sex Offender Risk Levels for Other Sexual Offenses - FY2011**



During FY2011, there were 574 offenders convicted of an offense covered by the sexual assault guidelines (this group excludes offenders convicted of rape, forcible sodomy, or object penetration). However, the sex offender risk assessment instrument does not apply to certain guideline offenses, such as bestiality, bigamy, non-forcible sodomy, prostitution, child pornography, and online solicitation of a minor (197 of the 574 cases in FY2011). Of the remaining 377 sexual assault cases for which the risk assessment was applicable, the majority (59%) were not assigned a level of risk by the sex offender risk assessment instrument (Figure 21). Approximately 28% of applicable sexual assault guidelines cases resulted in a Level 3 risk classification, with an additional 11% assigned to Level 2. Just 1.6% of offenders reached the highest risk category of Level 1.

Under the sex offender risk assessment, the upper end of the guidelines range is extended by 300%, 100% or 50% for offenders assigned to Level 1, 2 or 3, respectively. Judges have begun to utilize these extended ranges when sentencing sex offenders. For the seven sexual assault offenders reaching Level 1 risk during the past fiscal year, six of them were given sentences within the traditional guidelines range (Figure 22). Judges used the extended guidelines range in 25% of Level 2 cases and 14% of Level 3 risk cases. Judges rarely sentenced Level 1, 2 or 3 offenders to terms above the extended guidelines range provided in these cases. However, offenders who scored less than 28 points on the risk assessment instrument (who are not assigned a risk category and receive no guidelines adjustment) were less likely to be sentenced in compliance with the guidelines (58% compliance rate) and were more likely to receive a sentence that was an upward departure from the guidelines (31% aggravation rate).

FIGURE 22

**Other Sexual Assault Compliance Rates by Risk Level Offenses - FY2011**

	Mitigation	Compliance		Aggravation	Number of Cases
		Traditional Range	Adjusted Range		
Level 1	0.0%	85.7%	14.3%	0.0%	7
Level 2	11.4%	61.4%	25.0%	2.3%	44
Level 3	16.5%	67.0%	13.6%	2.9%	103
No Level	10.3%	58.3%	----	31.4%	223
Overall	11.9%	61.5%	6.9%	19.6%	377



In FY2011, there were 210 offenders convicted of offenses covered by the rape guidelines (which cover the crimes of rape, forcible sodomy, and object penetration). Among offenders convicted of these crimes, over one-half (57%) were not assigned a risk level by the Commission's risk assessment instrument (Figure 23). Approximately 22% of these cases resulted in a Level 3 adjustment - a 50% increase in the upper end of the traditional guidelines range recommendation. An additional 16% received a Level 2 adjustment (100% increase). The most extreme adjustment (300%) affected about 5% of rape guidelines cases. Two of the ten rape offenders reaching the Level 1 risk group were sentenced within the extended high end of the range (Figure 24). As shown below, 30% of offenders with a Level 2 risk classification and 9% of offenders with a Level 3 risk classification were given prison sentences within the adjusted range of the guidelines. With extended guidelines ranges available for higher risk sex offenders, judges rarely sentenced Level 1, 2 or 3 offenders above the expanded guidelines range.

FIGURE 23

**Sex Offender Risk Levels for Rape Offenses - FY2011**

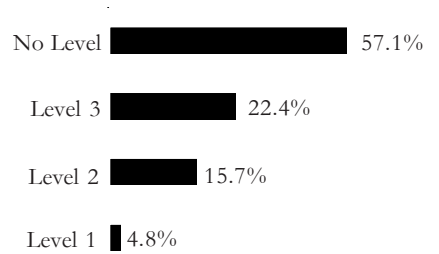


FIGURE 24

**Rape Compliance Rates by Risk Level Offenses - FY2011**

	Mitigation	Compliance		Aggravation	Number of Cases
		Traditional Range	Adjusted Range		
Level 1	30.0%	50.0%	20.0%	0.0%	10
Level 2	9.1%	54.5%	30.3%	6.1%	33
Level 3	14.9%	72.3%	8.5%	4.3%	47
No Level	22.5%	58.3%	----	19.2%	120
Overall	19.0%	60.5%	7.6%	12.9%	210

### Sentencing Revocation Reports (SRRs)

The most complete resource regarding revocations of community supervision in Virginia is the Sentencing Commission's Community Corrections Revocations Data System, also known as the Sentencing Revocation Report (SRR) database. First implemented in 1997 with assistance from the Department of Corrections (DOC), the SRR is a simple form designed to capture the reasons for, and the outcomes of, community supervision violation hearings. The probation officer (or Commonwealth's attorney) completes the first part of the form, which includes the offender's identifying information and checkboxes indicating the reasons why a show cause or revocation hearing has been

requested. The checkboxes are based on the list of eleven conditions for community supervision established for every offender, but special supervision conditions imposed by the court also can be recorded. Following the violation hearing, the judge completes the remainder of the form with the revocation decision and any sanction ordered in the case. The completed form is submitted to the Commission, where the information is automated. A revised SRR form was developed and implemented in 2004 to serve as a companion to the new probation violation sentencing guidelines introduced that year.

In FY2011, there were 11,134 felony violations of probation, suspended sentences, or good behaviors for which a Sentencing Revocation Report (SRR) was submitted to the Commission by July of this year. The number of SRRs received is preliminary, since the Commission expects to receive additional forms for FY2011. The SRRs received include cases in which the court found the defendant in violation, cases that the court decided to take under advisement until a later date, and cases in which the court did not find the defendant in violation. The circuits submitting the largest number of SRRs during the time period were Circuit 4 (Norfolk), Circuit 29 (Buchanan area), and Circuit 15 (Fredericksburg area). Circuit 17 (Arlington area), Circuit 6 (Sussex County area), and Circuit 11 (Petersburg area) submitted the fewest SRRs during the time period (Figure 25).

FIGURE 25

#### Number and Percent of Sentencing Revocation Reports Received by Circuit, FY2011\*

Circuit	Circuit Name	Number	Percent
4	Norfolk	831	7.5%
29	Buchanan Area	637	5.7
15	Fredericksburg Area	631	5.7
19	Fairfax	555	5
14	Henrico	537	4.8
22	Danville Area	524	4.7
27	Radford Area	522	4.7
1	Chesapeake	511	4.6
26	Harrisonburg Area	498	4.5
13	Richmond City	461	4.1
28	Bristol Area	393	3.5
9	Williamsburg Area	391	3.5
23	Roanoke Area	382	3.4
5	Suffolk Area	362	3.3
24	Lynchburg Area	361	3.2
8	Hampton	350	3.1
12	Chesterfield Area	320	2.9
25	Staunton Area	313	2.8
16	Charlottesville Area	307	2.8
3	Portsmouth	300	2.7
7	Newport News	290	2.6
2	Virginia Beach	266	2.4
31	Prince William Area	247	2.2
20	Loudoun Area	244	2.2
18	Alexandria	218	2
10	South Boston Area	209	1.9
21	Martinsville Area	135	1.2
30	Lee County Area	102	0.9
11	Petersburg Area	82	0.7
6	Sussex Area	79	0.7
17	Arlington Area	76	0.7
Total		11,134	100%

\*Includes all felony violations of probation, suspended sentence, good behavior, and community-based programs for FY2011

## Probation Violation Guidelines

In 2003, the General Assembly directed the Commission to develop, with due regard for public safety, discretionary sentencing guidelines for felony offenders who are determined by the court to be in violation of their probation supervision for reasons other than a new criminal conviction (Chapter 1042 of the Acts of Assembly 2003). Often, these offenders are referred to as "technical violators." In determining the guidelines, the Commission was to examine historical judicial sanctioning practices in revocation hearings.

Early use of the probation violation guidelines, which took effect on July 1, 2004, indicated that the guidelines needed further refinement to better reflect current judicial sentencing patterns in the punishment of supervision violators. Judicial compliance with the first edition of the probation violation guidelines was lower than expected, with only 38% of the violators being sentenced within the range recommended by the new guidelines. Therefore, the Commission's 2004 Annual Report recommended several adjustments to the probation violation guidelines. The proposed changes were accepted by the General Assembly and the second edition of the probation violation guidelines took effect on July 1, 2005. These changes yielded an improved compliance rate of 48% for fiscal years (FY) 2006 and 2007.

Compliance with the revised guidelines, and ongoing feedback from judges, suggested that further refinement could improve their utility as a benchmark for judges. Therefore, the Commission's 2006 Annual Report recommended additional adjustments to the probation violation guidelines. The majority of the changes proposed in the 2006 Annual Report affected the Section A worksheet. The score on Section A of the probation violation guidelines determines whether an offender will be recommended for probation with no active term of incarceration to serve, or whether the offender will be referred to the Section C worksheet, for a jail or prison recommendation. Changes to the Section A worksheet included revising scores for existing factors, deleting certain factors and replacing them with others (e.g., "Previous Adult Probation Violation Events" replaced "Previous Capias/Revocation Requests"), and adding new factors (e.g., "Original Disposition was Incarceration"). The only change to the Section C worksheet (the sentence length recommendation) was an adjustment to the point value assigned to offenders who violated their sex offender restrictions. The proposed changes outlined in the 2006 Annual Report were accepted by the General Assembly and became effective for technical probation violators sentenced on July 1, 2007 and after. This third edition of the probation violation guidelines has resulted in a higher compliance rate than previous versions of the guidelines. Violation cases for FY2011 that were heard and submitted to the Commission by July of this year are examined below. The analysis below is preliminary since the Commission expects to receive additional forms for FY2011.

For FY2011, the Commission received 11,134 SRRs. Of the total, 5,839 cases involved a new law violation. In these cases, the judge found the defendant guilty of violating Condition 1 of the Department of Corrections' Conditions of Probation (obey all federal, state, and local laws and ordinances). In 4,970 cases, the offender was found in violation of other conditions not related to a new law violation. For these "technical violators," the Probation Violation Guidelines should be completed and submitted to the court. In a number of cases, the offender was not found in violation of any condition (202 cases) or the type of violation was not identified on the SRR form (92 cases). The judge took the violation under advisement in another 31 cases.

Upon further examination of the 4,970 technical violator cases, it was found that 447 could not be included in the analysis of judicial compliance with the Probation Violation Guidelines. There were several reasons for excluding these cases from compliance analysis. Cases were excluded if the guidelines were not applicable (the case involved a parole-eligible offense, a first-offender violation, a misdemeanor original offense, or an offender who was not on supervised probation), if the guidelines forms were incomplete, or if outdated forms were prepared. The following preliminary analysis of compliance with the Probation Violation Guidelines will focus on the remaining 4,523 technical violator cases heard in Virginia's circuit courts between July 2010 and June 2011.

Of the 4,523 cases in which offenders were found to be in violation of their probation for reasons other than a new law violation, approximately 44% were under supervision for a felony property offense (Figure 26). This represents the most serious offense for which the offender was on probation. Another 34% were under supervision for a felony drug conviction. Offenders who were on probation for a crime against a person (most serious original offense) made up a smaller portion (13%) of those found in violation during FY2011.

FIGURE 26

**Probation Violation Guidelines Worksheets Received  
by Type of Most Serious Original Offense - FY2011\*  
N=4,523**

<b>Original Offense Type</b>	<b>Percent Received</b>
Property	44.2%
Drug	34.9%
Person	12.8%
Traffic	5.7%
Other	2.4%
Total	100.0%

*\*Only includes technical violators included in the compliance analysis.*

Examining the 4,523 violation cases (excluding those with a new law violation) reveals that over half (53%) of the offenders were cited for failing to follow instructions given by the probation officer (Figure 27). More than half (51%) of the offenders were cited for using, possessing, or distributing a controlled substance (Condition 8 of the DOC Conditions of Probation).

Violations of Condition 8 may include a positive test (urinalysis, etc.) for a controlled substance or a signed admission. Other frequently cited violations included absconding from supervision (33%) or failing to report to the probation officer in person or by telephone when instructed (26%). In more than one-quarter of the violation cases (29%), offenders were cited for failing to follow special conditions imposed by the court, including: failing to pay court costs and restitution, failing to comply with court-ordered substance abuse treatment, or failing to successfully complete alternatives, such as a Detention Center or Diversion Center program. It is important to note that defendants may be, and typically are, cited for violating more than one condition of their probation.

The overall compliance rate summarizes the extent to which Virginia's judges concur with recommendations provided by the probation violation guidelines, both in type of disposition and in length of incarceration. In FY2011, the overall rate of compliance with the Probation Violation Guidelines was 54%, which is slightly higher than the 48% compliance rate for the previous edition of these guidelines and significantly higher than the compliance rate of 38% for the first edition of the guidelines (Figure 28). The aggravation rate, or the rate at which judges sentence offenders to sanctions more severe than the guidelines recommend, was 22% during the FY2011. The mitigation rate, or the rate at which judges sentence offenders to sanctions considered less severe than the guidelines recommendation, was 24%.

FIGURE 27

**Violation Conditions Cited by Probation Officers, Excluding New Law Violations - FY2011**  
N=4,523

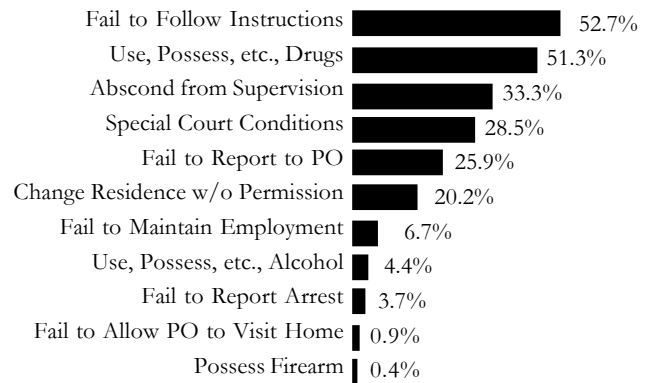


FIGURE 28

**Overall Probation Violation Guidelines Compliance and Direction of Departures - FY 2011**  
N=4,523

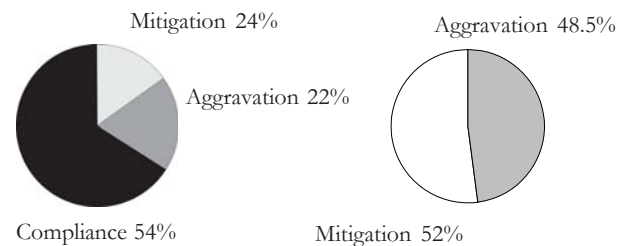


FIGURE 29

**Probation Violation Guidelines  
Dispositional Compliance  
FY2011**

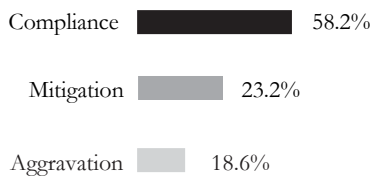
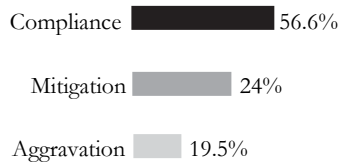


FIGURE 30

**Probation Violation Guidelines  
Durational Compliance\*  
FY2011**



*\*Compliance in cases that are recommended for, and receive, an active jail or prison sentence.*

Figure 29 illustrates judicial concurrence with the type of disposition recommended by the Probation Violation Guidelines for FY2011. There are three general categories of sanctions recommended by the probation violation guidelines: probation/no incarceration, a jail sentence up to twelve months, or a prison sentence of one year or more. Data for the time period reveal that judges agree with the type of sanction recommended by the probation violation guidelines in 58% of the cases. When departing from the dispositional recommendation, judges were more likely to sentence below the guidelines recommendation than above it. Consistent with the traditional sentencing guidelines, sentences to the Detention Center and Diversion Center programs are defined as incarceration sanctions under the Probation Violation Guidelines and are counted as seven months of confinement (per changes to the program effective July 1, 2007).

Another facet of compliance is durational compliance. Durational compliance is defined as the rate at which judges sentence offenders to terms of incarceration that fall within the recommended guidelines range. Durational compliance analysis only considers cases for which the guidelines recommended an active term of incarceration and the offender received an incarceration sanction consisting of at least one day in jail. Data reveal that durational compliance for FY2011 was approximately 57% (Figure 30). For cases not in durational compliance, mitigations were more prevalent (24%) than aggravations (20%).

When judges sentenced offenders to incarceration, but to an amount less than the recommended time, offenders were given "effective" sentences (imposed sentences less any suspended time) short of the guidelines range by a median value of six months. For offenders receiving longer than recommended incarceration sentences, the effective sentence exceeded the guidelines range by a median value of nine months. Thus, durational departures from the guidelines are typically less than one year above or below the recommended range.

Prior to July 1, 2010, completion of the Probation Violation Guidelines was not required by statute or other any provision of law. However, the 2010-2012 biennium budget passed by the General Assembly specifies that, as of July 1, 2010, a sentencing revocation report (SRR) and, if applicable, the Probation Violation Guidelines, must be presented to the court and reviewed by the judge for any violation hearing conducted pursuant to § 19.2-306 (this requirement can be found in Item 41 of Chapter 874 of the 2010 Acts of Assembly). Similar to the traditional felony sentencing guidelines, sentencing in accordance with the recommendations of the Probation Violation Guidelines is voluntary. The approved budget language states, however, that in cases in which the Probation Violation Guidelines are required and the judge imposes a sentence greater than or less than the guidelines recommendation, the court must file with the record of the case a written explanation for the departure. The requirements pertaining to the Probation Violation Guidelines spelled out in the latest budget parallel existing statutory provisions governing the use of sentencing guidelines for felony offenses.

Before July 1, 2010, circuit court judges were not required to provide a written reason for departing from the Probation Violation Guidelines. Because the opinions of the judiciary, as reflected in their departure reasons, are of critical importance when revisions to the guidelines are considered, the Commission had requested that judges enter departure reasons on the Probation Violation Guidelines form. Many judges responded to the Commission's request. Ultimately, the types of adjustments to the Probation Violation Guidelines that would allow the guidelines to more closely reflect judicial sentencing practices across the Commonwealth are largely dependent upon the judges' written reasons for departure.

According to Probation Violation Guidelines data for FY2011, 54% of the cases resulted in sentences that fell within the recommended guidelines range. With judges departing from these guidelines at such a high rate, written departure reasons are an integral part of understanding judicial sentencing decisions. An analysis of the 1,077 mitigation cases revealed that over half (52%) included a departure reason. For the mitigation cases in which departure reasons were provided, judges were most likely to cite the utilization of an alternative punishment option (e.g., Detention or Diversion Center programs), the involvement of a plea agreement, the offender's poor health, judicial discretion, the defendant's progress in rehabilitation, or minimal circumstances involving the violation.

Examining the 994 aggravation cases, the Commission found that more than half (54%) included a departure reason. When a departure reason was provided in aggravation cases, judges were most likely to cite multiple revocations in the defendant's prior record, the defendant's failure to follow instructions, the defendant's poor potential for rehabilitation, the involvement of a plea agreement, the defendant absconding from supervision, or substance abuse issues.

Preliminary FY2011 data suggest that judicial concurrence with Probation Violation Guidelines recommendations is continuing to improve with changes implemented July 1, 2007. As with the felony sentencing guidelines first implemented in 1991, the development of useful sentencing tools for judges to deal with probation violators will be an iterative process, with improvements made over several years. Feedback from judges, especially through written departure reasons, is of critical importance to the process of continuing to improve the guidelines, thereby making them a more useful tool for judges in formulating sanctions in probation violation hearings.





# **❧ REVIEW OF NONVIOLENT OFFENDER RISK ASSESSMENT STUDY**

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## **❧ Introduction**

In 1994, as part of the reform legislation that instituted truth-in-sentencing, the General Assembly required the Commission to study the feasibility of using an empirically-based risk assessment instrument to select 25% of the lowest risk, incarceration-bound, drug and property offenders as candidates for placement in alternative (non-prison) sanctions. By 1996, the Commission developed such an instrument and implementation of the instrument began in pilot sites in 1997. The National Center for State Courts (NCSC) conducted an evaluation of the nonviolent offender risk assessment instrument used in the pilot sites from 1998 to 2001.

In 2001, the Commission conducted a validation study of the original risk assessment instrument to test and refine the instrument for possible use statewide. Upon conclusion of the validation study, the Commission reviewed the nonviolent risk assessment instrument and concluded that the refined nonviolent risk assessment tool should be implemented statewide. In July 2002, the nonviolent risk assessment instrument was implemented statewide for all eligible felony larceny, fraud, and drug cases. In 2010, the Commission embarked upon an extensive re-validation study to evaluate the validity of the current nonviolent offender risk assessment instrument and potentially revise the existing instrument based upon more recent data.

## **❧ Development of the Risk Assessment Instrument**

To develop the original risk assessment instrument for nonviolent offenders, the Commission studied a random sample of over 1,500 drug and property offenders who had been released from incarceration between July 1, 1991, and December 31, 1992. The use of a release cohort was necessary because the early stages of the original analysis included offenders convicted of burglary, who traditionally receive longer sentences than fraud, larceny, and drug offenders. To use an actual sentence group, the Commission would have had to limit the amount of time burglary offenders were tracked for recidivism following release. The Commission later decided to exclude burglary offenders from nonviolent risk assessment. A stratified sampling technique was used to increase the chance of including offenders with juvenile criminal records, since juvenile criminal behavior has been shown to be a common precursor to later adult crime. The sample was also stratified to draw equal numbers of drug, larceny, and fraud cases.

Recidivism was defined as reconviction for a felony within three years of release from incarceration. Sample cases were matched to data from the Pre/Post-Sentence Investigation (PSI) database to determine which offenders had been reconvicted of a felony crime during the three-year follow-up period.

Construction of the risk assessment instrument was based on statistical analysis of the characteristics, criminal histories, and patterns of recidivism of the fraud, larceny, and drug offenders in the sample. The factors proving statistically significant in predicting recidivism were assembled on a risk assessment worksheet, with scores determined by the relative importance of the factors in the statistical model. The Commission, however, chose to remove the race of the offender from the risk assessment instrument. Although it emerged as a statistically significant factor in the analysis, the Commission viewed race as a proxy for social and economic disadvantage and, therefore, decided to exclude it from the final risk assessment worksheet.

The risk assessment worksheet is completed for fraud, larceny, and drug offenders who are recommended for some period of incarceration by the guidelines and who satisfy the eligibility criteria established by the Commission. Offenders with any current or prior convictions for violent felonies (defined in § 17.1-803), offenders who sell an ounce or more of cocaine, and offenders whose current offenses require a mandatory term of incarceration are excluded from risk assessment consideration.

The total score on the risk assessment worksheet represents the likelihood that an offender will be reconvicted of a felony within three years. Offenders who score few points on the worksheet are less likely to be reconvicted of a felony than offenders who have a higher total score. For the original worksheet, the Commission adopted a scoring threshold of nine points. In the analysis used to construct the scale, offenders who scored nine points or less on the risk assessment instrument had a one in eight chance of being reconvicted for a felony crime within three years. Moreover, the Commission's analysis suggested that a threshold of nine points would satisfy the legislative goal of diverting 25% of nonviolent offenders from incarceration in a state prison facility to other types of sanctions.

When the risk assessment instrument is completed, offenders scoring at or below the selected threshold are recommended for sanctions other than traditional incarceration. The instrument itself does not recommend any specific type or form of alternative punishment. That decision is left to the discretion of the judge and may depend on program availability. In these cases, judges are seen as concurring with the guidelines recommendation if they sentence within the recommended incarceration range or if they impose any less restrictive sanction. For offenders scoring over the selected threshold, the original recommendation for incarceration remains unchanged.

The intent of the nonviolent offender risk assessment instrument is to identify offenders who are, at the time of sentencing, a low risk for re-offending and can therefore be diverted to less restrictive sanctions with due regard for public safety. It does not assess potential therapeutic needs of offenders and does not identify offenders who may be suitable for treatment. Instead, it is a predictive tool that measures an eligible offender's likelihood of reoffending in order to assist judges in identifying offenders who may be safely diverted to a less restrictive sanction, such as probation.

### Pilot Program

Prior to the statewide implementation of the nonviolent offender risk assessment instrument, six judicial circuits agreed to participate as pilot sites. On December 1, 1997, Circuit 5 (cities of Franklin and Suffolk and the counties of Southampton and Isle of Wight), Circuit 14 (Henrico), and Circuit 19 (Fairfax) became the first circuits to use the risk assessment instrument. Three months later, Circuit 22 (city of Danville and counties of Franklin and Pittsylvania) joined the pilot project. In the spring of 1999, Circuit 4 (Norfolk) and Circuit 7 (Newport News) began using the instrument, bringing the number of pilot sites to six. The pilot sites represented large and small jurisdictions, urban and rural areas, and different geographic regions of the state.

## NCSC Evaluation

The National Center for State Courts (NCSC), with funding from the National Institute of Justice, conducted an independent evaluation of the development and impact of the original risk assessment instrument. During the summer of 2000, investigators visited the pilot sites to interview judges, Commonwealth's attorneys, defense counsel, and probation officers about the design and use of the risk assessment instrument. Although responses and recommendations varied by locality and occupation, some common themes emerged.

Specifically, judges and probation officers generally supported the idea of offender risk assessment, but expressed concern about the inclusion of demographic factors on the risk scale. They noted that unemployed, unmarried males under the age of 20 began with a score right at the recommendation threshold, and any additional scoring made them ineligible for a diversion recommendation. While aware that past research shows this profile to be associated with higher recidivism rates, respondents felt this was the group most in need of services. Since the statewide implementation of the nonviolent offender risk assessment instrument, the Commission has incorporated the instrument into the training seminar curriculum, which covers the purpose and use of nonviolent offender risk assessment. Consistent with the directive from the General Assembly, the risk assessment instrument is intended to identify incarceration-bound offenders who are a low risk for being convicted of a new felony offense within three years and, therefore, may be relatively good candidates for diversion to a less restrictive sanction. It does not assess potential therapeutic needs of offenders and does not identify offenders who may be suitable for treatment or services.

Although most judges supported statewide expansion with qualifications, many probation officers were not supportive of expansion unless the demographic factors were reassessed. Defense attorneys supported the greater use of alternative sanctions and generally favored expansion of the risk assessment program to other circuits. Prosecutors, however, did not generally support programs intended to divert offenders recommended for incarceration under the sentencing guidelines. They believed that alternative sanctions were best suited for offenders guilty of a first non-violent felony conviction.

The NCSC evaluation study also identified and tracked a group of diverted offenders for at least one year following their sentence to an alternative punishment program. A sample of offenders was drawn from 5,158 drug, fraud, and larceny cases resolved in the six pilot sites between December, 1997, and September, 1999. Of these, 40% were found potentially eligible for screening with the risk assessment instrument. Offenders who received a diversion sanction were identified and offenders who received a prison sentence, offenders with missing files, and offenders with incomplete information were removed. The final sample for evaluation consisted of 555 offenders eligible for risk assessment who received an alternative punishment.

A statistical technique called survival analysis was used to investigate the possible relationships between risk assessment factors and the length of time the offender spent in the community before recidivating. For the primary analysis, recidivism was defined as re-arrest for any misdemeanor or felony. A secondary analysis was conducted with recidivism defined as re-arrest resulting in a misdemeanor or felony conviction. The primary analysis showed larceny offenders were more likely to recidivate over time than drug or fraud offenders. In addition, gender was the only demographic factor with a statistically significant effect on recidivism, with males being 55% more likely to be re-arrested than females.

Prior criminal record factors were also important predictors of recidivism. It was noted that if the threshold value for a diversion recommendation were increased, more offenders would be recommended for alternatives. There would be an accompanying increase, however, in the number of offenders scoring below the threshold who would subsequently recidivate. In the secondary analysis, specific prior record factors, such as prior arrest or confinement in the past 12 months and the number of prior adult incarcerations, were significantly related to recidivism.

The evaluation concluded that the risk assessment instrument is an effective tool for predicting recidivism. However, the NCSC suggested that the instrument may be streamlined by modifying or removing some demographic factors, while noting that the factors associated with adult prior record were the strongest predictors. It is important to understand why these findings differ from those produced by the Commission's original research. First, there were significant methodological differences between the two studies. The evaluation study used re-arrest and re-arrest resulting in conviction as outcome measures, while the Commission's original study relied upon only felony convictions as the recidivism measure. Second, the original study examined a release cohort of all convicted larceny, fraud, and drug felons, while the NCSC evaluation study used only larceny, fraud, and drug felons from pilot sites who were actually diverted to alternative punishment. These differences in research methodology could account for the differences in the studies' findings.

The NCSC evaluation included a benefit-cost analysis of the risk assessment instrument. Estimates of the monetary value of all significant benefits and costs associated with the diversion of non-violent felons from traditional incarceration were calculated. The benefits of reduced prison (363 offenders diverted) and jail (192 offenders diverted) populations saved the Commonwealth an estimated \$8.7 million dollars. Beyond these reduced incarceration costs, additional benefits accruing from the diverted population could include an increased number of offenders becoming productive citizens, decreased recidivism, and enhanced quality of life for offenders. Since it is very difficult to place a

monetary value on these benefits, no amount was assigned to them. The cost of alternative sanction programs for the diverted offenders was \$6.2 million. An additional \$1 million in costs were incurred when offenders failed in the assigned alternatives and became recidivists. The total savings of \$8.7 million were compared to the total diversion costs of \$7.2 million to produce a net benefit of \$1.5 million due to the diversion of nonviolent felons through risk assessment. If the risk assessment instrument had been used statewide during 2000, the NCSC estimated the net benefit would have been between \$3.7 and \$4.5 million in reduced costs. The NCSC evaluation concluded that the risk assessment instrument is an effective tool for predicting recidivism as well as a cost-saving benefit for the Commonwealth. Evaluators recommended that the instrument be refined based on more recent cases and then expanded statewide.

### Commission Pilot Site Review

In its own analysis of pilot program data, the Commission focused on two specific features of the nonviolent risk assessment program: the rate at which offenders eligible for risk assessment were diverted to alternative sanctions and whether information necessary to accurately complete the risk instrument was available. It was important to determine whether nonviolent risk assessment in the pilot sites actually led to increased utilization of alternative sanctions and other beneficial changes. Accordingly, the Commission compared data from the pilot and non-pilot sites.

Evidence from the pilot sites indicated that diversion of larceny, fraud, and drug offenders who met the Commission's eligibility criteria increased under the risk assessment program. Before the risk assessment pilot program was implemented in fiscal year (FY) 1998, pilot circuits were less likely than non-pilot circuits to utilize alternative punishments for larceny, fraud, and drug offenders when the sentencing guidelines recommended a term of incarceration in prison or jail. Between FY1996 and FY2001, however, the rate at which eligible offenders were diverted from incarceration to alternative sanctions increased by nearly 30% in the risk assessment pilot sites, compared to only 4% in non-pilot circuits. It seemed, therefore, that the risk assessment program was meeting its goal of diverting low risk nonviolent offenders to alternative sanctions while reserving traditional incarceration for high risk and violent offenders.

Some of the pertinent information on the risk assessment instrument is taken from the PSI report, particularly information relating to employment history and marital status. It can be more difficult to adequately ascertain information about the offender's characteristics and criminal history without a detailed PSI. The Commission encouraged completion and use of the PSI in the pilot sites. Nearly half of the pilot site cases had a PSI completed prior to sentencing, versus a corresponding rate of approximately 39% for the non-pilot sites. Thus, pilot sites were more likely to possess information crucial to the accurate scoring of the risk instrument.

## 2001 Validation Study

In 2001, the Commission conducted a validation study to test and refine the model used to create the original nonviolent offender risk assessment instrument for possible implementation statewide. The population of offenders examined for the original analysis and validation study differed from that of the NCSC evaluation. The Commission's original analysis in 1996 used a sample of drug and property offenders released over an 18-month period of time who were selected to model a group of offenders that was sentenced within the same period of time. With the exclusion of burglary offenders, it was possible to utilize an actual sentence group for the Commission's validation study. The Commission's original analysis and validation study included offenders from throughout the Commonwealth who were eligible for nonviolent risk assessment. This approach differs from the evaluation study conducted by NCSC because the evaluation study only observed offenders from pilot sites who were diverted to alternative sanctions.

For the validation study, the Commission merged the PSI data system with the sentencing guidelines database and selected a sample of 800 fraud, larceny, and drug offenders sentenced in calendar year 1996. Of the entire sample, 54 were eliminated for various reasons, including missing files and the discovery of a violent prior conviction, which made an offender ineligible for risk assessment. Recidivism, as defined in the original nonviolent risk assessment model and the validation model, was any arrest within three years of release that resulted in a felony conviction. A different definition of recidivism, re-arrest for any misdemeanor or felony, was utilized for the NCSC evaluation study.

Pre-sentence report data, Virginia rap sheets, and FBI rap sheets were utilized in all phases of the analysis. The original analysis utilized information from the Juvenile and Domestic Relations Courts; however, this information did not prove fruitful to the analysis and was, therefore, not pursued for the validation study. The NCSC evaluation study also relied on information obtained from pilot site interviews to draw conclusions. For the validation study, rap sheets from other states were available, allowing additional information on recidivist activity to be uncovered.

Two types of analysis were used in the original and validation studies. First, survival analysis, which is useful in instances where researchers want to identify factors that significantly impact how long it takes for a particular event to occur, was utilized for the original analysis, the NCSC evaluation study, and the validation study. Logistic regression, which is commonly used when the event of interest is dichotomous, in this case whether an offender recidivated or did not recidivate within three years, was used for

both the original and validation studies. Logistic regression requires a consistent follow-up for all offenders under study and looks for characteristics of offenders who recidivate within that time period. Statistical tests revealed that the second type of analysis (logistic regression) provided the most accurate predictive power and was most closely associated with recidivism in nonviolent risk assessment; consequently, the original nonviolent risk assessment model and the final model developed through the validation study were based on the second type of analysis.

In the original study, all offenders were tracked for a minimum of three years; thus, all cases were available for both methods of analysis. The validation study sample contained 746 cases with follow-up times ranging from 44 days to nearly five and one-half years. All cases were examined using the type of analysis that allows for survival analysis, as that technique permits varying follow-up intervals; 668 of the 746 cases had a follow-up period of at least three years and could be examined using logistic regression, which requires a consistent follow-up interval for all cases. The NCSC evaluation study relied on a more limited follow-up of offenders, which ranged from a minimum of 11 months to a maximum of three years.

In the original analysis and the validation study, the Commission selected the group of offenders to recommend for alternative punishment based on legislative mandate. Under its directive, the General Assembly requested that 25% of the eligible prison-bound offenders be recommended for alternative punishment. In accordance with the General Assembly's directive, the Commission chose a score threshold that would result in 25% of the lowest risk offenders being recommended for alternative sanctions. On the other hand, the NCSC evaluation suggested score thresholds that were based on experimentation using a sample of diverted offenders and recommendations from practitioners in the field, without regard to the General Assembly's directive.

The goal of nonviolent risk assessment is to accurately predict which nonviolent offenders are at the lowest risk of recidivating so that they can be recommended for alternative sanctions. The 2001 validation study produced a refinement of the original model, which had served as the basis for the risk assessment instrument used in the pilot sites. The validation model included some common factors with the original model, although some of the factors in the original model (offender acted alone, prior



felony drug offense, and prior juvenile commitment) were not identified as statistically significant in the validation model. In addition, one factor, offense type, which distinguishes among larceny, fraud, or drug offenses, was part of the validation model but not part of the original model. Three factors that were in the original model were modified for use in the validation model. Finally, the original model included a combination of prior felonies and misdemeanors. While the validation model used prior felonies, the focus in this model was on a combination of adult and juvenile felonies, rather than a combination of felonies and misdemeanors. The validation model also contained versions of four demographic factors (age, gender, marital status, and employment). Variables representing these demographic factors were found to be statistically significant in predicting recidivism among larceny, fraud, and drug offenders in both the Commission's original analysis and the validation study.

In response to concerns expressed by some of the respondents interviewed by NCSC during its evaluation of the risk assessment pilot program, the Commission tested alternative models that excluded some or all of the demographic factors. Although all four demographic factors were statistically significant in the validation model, the demographic factors were forcibly removed from the model one at a time, and in combination, so that the impact of removing each factor could be assessed. With only one exception, the elimination of the individual demographic factors or a combination of factors compromised the integrity of the statistical model.

For the validation study, the predictive power of the original risk assessment model was improved by refining the measures used for the demographic factors. In the original risk assessment model, age was divided into four groups: younger than 20 years, 20 to 27 years, 28 to 33 years, and 34 years or older. The validation model also divided age into 4 groups: younger than 30 years, 30 to 40 years, 41 to 46 years, and 47 years or older. While both the original model and the validation model added points based on age, the validation model covered a broader spectrum of ages. A version of the marital status factor found in the original model was also included in the validation model. In the original model, points were awarded if the offender was never married. In the validation model, points were added if the offender was never married and was at least 26 years of age. Finally, the original model included unemployment at the time of offense. The validation model included a modified factor that was scored if the offender was not regularly employed during the two years preceding the arrest for the instant offense.

The use of demographic factors is sensitive because demographic factors are believed by some to stand in for other socio-economic factors that are not easily defined or measured, a concern raised during interviews conducted for the NCSC evaluation. Nevertheless, the demographic factors used in the validation model were statistically significant and had the capability of predicting recidivism/non-recidivism in a manner that is consistent with the goal of nonviolent risk assessment.

Pursuant to the General Assembly's directive, the concern of nonviolent offender risk assessment was to accurately predict which offenders would be non-recidivists so that the 25% of offenders with the lowest risk of recidivism could be recommended for alternative (nonprison) sanctions. The validation model predicted non-recidivists with 75.7% accuracy and resulted in a 12.4% recidivism rate for offenders who were recommended for alternative sanctions.

Discussion of the nonviolent offender risk assessment program was a significant component of the Commission's agenda during 2001. After careful consideration of the findings of the Commission's original analysis, its validation study, and the independent NCSC evaluation, the Commission concluded that a risk assessment instrument would be a useful tool for judges throughout the state. Based on the validation study conducted in 2001, the Commission approved a risk assessment instrument that was a modified version of the instrument that served as the pilot prototype. In July 2002, the nonviolent risk assessment instrument was implemented statewide for all eligible felony larceny, fraud, and drug offenders.

In 2003, the General Assembly directed the Commission to utilize the nonviolent risk assessment instrument to identify offenders who were not recommended for alternative punishment options by the existing assessment instrument and who, nonetheless, posed little risk to public safety. Data revealed that the threshold of 35 points, the maximum score for an offender to be recommended for an alternative sanction, could be adjusted to the score of 38 without a significant increase in the risk to public safety. Adjusting the threshold increased the number of offenders recommended by the risk assessment instrument for alternative punishment in lieu of traditional incarceration.

### 2010-2011 Re-Validation Study

The purpose of the re-validation study is to review and refine the nonviolent offender risk assessment instrument. For both the original analysis as well as the 2001 validation study, the Commission relied primarily on PSI data because not enough sentencing guidelines data had accumulated for it to be the primary data source for these studies. Use of the PSI as the principal data source for the original and validation studies provided several advantages. First, the PSI contains the most complete account of the offender's prior criminal record and major portions of the PSI are automated. Also, the information contained on the PSI is considered to be highly reliable, since its accuracy can be challenged in court.

However, the proportion of guidelines cases in which a PSI was completed has declined in recent years. Statewide, pre-sentence reports are ordered in fewer cases and post-sentence reports (which are to be completed when a pre-sentence report is not ordered) often cannot be found. Moreover, the Department of Corrections now uses a shortened version of the PSI form that contains less information than the original. The detailed information typically contained in a PSI report can be difficult to obtain if a pre-sentence report is not ordered. Also, offenders for whom a pre-sentence report is completed may be considerably different than those for whom a PSI is not ordered and, therefore, may not be representative of the entire population of offenders sentenced for felonies in Virginia. Since the sentencing guidelines and the nonviolent offender risk assessment instrument have been fully implemented for several years, the Commission was able to use sentencing guidelines data as the starting point for the 2010-2011 re-validation study.

Figure 31 illustrates the differences and similarities in methodologies for each of the phases of the risk assessment project. For the re-validation study, the Commission selected a sample from 12,442 offenders sentenced in FY2005 or FY2006 whose primary offense on the guidelines was a felony fraud, larceny, or drug offense and whose case had been scored out on the nonviolent offender risk assessment instrument. Cases with obvious worksheet scoring errors were excluded from the sampling frame. A stratified sampling technique was used to increase the chance of including offenders with juvenile criminal records, since criminological studies have shown that a juvenile record is often correlated with subsequent offense behavior as an adult. The sample was also stratified to draw equal numbers of drug, larceny, and fraud cases. This step was necessary to ensure that each offense group was represented with a similar degree of precision and that there was an adequate number of each type of offense in the study. The sampled cases were then weighted to reflect their actual proportions in the universe of felony drug, fraud, and larceny sentencing events.

FIGURE 31

**Methodologies of the Analysis, Evaluation, and Validation Phases of Nonviolent Risk Assessment**

	<b>Original Analysis (1995-1996)</b>	<b>NCSC Evaluation (1999-2000)</b>	<b>Commission Validation (2001)</b>	<b>Commission Re-Validation (2011)</b>
Measure of Recidivism	Felony Conviction	Any Arrest	Felony Conviction	Felony Conviction
Recidivism Rate	28%	33.2%	31.7%	Drug: 23.8%, Larceny/Fraud: 30.3%, Total: 27.1%
Sample Size	1,513	555	668	1,509
Sample Cases	Larceny, Fraud, Drug Offenders, Released 7/1/91-12/31/92 (Release group selected to model sentence group)	Larceny, Fraud, Drug Offenders, diverted in pilot sites	Larceny, Fraud, Drug Offenders, Sentenced in 1996 (Actual sentence group)	Larceny, Fraud, Drug Offenders, Sentenced in FY2005/FY2006 (Actual sentence group)
Methods of Analysis	Logistic Regression, Survival Analysis	Survival Analysis	Logistic Regression, Survival Analysis	Logistic Regression, Survival Analysis
Final Model Analytical Method	Logistic Regression	Survival Analysis and Interviews	Logistic Regression	Logistic Regression
Amount of Follow-up Time	3 + years	11 months - 3 years	3 + years	3 + years
Sources of Follow-up	VA Rap Sheets, FBI Rap Sheets, PSI - including narratives, Juvenile Court information	VA Rap Sheets, FBI Rap Sheets, PSI, File Reviews	VA Rap Sheets, FBI Rap Sheets, Other States' Rap Sheets, PSI data, Guidelines data	VA Rap Sheets, FBI Rap Sheets, Other States' Rap Sheets, PSI data, Guidelines data, Court data, Inmate data
Selection of Risk Threshold	General Assembly directive to divert 25% of qualified felons	Suggestions from field, Experimentation	General Assembly directive to divert 25% of qualified felons	To be determined

While the size of the sample varied in each stage of the analysis, each was adequate to produce statistically significant results. Initially, the Commission intended to select 1,800 felony fraud, larceny, and drug offenders sentenced in FY2005 and FY2006, with 600 cases in each offense group and each offense group divided equally among offenders with juvenile records and those without juvenile records. However, only 299 fraud offenders convicted in FY2005 and FY2006 had juvenile records, so all 299 of these offenders were included in the sample. Ultimately, 1,799 eligible offenders were randomly selected for inclusion in the sample for the most recent re-validation study. Of the sample, 137 cases were excluded for the following reasons: the offender was still in prison, files had been purged or were unavailable, the discovery of a violent conviction made an offender ineligible for risk assessment, or the felony conviction was reduced to a misdemeanor (Figure 32).

FIGURE 32

**Reasons for Excluding Cases from Validation Study**

<b>Reason</b>	<b>Number</b>	<b>Percent</b>
Offender Has Prior Violent Felony	65	47.4%
Offender Has Current Violent Felony	17	12.4%
Offender Still in Prison	53	38.7%
Rap Sheet Could Not Be Located	1	0.7%
Other	1	0.7%
Total	137	100.0%

Recidivism, as defined in the original nonviolent risk assessment analysis and the validation and re-validation studies, was any arrest within three years of release to the community that resulted in a felony conviction.

Data from the sentencing guidelines, pre/post-sentence reports, general district and circuit courts, and inmate datasets, as well as state and federal criminal history reports (rap sheets), were utilized in the re-validation analysis. Unlike in the original and validation studies, the sentencing guidelines data used for the re-validation study included information collected from the current nonviolent offender risk assessment instrument, which allowed the Commission to test how well the existing factors are being utilized and how well the instrument performs in the field.

Two main types of multivariate analysis were used in the original, validation, and re-validation analyses. The first type of analysis, survival analysis, looks at characteristics of offenders who recidivate after various time intervals following release into the community. This type of analysis was utilized in every phase of the risk assessment project, including the original analysis, the NCSC evaluation study, the validation study, and the re-validation study. Survival analysis is particularly useful in situations where the focus of the analysis is the amount of time until a particular event occurs. In this case, survival analysis was used to identify factors that affected the length of time until recidivating.

The second type of analysis, logistic regression, is a particularly powerful tool when the event of interest is dichotomous, in this case whether an offender recidivated or did not recidivate within three years. Unlike survival analysis, logistic regression requires a consistent follow-up time for all offenders under study, which gives each offender an

equal time period in which to reoffend. The standard length of study for recidivism analysis is three years after release into the community. This type of analysis was utilized in the original analysis, the validation study, and the re-validation study. In the Commission's studies, the results of survival analysis and logistic regression were compared and statistical tests indicated that logistic regression provided the most accurate predictive power; as a result, the models are based on logistic regression analysis.

The final re-validation study sample contained 1,662 cases, with follow-up times from 1 day to 6.8 years. Of the 1,662 cases, 1,509 offenders had a follow-up period of at least three years and could be examined using logistic regression, the type of analysis that requires a consistent follow-up interval for all cases.

In the original analysis and the validation study, the Commission selected the group of offenders to recommend for alternative punishment based on legislative mandate. Under its directive, the General Assembly requested that 25% of the eligible prison-bound offenders be recommended for alternative punishment. In accordance with the General Assembly's directive, the Commission originally chose a score threshold that would result in 25% of the lowest risk offenders being recommended for alternative sanctions.

In 2003, the General Assembly asked that the Commission conduct additional analysis to determine if additional offenders could be recommended for an alternative without jeopardizing public safety. In response, the Commission determined that the score threshold could be raised to recommend more offenders for an alternative. The most recent guidelines data for FY2011 show that, of the eligible offenders for whom a risk assessment form was received, 53% were recommended for an alternative sanction by the current risk assessment instrument.

Pursuant to the directive of the General Assembly, the goal of the nonviolent offender risk assessment instrument is to accurately predict which nonviolent offenders are at the lowest risk of recidivating so that they can be recommended for alternative sanctions. Since several years of data have been gathered from the existing nonviolent offender risk assessment instrument, the Commission can evaluate its performance in the field. Guidelines users have identified a few areas of concern relating to the current nonviolent risk assessment instrument. Specifically, users have stated that certain information that is required by the nonviolent offender risk assessment instrument, particularly employment history and marital status, has become increasingly difficult to obtain, especially if a pre-sentence report is not completed for the offender.

In order to gauge the extent of the problem, the Commission recently added a box to the risk assessment worksheet that allows users to identify cases where they are unable to discover information that is required by the risk assessment instrument. Among eligible offenders sentenced in FY2011 for whom a risk assessment form was received, this box was checked in over 600 (9.8%) of the cases. It has always been the Commission's policy that the guidelines preparer err on behalf of the defendant if a particular piece of information is unknown. In the context of the nonviolent offender risk assessment instrument, preparers should not assign points for the factors indicating that an offender was not regularly employed or was never married and is over the age of 25 if that information is not available. As a result, some offenders who otherwise would not be recommended for an alternative may be recommended on the current worksheet because preparers are unable to gather certain information. In cases where information necessary to score the risk assessment instrument is unknown, the precision of the instrument is reduced. The additive nature of the risk assessment instrument requires that all factors be scored properly so that the predicted level of risk accurately reflects an offender's actual level of risk. Consequently, part of the re-validation analysis focused upon the possibility of simplifying the model so that the marital status and employment history factors could be removed.

## Preliminary Re-Validation Models

Commission staff have developed two preliminary models, but additional analysis is required to explore remaining research questions and to examine the potential impact of implementing a revised risk assessment instrument or instruments. In addition, Commission staff will test potential score thresholds in order to determine appropriate cut points that will identify offenders to be recommended for an alternative. As a result, the Commission has decided to present preliminary models in this report and to conduct additional analysis in 2012. If the Commission approves the new instrument(s) and recommends its adoption, it will be included in the 2012 Annual Report.

As with previous analyses, Commission staff tested numerous potential models in order to identify factors that are significantly related to offender recidivism. Commission staff also focused on the predictive validity of factors contained in the models relative to the current risk assessment instrument. Careful analysis revealed that two separate models, with one model for drug offenders and one model for larceny and fraud offenders, would provide the strongest predictive power. Data indicate that the factors that are significant predictors of recidivism vary based upon the type of primary offense. While some overlap exists between the factors in each preliminary model, the degree of importance of the shared factors varies across offense groups. As a result, the Commission has developed two preliminary models.

Figure 33 summarizes the performance of the preliminary models relative to the current risk assessment instrument. The predictive ability of the preliminary models is a test of how accurately the models predict recidivism. In particular, the primary focus of nonviolent offender risk assessment is to accurately predict which offenders will be non-recidivists so that a certain proportion of offenders with the lowest risk of recidivating can be recommended for alternative (nonprison) sanctions. The preliminary model for drug offenders predicts non-recidivists with 84.0% accuracy, while the current risk assessment instrument predicts non-recidivists among drug offenders with 82.6% accuracy. The preliminary model for larceny/fraud offenders predicts non-recidivists with 79.3% accuracy, while the current instrument predicts non-recidivists among larceny/fraud offenders with 76.3% accuracy. While the current risk assessment instrument is performing well, the preliminary models developed this year, overall, have a slightly higher degree of predictive accuracy than the risk assessment instrument currently in use.

FIGURE 33

**Comparison of Preliminary Models**

	<b>Preliminary Drug Model</b>	<b>Preliminary Larceny/Fraud Model</b>
Type of Analysis	Logistic Regression	Logistic Regression
Sample Size	513	996
Follow-Up	3 years	3 years
Non-Recidivists Accurately Predicted	84.0%	79.3%
Non-Recidivists Accurately Predicted by Current Instrument	82.6%	76.3%
Recidivism Rate for Offenders Recommended for Alternative Sanctions	To be determined	To be determined

Both preliminary models include factors that are similar to those on the current model (Figure 34). For instance, gender, age, prior adult felony convictions, and prior adult incarcerations are present in some form on the current and new preliminary models. In contrast, some of the factors in the current model (additional offenses, never married by age 26, and not regularly employed) are not part of either preliminary model. Dividing the cases by offense group revealed interesting interaction effects relating to gender for the different groups. For instance, among offenders whose primary offense was a drug offense, male offenders with a prior juvenile adjudication were significantly more likely to recidivate than female offenders with a prior juvenile adjudication. Gender also played an interesting role among larceny and fraud offenders. Specifically, male offenders whose primary offense was a fraud offense were significantly more likely to recidivate than female offenders whose primary offense was a fraud offense. Conversely, females whose primary offense was larceny were more likely to recidivate than males whose primary offense was a larceny offense.



For the 2010-2011 re-validation study, the predictive power of the current risk assessment model was improved by splitting the sample by offense group and creating factors that are fine-tuned to the separate sub-groups. For drug offenders, the most important factor is prior adult felony convictions, followed by the number of prior adult incarceration events (Figure 35). The gender/prior juvenile adjudication factor is the third most important factor for drug offenders. For larceny and fraud offenders, the number of prior adult incarcerations is the most important factor, followed by the factor representing the offender's age. While the age factor for the preliminary drug model is divided into the same categories as the age factor for the preliminary larceny and fraud model (namely, younger than 21 years, 21 to 29 years, 30 to 43 years, and over 43 years old), the relative degree of importance of this factor is higher for larceny and fraud offenders than it is for drug offenders. Since the age factor is the second most important factor for larceny and fraud offenders, the age group that demonstrated the highest risk of recidivism (younger than 21 years old) is assigned the second-highest point value on the preliminary larceny/fraud risk assessment worksheet.

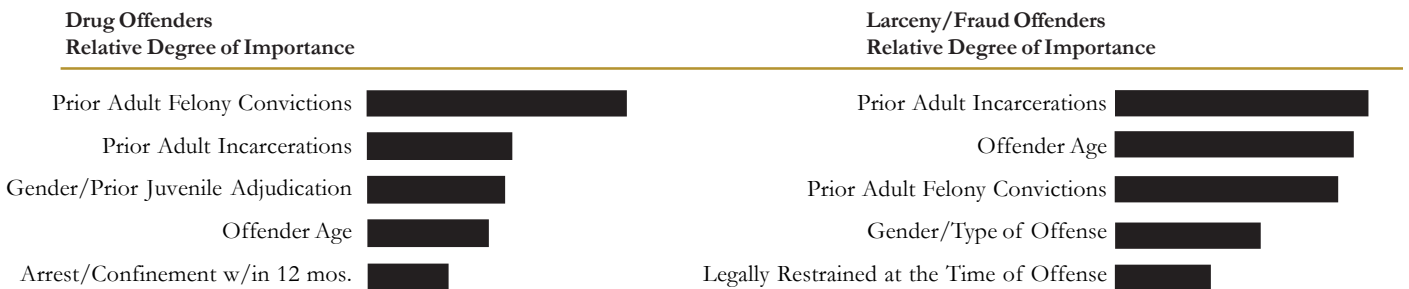
FIGURE 34

**Comparison of Current Risk Assessment Instrument and Preliminary Re-Validation Models**

<u>Current Model Factors</u>	<u>Preliminary Drug Model Factors</u>	<u>Preliminary Larceny/Fraud Model Factors</u>
Gender	Gender/Prior Juvenile Adjudication Combination	Gender/Offense Type Combination
Age	Age	Age
Never Married by Age 26		
Not Regularly Employed		
Additional Offenses - yes/no		
Prior Arrest/Commitment within 18 mos.	Prior Arrest/Confinement within 12 mos.	
Prior Adult/Juvenile Felony Combination	Prior Adult Felony Convictions	Prior Adult Felony Convictions
Prior Adult Incarcerations	Prior Adult Incarcerations	Prior Adult Incarcerations
		Legally Restrained at Time of Offense
Offense Type	Separate models by offense type	Separate models by offense type

FIGURE 35

**Significant Factors in Assessing Risk**



Note: The larger the bar on the chart, the more important the factor is, relative to the other factors in the model.

Figure 36 illustrates the potential worksheet scores for each of the preliminary models. The thresholds for each of the models will be determined after further analysis.

Careful consideration is involved in the choice of models. Among these concerns is the type of factors utilized and statistical considerations, including the predictive ability of the models and the composition of the resultant target group. The use of demographic factors is sensitive because demographic factors are believed by some to stand in for other socio-economic factors that are not easily defined, a concern raised during interviews conducted for the NCSC evaluation. Commission staff tested the possibility of removing gender and age from both preliminary models. However, the demographic factors used in these models are statistically significant and have the capability of predicting non-recidivism in a manner that is consistent with the goal of nonviolent offender risk assessment.

Both of the preliminary models exclude employment history and marital status factors yet provide slightly greater predictive accuracy than the current instrument. If the preliminary risk assessment instruments are implemented, guidelines preparers will likely find that they are easier to fill out because nearly all of the information necessary for the risk assessment instrument is necessary for completing the other sentencing guidelines worksheets.

FIGURE 36

Drug Offenders	Larceny/Fraud Offenders
<p>◆ <b>Offender Age at Time of Offense</b></p> <p style="text-align: right;">Points</p> <p>Younger than 21 ..... 9</p> <p>21 to 29 years ..... 6</p> <p>30 to 43 years ..... 3</p> <p>Over 43 years ..... 1</p>	<p>◆ <b>Offender Age at Time of Offense</b></p> <p style="text-align: right;">Points</p> <p>Younger than 21 ..... 22</p> <p>21 to 29 years ..... 16</p> <p>30 to 43 years ..... 7</p> <p>Over 43 years ..... 1</p>
<p>◆ <b>Gender</b></p> <p>Offender is Male ..... 2</p>	<p>◆ <b>Gender</b></p> <p><b>Primary Offense is Fraud</b></p> <p>Offender is Female ..... 1</p> <p>Offender is Male ..... 10</p> <p><b>Primary Offense is Larceny</b></p> <p>Offender is Female ..... 13</p> <p>Offender is Male ..... 9</p>
<p>◆ <b>Prior Juvenile Adjudication</b></p> <p>Female with prior juvenile adjudication ..... 1</p> <p>Male with prior juvenile adjudication ..... 7</p>	
<p>◆ <b>Prior Adult Felony Convictions</b></p> <p style="text-align: right;">Points</p> <p>Number: 0 ..... 0</p> <p>1 - 2 ..... 1</p> <p>3 ..... 5</p> <p>4 or more ..... 15</p>	<p>◆ <b>Prior Adult Felony Convictions</b></p> <p style="text-align: right;">Points</p> <p>Number: 0 ..... 0</p> <p>1 - 2 ..... 5</p> <p>3 or more ..... 15</p>
<p>◆ <b>Prior Adult Incarcerations</b></p> <p style="text-align: right;">Points</p> <p>Number: 0 ..... 0</p> <p>1 - 3 ..... 1</p> <p>4 or more ..... 8</p>	<p>◆ <b>Prior Adult Incarcerations</b></p> <p style="text-align: right;">Points</p> <p>Number: 0 ..... 0</p> <p>1 - 9 ..... 4</p> <p>10 or more ..... 32</p>
<p>◆ <b>Prior Arrest or Confinement Within Past 12 Months (Prior to Offense)</b></p> <p>If Yes, add ..... 3</p>	<p>◆ <b>Legally Restrained at Time of Offense</b></p> <p>If Yes, add ..... 6</p>

In addition to predictive accuracy, another comparison is the recidivism rate of those recommended for alternative sanctions. This is of particular concern since the Commission was originally instructed by the General Assembly to proceed with "due regard for public safety needs." For this test, the recidivism rate of offenders who would be recommended for alternative sanction must be examined. The percent of offenders recommended for an alternative under the preliminary models has not yet been determined, since the Commission will continue to research potentially suitable thresholds during the coming year.

The overall recidivism rate for the 2010-2011 re-validation study sample was 27.1%. The decrease from the recidivism rate observed in the 2001 validation study (31.7%) may be related to a general decline in crime rates and recidivism that has been observed in the Commonwealth over the past several years. As expected, recidivism rates among the entire sample used for logistic regression analysis are higher among offenders with characteristics that result in points scored on the preliminary nonviolent offender risk assessment instruments. For instance, of the offenders studied, 32.4% of larceny offenders recidivated, followed by fraud (26.9%) and drug (23.8%) offenders. However, as discussed above, the recidivism rates varied across offense types based on gender. Specifically, among larceny and fraud offenders, female larceny offenders were the most likely to recidivate, followed by male offenders. Female fraud offenders were the least likely the recidivate among larceny and fraud offenders. Overall, nearly 29% of male offenders recidivated, compared to 23% of females.

Offender age groups showed considerably different recidivism rates, with 31.7% of offenders younger than 21 years of age recidivating, around 29% of those 21 to 29 years of age recidivating, slightly more than 25% of offenders 30 to 43 years of age recidivating and 22.7% of offenders over the age of 43 recidivating. While nearly 36% of offenders with a prior juvenile record recidivated, slightly more than 25% of offenders without a prior juvenile record recidivated. Offenders with no prior adult incarcerations recidivated at a rate of 17.6%, compared to 31.1% of offenders with at least one prior adult incarceration. Approximately 21% of offenders with no prior adult felonies recidivated, 22.5% of those with one or two prior adult felonies recidivated, 31% of those with three prior adult felonies recidivated, and 43.8% of offenders with four or more adult felonies recidivated.

### **Future of Nonviolent Risk Assessment**

The current nonviolent risk assessment instrument has been in use statewide for nearly 10 years. Over the last decade, the Commission has gathered valuable information from the sentencing guidelines worksheets, as well as judges and guidelines users, that has facilitated the execution of a thorough re-validation study. Based on the re-validation analysis, Commission staff have developed two preliminary models. However, additional exploration of remaining research questions is necessary and the Commission intends to further examine the potential impact of implementing the preliminary risk assessment instruments. In addition, Commission staff will test potential score thresholds to determine appropriate cut points to identify offenders who will be recommended for an alternative under the preliminary models. The Commission will continue to conduct additional analysis in 2012. If the Commission approves the new instrument(s) and recommends its adoption, it will be included in the 2012 Annual Report.

## ∞ RECOMMENDATIONS OF THE COMMISSION

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### ∞ Introduction

The Commission closely monitors the sentencing guidelines system and, each year, deliberates upon possible modifications to enhance the usefulness of the guidelines as a tool for judges in making their sentencing decisions. Under § 17.1-806 of the *Code of Virginia*, any modifications adopted by the Commission must be presented in its annual report, due to the General Assembly each December 1. Unless otherwise provided by law, the changes recommended by the Commission become effective on the following July 1.

The Commission draws on several sources of information to guide its discussions about modifications to the guidelines system. Commission staff meet with circuit court judges and Commonwealth's attorneys at various times throughout the year, and these meetings provide an important forum for input from these two groups. In addition, the Commission operates a "hotline" phone system, staffed Monday through Friday, to assist users with any questions or concerns regarding the preparation of the guidelines. While the hotline has proven to be an important resource for guidelines users, it has also been a rich source of input and feedback from criminal justice professionals around the Commonwealth. Moreover, the Commission conducts many training sessions over the course of a year and these sessions often provide information that is useful to the Commission. Finally, the Commission closely examines compliance with the guidelines and departure patterns in order to pinpoint specific areas where the guidelines may need adjustment to better reflect current judicial thinking. The opinions of the judiciary, as expressed in the reasons they write for departing from the guidelines, are very important in directing the Commission's attention to areas of the guidelines that may require amendment.

On an annual basis, the Commission examines crimes that are not yet covered by the guidelines. Currently, the guidelines cover approximately 95% of felony cases in Virginia's circuit courts. Over the years, the General Assembly has created new crimes and raised other offenses from misdemeanors to felonies. The Commission keeps track of all of the changes to the *Code of Virginia* in order to identify new felonies that may be added to the guidelines system in the future. Unlike many other states, Virginia's guidelines are based on historical practices among its judges. The ability to create guidelines depends, in large part, on the number of historical cases that can be used to identify past judicial sentencing patterns. Of the felonies not currently covered by the guidelines, many do not occur frequently enough for there to be a sufficient number of cases upon which to develop historically-based guideline ranges. Through this process, however, the Commission can identify offenses and analyze data to determine if it is feasible to add particular crimes to the guidelines system.

The Commission has adopted five recommendations this year. Each of these is described in detail on the pages that follow.

## RECOMMENDATION 1

Modify the Schedule I/II Drug sentencing guidelines to increase the length of prison incarceration recommended for offenders convicted of a third or subsequent offense under § 18.2-248(C), relating to the distribution, sale, or manufacture of a Schedule I/II drug, or possession of a Schedule I/II Drug with intent to commit any of those acts.

### Issue

Third or subsequent convictions for the distribution, sale, etc., of a Schedule I/II drug under § 18.2-248(C) are covered by the current sentencing guidelines. In 2006, the General Assembly increased the mandatory minimum sentence for this offense from three to five years. In 2007, a factor was added to Section C of the Schedule I/II Drug guidelines to increase the prison sentence recommendation for offenders who have an accompanying weapons offense that also requires a mandatory minimum term. Despite this change, judicial compliance with the guidelines for this offense remains lower than the overall guidelines compliance rate and, when judges depart from the guidelines recommendation, they are more likely to give the offender a sentence above the guideline range than below it. This suggests that the guidelines could be refined to more closely reflect judicial thinking in these cases. With five years of historical data now available, the Commission conducted a thorough analysis and has developed a proposal to bring the guidelines more in line with current judicial practice.

### Discussion

Under § 18.2-248(C) of the *Code of Virginia*, a third or subsequent conviction for distribution, sale, etc., of a Schedule I/ II drug is a felony punishable by imprisonment of five years to life. In 2006, the General Assembly increased the mandatory minimum sentence for this offense from three to five years. This mandatory minimum term of incarceration must be served consecutively to all other sentences.

A number of offenders convicted under § 18.2-248(C) were also convicted of an accompanying weapons offense that carries a mandatory minimum sentence, such as possession of a firearm while selling a Schedule I/II drug under § 18.2-308.4. In 2007, the Commission recommended, and the General Assembly approved, the addition of a factor to Section C of the Schedule I/II Drug guidelines to increase the prison sentence recommendation for offenders who have an accompanying weapons offense that carries a mandatory minimum term. Despite this change, compliance with the sentencing guidelines remains significantly lower for this offense (65.4% for FY2007-FY2011) than the overall guidelines compliance rate (close to 80%). In addition, nearly all of the departures in these cases were aggravations, or sentences above the guidelines.

After thorough examination of cases involving a third or subsequent conviction for distribution, sale, etc., of a Schedule I/ II drug, the Commission recommends revising the guidelines for this offense, as described below, to bring the guidelines more in sync with current judicial practice. The proposed changes to the guidelines are based on analysis of actual sentencing patterns over a five-year period (FY2007 through FY2011). Current guidelines worksheets serve as the starting point for scoring historical cases. Using historical sentencing data, various scoring scenarios were rigorously tested. Individual factors on the worksheets were assessed and new factors were considered to ensure that the proposed revisions reflect judicial sentencing practices in these cases. No modifications to Sections A and B of the Schedule I/II Drug guidelines are necessary, as all offenders convicted of this crime are recommended for a prison term and, therefore, are scored on the Section C worksheet. The proposed changes to Section C of the Schedule I/II Drug guidelines are presented in Figure 1 and 2.

Section C of the guidelines is scored to produce a sentence length recommendation. On Section C, Primary Offense points are assigned based on the classification of an offender's prior record. An offender is assigned to the Other category if he does not have a prior conviction for a violent felony defined in § 17.1-805. An offender is assigned to Category II if he has a prior conviction for a violent felony that has a statutory maximum penalty of less than 40 years. Offenders are classified as Category I if they have a prior conviction for a violent felony with a statutory maximum of 40 years or more.

On Section C of the proposed guidelines (Figure 37), an offender with a third or subsequent conviction for distribution, sale, etc., of a Schedule I/II drug will receive 35 points on the Primary Offense factor (for one count of this offense) if his prior record is classified as Other, 105 points if he is a Category II offender, and 175 points if he is a Category I offender. These Primary Offense scores are significantly higher than the scores an offender currently receives for this offense (22 points for Other, 66 points for Category II, and 110 points for Category I offenders).

FIGURE 37

**Current and Proposed Primary Offense Factor  
Schedule I/II Drug - Section C**

**Sell, etc., of a Schedule I/II drug - Third or Subsequent Offense**

	Current			Proposed		
	Category I	Category II	Other	Category I	Category II	Other
1 count	110	66	22	175	105	35
2 counts	310	186	62	390	234	78

Under the proposal, the factor on the Section C worksheet for Additional Offenses must be revised (Figure 38). This factor is split so that offenders with a third or subsequent conviction for distribution, sale, etc., of a Schedule I/II drug will receive higher points for additional offenses than offenders convicted of other crimes. This change is based on analysis of the available data. The factor for scoring Prior Felony Drug Convictions/Adjudications is modified in a similar fashion, in that offenders convicted of this specific drug offense will receive higher points on this factor than other offenders. These changes will significantly increase the prison sentence recommendation for such offenders in order to bring recommendations more in line with current judicial sentencing practices for this offense.

The proposal is based on the actual practices of Virginia's circuit court judges for the period studied. As the Commission's proposal is designed to integrate current judicial sanctioning practices into the guidelines, no impact on correctional bed space is anticipated.

FIGURE 38

**Proposed Factors for Sell, etc., of a Schedule I or II drug  
(Third or Subsequent Conviction) Section C**

**Additional Offense Factor**

Maximum Penalty:	Less than 5 .....	0
(years)	5, 10 .....	2
	20 .....	4
	30 .....	6
	40 or more .....	7

**Prior Felony Drug Convictions/Adjudications**

Number:	2 .....	9
	3 .....	10
	4 .....	17
	5 or more .....	20



## RECOMMENDATION 2

Amend the Schedule I/II Drug sentencing guidelines to add the crime of manufacturing methamphetamine as defined in § 18.2-248(C1).

### Issue

Currently, the manufacture of methamphetamine under § 18.2-248(C1) is not covered by the sentencing guidelines. Since 2005, when it was split out from § 18.2-248(C) as a separate and distinct offense, the Commission has received numerous requests to add this crime to the guidelines. With five to six years of historical data now available, the Commission conducted a thorough analysis and has developed a proposal to incorporate the manufacture of methamphetamine under § 18.2-248 (C1) into the Schedule I/II Drug guidelines.

### Discussion

Methamphetamine, a form of amphetamine, is a highly addictive stimulant that affects the central nervous system. In addition to feelings of excitement and euphoria, methamphetamine can cause severe paranoia, confusion, anxiety, hallucinations, and violent behavior. Partly due to the toxic nature of some of the ingredients used to create methamphetamine, prolonged use can lead to serious health problems, including long-term changes in brain chemistry, the destruction of brain cells, oral infections, and an increased risk of stroke and kidney failure (DrugInfo Clearinghouse, 2007; National Institute on Drug Abuse, 2006).

Unlike most other drugs, methamphetamine is typically manufactured in clandestine laboratories using common household ingredients, including battery acid and pseudoephedrine. The methods used to manufacture methamphetamine in clandestine laboratories can be extremely dangerous to the community, since laboratories produce toxic chemicals and sometimes explode. Although methamphetamine use is more common in the Western region of the United States, its popularity has increased in many communities in the Midwest and South. Over the past decade, methamphetamine crime has become an issue of concern for the general public, legislators, and other officials in Virginia. This has led to the introduction of several pieces of legislation in the General Assembly specifically targeting methamphetamine crimes.

The Commission typically compiles five years of historical data to develop guidelines. As § 18.2-248(C1) was enacted in 2005, sufficient data have accumulated to proceed with this type of analysis. It should be noted that offenders who manufacture methamphetamine can be charged under the general Schedule I/II drug provision (§ 18.2-248(C)). When this occurs, methamphetamine cases cannot be distinguished from other Schedule I/II drugs. The analysis presented here captures only those cases in which the offender was convicted of a first or second offense under the specific provision of § 18.2-248(C1).

Commission staff analyzed FY2007 through FY2011 data from the Supreme Court of Virginia's Circuit Court Automated Information System (CAIS) to identify cases involving the manufacture of methamphetamine under § 18.2-248(C1). According to the CAIS database, there were 23 cases in which this crime was the most serious offense in the case. As shown in Figure 39, the majority of these offenders (78.3%) were sentenced to more than six months of incarceration. The median sentence in such cases was 3.75 years.

FIGURE 39

**Manufacture of Methamphetamine (§ 18.2-248(C1))**  
**Sentencing Outcomes**  
**FY2007 - FY2011**  
**N=23**

Disposition	Percent	Median Sentence
No Incarceration	17.4%	N/A
Incarceration up to 6 months	4.3%	1 Month
Incarceration more than 6 months	78.3%	3.75 Years

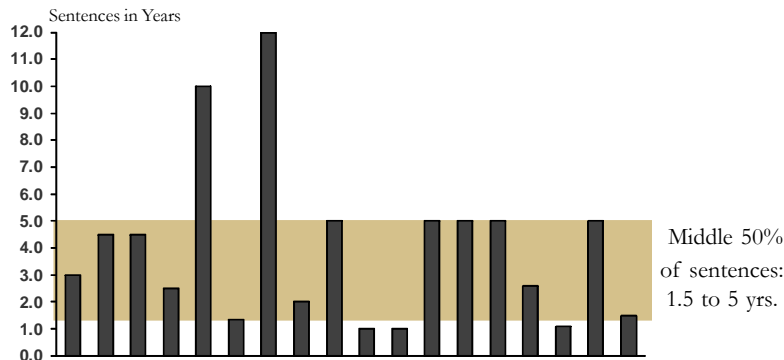
*Data reflect cases in which this offense was the primary (or most serious) offense at sentencing.*

The Commission's analysis of historical sentencing practices revealed considerable variation in sentencing for these offenses. For the cases resulting in a sentence greater than six months, the sentences spanned from 1 to 12 years (Figure 40). To develop the sentencing guidelines ranges for prison recommendations, the Commission focuses on the middle 50% of sentences. This removes the 25% of sentences at the high end and the 25% of sentences at the low end, which represent the more atypical sentences. For the manufacture of methamphetamine, the middle 50% of sentences fell between 1.5 and 5.0 years.

Several steps were employed in the development of sentencing guidelines for this offense. The Commission examined historical sentencing practices for this crime for the period from FY2007 through FY2011. The proposed guidelines are based on analysis of actual sentencing patterns, including the historical rate of incarceration in prison and jail. Current guideline worksheets serve as the starting point for scoring historical cases. Using historical sentencing data, various scoring scenarios were rigorously tested. Individual factors on the worksheets were assessed and new factors were considered to ensure the proposed guidelines are closely aligned with judicial sentencing practices in these cases.

FIGURE 40

**Manufacture of Methamphetamine (§ 18.2-248(C1))**  
**Offenders Sentenced to Incarceration of More than 6 Months**  
**FY2007 - FY2011**  
**N=18**



After a thorough analysis of the data, the Commission recommends adding the manufacture of methamphetamine to the guidelines for Schedule I/II Drug offenses. Figures 4 and 5 present the proposed revisions for integrating this offense into the sentencing guidelines.

On Section A of the proposed guidelines (Figure 41), offenders convicted of one count of manufacturing methamphetamine will receive 12 points on the Primary Offense factor. The Primary Offense score will increase based on the number of counts resulting in a conviction. The remaining factors on the worksheet would be scored as they currently appear on Section A. However, because of the number of points assigned for the Primary Offense factor, all offenders convicted of manufacturing methamphetamine will be recommended for a term of incarceration that includes prison. This scoring is consistent with the scoring for offenders convicted of distribution, sale, etc., of a Schedule I/II drug under § 18.2-248(C).

Section C of the guidelines is scored to produce a prison sentence recommendation. Primary Offense points on Section C are assigned based on the classification of an offender's prior record. An offender is assigned to the Other category if he does not have a prior conviction for a violent felony defined in § 17.1-805. If an offender has a prior conviction for a violent felony that has a statutory maximum penalty of less than 40 years, he is assigned to Category II. Offenders are classified as Category I if they have a prior conviction for a violent felony with a statutory maximum of 40 years or more.

On Section C of the proposed Schedule I/II Drug guidelines (Figure 42), an offender convicted of manufacturing methamphetamine will receive 29 points for the Primary Offense factor if his prior record is classified as Other. Under the proposal, a Category II offender convicted of manufacturing methamphetamine scores 87 points on the Primary Offense factor, while a Category I offender scores 145 points. No changes are proposed to the other factors currently found on Section C. In order to best model actual practices in these cases, however, a new factor must be added to Section C. This new factor, scored only when the most serious primary offense is a first or second conviction for the manufacture of methamphetamine under § 18.2-248(C1), adds 14 points if the offender was also convicted of allowing a child to be present during the manufacture of methamphetamine (defined in § 18.2-248.02). This factor will increase the length of the prison sentence recommendation for offenders who committed their crime while a child was present and were convicted under § 18.2-248.02.

The proposal is based on the actual practices of Virginia's circuit court judges for the period studied. The Commission will closely monitor judicial response to these new guidelines and will recommend adjustments, if necessary, based on judicial practice after the guidelines take effect.

As the Commission's proposal is designed to integrate current judicial sanctioning practices into the guidelines, no increase in correctional bed space needs is anticipated.

FIGURE 41

**Proposed Primary Offense Factor  
Schedule I/II Drug - Section A**

**Manufacture of Methamphetamine,  
First or Second Offense**

1 count .....	12
2 counts .....	13
3 counts .....	14
4 counts .....	15

FIGURE 42

**Proposed Primary Offense Factor  
Schedule I/II Drug - Section C**

**Manufacture of Methamphetamine,  
First or Second Offense**

	Proposed		
	Category I	Category II	Other
1 count	145 .....	87 .....	29

### RECOMMENDATION 3

Amend the Assault sentencing guidelines to add the offense of driving while intoxicated (DWI) resulting in permanent and significant physical impairment to another as defined in § 18.2-51.4(A).

#### Issue

Currently, Virginia's sentencing guidelines do not cover convictions for driving while intoxicated (DWI) resulting in permanent and significant physical impairment to another. This offense is defined in § 18.2-51.4(A), which became effective July 1, 2000. In recent years, the Commission has received multiple requests to add this crime to the guidelines. After thorough analysis, the Commission has developed a proposal to incorporate this offense into the Assault guidelines.

#### Discussion

Commission staff analyzed FY2007 through FY2011 data from the Supreme Court of Virginia's Circuit Court Automated Information System (CAIS) to identify convictions for driving while intoxicated (DWI) resulting in permanent and significant physical impairment to another under § 18.2-51.4(A). According to the CAIS database, there were 46 cases in which this crime was the most serious offense in the case. As shown in Figure 43, most offenders convicted of this crime (69.6%) were sentenced to more than six months of incarceration. For offenders given such a term of incarceration, the median sentence was 1.5 years. The remaining offenders received probation without an active term of incarceration (10.9%) or incarceration of up to six months in jail (19.6%).

FIGURE 43

#### **Driving While Intoxicated (DWI) Resulting in Permanent and Significant Impairment to Another (§ 18.2-51.4(A))**

##### **Sentencing Outcomes**

**FY2007 - FY2011**

**N=46**

<b>Disposition</b>	<b>Percent</b>	<b>Median Sentence</b>
No Incarceration	10.9%	N/A
Incarceration up to 6 months	19.6%	4 Months
Incarceration more than 6 months	69.6%	1.5 Years

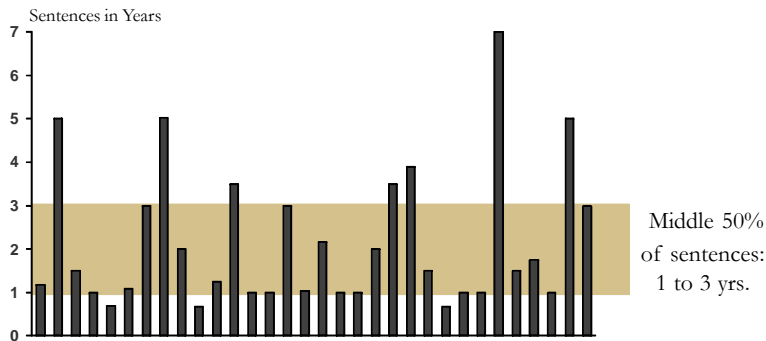
*Data reflect cases in which this offense was the primary (or most serious) offense at sentencing.*

Examination of the historical data revealed considerable variation in sentencing (both in type of disposition and sentence length) for offenders convicted of a DWI that resulted in permanent and significant physical impairment to another. Among offenders given an incarceration term in excess of six months, the sentences ranged from seven months to seven years (Figure 44). Virginia's sentencing guidelines are grounded in historical practices among judges and ranges are developed from the middle 50% of actual sentences, thus removing the extreme high and low sentences. For offenders convicted of DWI resulting in permanent and significant physical impairment to another, the middle 50% of sentences fell between one and three years.

Several steps were employed in the development of sentencing guidelines for this offense. The Commission examined historical sentencing practices for this crime for the period from FY2007 through FY2011. The proposed guidelines are based on analysis of actual sentencing patterns, including the historical rate of incarceration in prison and jail. Current guideline worksheets serve as the starting point for scoring historical cases. Using historical sentencing data, various scoring scenarios were rigorously tested. Individual factors on the worksheets were assessed and new factors were considered to ensure the proposed guidelines are closely aligned with judicial sentencing practices in these cases.

Figure 44

**Driving While Intoxicated (DWI) Resulting in Permanent and Significant Impairment to Another (§ 18.2-51.4(A))**  
**Offenders Sentenced to Incarceration of More than 6 Months**  
**FY2007 - FY2011**  
**N=32**



After a thorough analysis of the data, the Commission recommends that the Assault sentencing guidelines be amended to cover convictions for DWI resulting in permanent and significant physical impairment under § 18.2-51.4(A). The proposal for integrating this offense is presented in Figures 45 and 46.

On Section A of the proposed guidelines (Figure 8), offenders convicted of one count of this offense will receive one point on the Primary Offense factor. An offender convicted of two counts will receive three points on this factor. To model actual sentencing practices for this crime most accurately, the Commission found it necessary to revise two of the other factors on Section A: Additional Offenses and Prior Convictions/Adjudications. Under the proposal, the factor for Additional Offenses is split. As shown in Figure 8, offenders convicted for DWI resulting in permanent and significant physical impairment to another will be scored differently from all other offenders. The factor for Prior Convictions /Adjudications is also split under the proposal. As a result of this modification, some offenders convicted for DWI resulting in permanent and significant physical impairment will receive higher points on this factor. These modifications were necessary in order to more clearly distinguish between offenders who historically received more than six months of incarceration and those who did not. Scoring for offenders convicted of other crimes covered by the Assault guidelines will not change.

FIGURE 45

**Proposed Factors for Assault  
Driving While Intoxicated (DWI) Resulting in Permanent  
and Significant Impairment to Another (§ 18.2-51.4(A))  
Section A**

**Primary Offense Factor**

DWI - Victim Permanently Impaired	
1 count .....	1
2 counts .....	3

**Additional Offense Factor**

Maximum Penalty:	Less than 2 .....	0
(years)	2-17 .....	2
	18-23 .....	3
	24-31 .....	4
	32-39 .....	5
	40 or more .....	6

**Prior Convictions/Adjudications**

Maximum Penalty:	Less than 1 .....	0
(years)	1-46 .....	2
	47 or more .....	3

An offender who scores five points or less on Section A is then scored on Section B of the Assault guidelines, which will determine if he will be recommended for probation without an active term of incarceration or a jail term of up to six months. Under the proposal, the factors on Section B will be scored as they currently appear on the worksheet. No modifications to this worksheet are necessary.

Finally, an offender who scores six points or more on Section A is scored on Section C, which will produce a sentence length recommendation for a longer term of incarceration. Primary Offense points on Section C are assigned based on the classification of an offender's prior record. An offender is assigned to the Other category if he does not have a prior conviction for a violent felony defined in § 17.1-805. An offender is assigned to Category II if he has a prior conviction for a violent felony that has a statutory maximum penalty of less than 40 years. Offenders are classified as Category I if they have a prior conviction for a violent felony with a statutory maximum of 40 years or more.

On Section C of the proposed guidelines (Figure 10), an offender convicted for a DWI that resulted in permanent and significant physical impairment to another under § 18.2-51.4(A) will receive 12 points if his prior record is classified as Other, 24 points if he is a Category II offender, and 48 points if he is a Category I offender. All other factors on Section C will be scored as they currently appear on the worksheet.

The proposal is based on the actual practices of Virginia's circuit court judges for the period studied. When developing sentencing guidelines, the Commission's goal is to match, or come very close to, the historical prison incarceration rate. The proposed guidelines are designed to recommend the same proportion of offenders for a sentence greater than six months as historically received a sentence greater than six months. Due to the wide variation in past sentencing practices for this offense, not all of the offenders who historically received such a sentence will be recommended for that type of sentence under the proposed guidelines. The guidelines are designed to bring about more

FIGURE 46

**Proposed Primary Offense Factor for Assault  
Driving While Intoxicated (DWI) Resulting in Permanent  
and Significant Impairment to Another (§ 18.2-51.4(A))  
Section C**

**DWI - Victim Permanently Impaired**

	Proposed		
	Category I	Category II	Other
1 count	48	24	12

consistency in sentencing decisions. As Figure 47 demonstrates, the proposed guidelines are expected to recommend 69.6% of offenders convicted of this crime for a sentence of more than six months. Actual practice has resulted in 65.2% of offenders being sentenced to such a term of incarceration. Thus, the recommended and actual historical rates of incarceration are very close. Moreover, for offenders convicted of this crime receiving a term of incarceration in excess of six months, the median sentence is 1.5 years. For the cases studied, the guidelines proposed here produce a recommended sentence with a median value of 1.4 years. Again, the recommended and actual sentences are closely aligned.

The Commission will closely monitor judicial response to these new guidelines and will recommend adjustments, if necessary, based on judicial practice after the guidelines take effect.

As the Commission's proposal is designed to integrate current judicial sanctioning practices into the guidelines, no increase in correctional bed space needs is anticipated.

FIGURE 47

**Driving While Intoxicated (DWI) Resulting in Permanent and Significant Impairment to Another (§ 18.2-51.4(A))**  
**FY2007 – FY2011**  
**N=46**

Sentencing Guidelines	Recommendations under Sentencing Guidelines		Actual Practices Prior to Sentencing Guidelines	
	Recommendation	Percent	NO PRISON Percent	PRISON Percent
Section A				
Score				
Up to 5	No Prison	34.8%	50.0%	50.0%
6 or More	Prison	65.2%	20.0%	80.0%
		100.0%	30.4%	<b>OVERALL 69.6%</b>



## RECOMMENDATION 4

Amend the Felony Traffic sentencing guidelines to add the third conviction for driving on a suspended license following a conviction for driving while intoxicated (DWI) as defined in § 18.2-272(A).

### Issue

Currently, the third conviction for driving on a suspended license following a conviction for driving while intoxicated (DWI) is not covered by the sentencing guidelines when it is the most serious offense in a case. Section § 18.2-272(A), which defines this offense, was enacted in 2006. Since that time, the Commission has received requests from users to add this crime to the guidelines system. With five years of historical data now available, the Commission conducted a thorough analysis and has developed a proposal to integrate this offense into the Felony Traffic guidelines.

### Discussion

Per § 18.2-272(A), any person who drives or operates a motor vehicle while his license was suspended because of a conviction for driving while intoxicated (DWI) is guilty of a Class 1 misdemeanor (except as otherwise provided in § 46.2-391). Any person convicted of three violations of this section committed within a 10-year period is guilty of a Class 6 felony. The General Assembly enacted the felony provision in 2006.

The Commission typically compiles five years of historical data to develop guidelines. Sufficient data have accumulated for this offense to proceed with the analysis. Examining the Supreme Court of Virginia's Circuit Court Automated Information System (CAIS) data for FY2007 through FY2011, the Commission identified 55 cases in which a third conviction for driving on a suspended license after a DWI conviction was the most serious offense. As shown in Figure 48, nearly one-third (30.9%) of the offenders studied were sentenced to a term of incarceration exceeding six months. In such cases, the median sentence was one year. However, the largest share of offenders convicted of this crime (41.8%) received a jail term of up to six months. The median sentence length for offenders receiving a jail term was three months. The remaining 27.3% were given probation without an active term of incarceration.

FIGURE 48

**Third Conviction for Driving on a Suspended License after a DWI Conviction (§ 18.2-272(A))**  
**Sentencing Outcomes**  
**FY2007 - FY2011**  
**N=55**

Disposition	Percent	Median Sentence
No Incarceration	27.3%	N/A
Incarceration up to 6 months	41.8%	3 Months
Incarceration more than 6 months	30.9%	1 Year

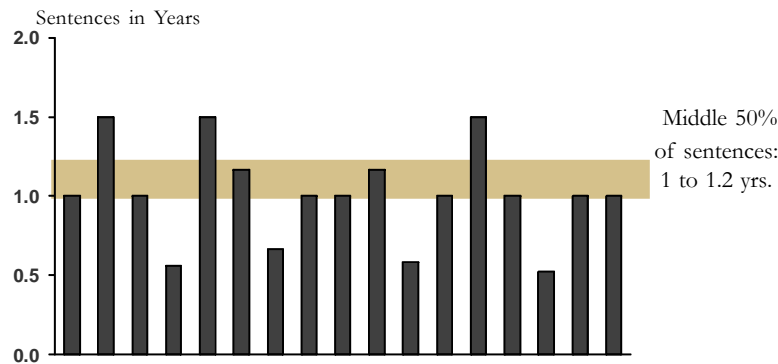
*Data reflect cases in which this offense was the primary (or most serious) offense at sentencing.*

For offenders receiving more than six months of incarceration, the sentences were further analyzed. Sentences in these cases ranged from 7.0 months to 1.5 years (Figure 49). Virginia's sentencing guidelines are grounded in historical practices among judges and ranges are developed from the middle 50% of actual sentences, thus removing the extreme high and low sentences. The middle 50% of sentences for this offense encompasses 1.0 to 1.2 years.

The development of sentencing guidelines for this offense involved several steps. The Commission examined historical sentencing practices for this crime for the period from FY2007 through FY2011. The proposed guidelines are based on analysis of actual sentencing patterns, including the historical rate of incarceration in prison and jail. Current guideline worksheets serve as the starting point for scoring historical cases. Using historical sentencing data, various scoring scenarios were rigorously tested. Individual factors on the worksheets were assessed and new factors were considered to ensure the proposed guidelines are closely aligned with judicial sentencing practices in these cases.

FIGURE 49

**Third Conviction for Driving on a Suspended License  
after a DWI Conviction (§ 18.2-272(A))  
Offenders Sentenced to Incarceration of More than 6 Months  
FY2007 - FY2011  
N=17**



After a thorough examination of the data, the Commission recommends expanding the Felony Traffic sentencing guidelines to cover the third conviction for driving on a suspended license following a DWI conviction, as defined in § 18.2-272(A). Proposed revisions for integrating these offenses are shown in Figures 50, 51 and 52.

On Section A of the proposed guidelines (Figure 14), offenders convicted of this offense will receive one point. This is the same point value assigned for a third DWI conviction (also a Class 6 felony). In order to best model actual practices in such cases, two other factors on Section A must be revised. The factor for Prior Incarcerations is modified such that offenders with a third conviction for driving on a suspended license after a DWI conviction will be scored differently than all other traffic offenders. Similarly, the Legally Restrained at the Time of Offense factor will be split. All offenders convicted of this specific offense will be assigned four points for being legally restrained. These offenders are considered to have been legally restrained because they were under legal obligation not to drive but did so. The remaining factors on Section A will be scored as they currently appear on the worksheet.

FIGURE 50

**Proposed Offense Factors for Traffic/Felony Sentencing Guidelines  
Third Conviction for Driving on a Suspended License  
after a DWI Conviction (§ 18.2-272(A))  
Section A**

**Primary Offense Factor**

Driving on Suspended License after DWI - 3rd Offense within 10 Years  
1 count ..... 1

**Prior Incarcerations/Commitments**

Number: 1 ..... 1  
2 or more ..... 4

**Legally Restrained at Time of Offense**

If YES, add ..... 4

An offender who scores eight points or less on Section A is then scored on Section B of the guidelines, which will determine if he will be recommended for probation without an active term of incarceration or a jail term of up to six months. On Section B of the proposed guidelines (Figure 51), offenders with a third conviction for driving on a suspended license after a DWI conviction will receive nine points for the Primary Offense factor. One new factor is added to the Section B worksheet and is scored only for this specific offense. This new factor will add two points to the score if the offender has previously served an active term of incarceration or if he had ever been committed to the state as a juvenile. The new factor ensures that offenders scored on Section B who have a prior incarceration/commitment will automatically be recommended for a jail term up to six months.

FIGURE 51

**Proposed Changes to the Traffic/Felony Sentencing Guidelines  
Section B Worksheet**

**Primary Offense Factor**

Driving on Suspended License after DWI- 3rd Offense within 10 Years  
1 count ..... 9

**Score the following factor only if Primary Offense is Driving on Suspended License After DWI - 3rd Offense within 10 Years (§ 18.2-272(A))**

Prior Incarcerations/Commitments

If YES, add ..... 2

Offenders who receive nine points or more on Section A of the Felony Traffic guidelines are scored on Section C, which determines the sentence length recommendation for a longer term of incarceration. On Section C, Primary Offense points are assigned based on the classification of an offender's prior record. An offender is assigned to the Other category if he does not have a prior conviction for a violent felony defined in § 17.1-805. An offender is assigned to Category II if he has a prior conviction for a violent felony that has a statutory maximum penalty of less than 40 years. Offenders are classified as Category I if they have a prior conviction for a violent felony with a statutory maximum of 40 years or more.

On Section C of the proposed guidelines (Figure 52), an offender with a third conviction for driving on a suspended license after a DWI conviction will receive eight points for the Primary Offense factor if his prior record is classified as Other, 16 points if he is a Category II offender, and 32 points if he is a Category I offender. All other factors on Section C are to be scored as they currently appear on the worksheet.

FIGURE 52

Proposed Changes to the Traffic/Felony Sentencing Guidelines  
Section C Worksheet

**Driving on Suspended License after DWI - 3rd Offense within 10 Years**

	Proposed		
	Category I	Category II	Other
1 count	32	16	8

The proposal is based on the actual practices of Virginia's circuit court judges for the period studied. When developing sentencing guidelines, the Commission's goal is to match, or come very close to, the historical prison incarceration rate. The proposed guidelines are designed to recommend the same proportion of offenders for a sentence greater than six months as historically received a sentence of more than six months. It is important to note that not all of the offenders who historically received such a sentence will be recommended for that type of sentence under the proposed guidelines. This is because of the inconsistencies in past sentencing practices for these offenses. The guidelines are designed to bring about more consistency in sentencing decisions for these offenses. As Figure 17 shows, the proposed guidelines are expected to recommend 32.7% of offenders convicted of this crime to a term of incarceration in excess of six months. In actual practice, 30.9% of offenders were sentenced to a term of incarceration greater than six months. Thus, the recommended and actual historical rates of incarceration are very close. Moreover, for offenders convicted of this crime currently receiving a term of incarceration of more than six months, the median sentence is one year. For the cases studied, the guidelines proposed here produce a recommended sentence with a median value of 0.8 years. Thus, the recommended and actual sentences are closely aligned.

The Commission will closely monitor judicial response to these new guidelines and will recommend adjustments, if necessary, based on judicial practice after the guidelines take effect.

No impact on correctional bed space is anticipated, since the Commission's proposal is designed to integrate current judicial sanctioning practices into the guidelines.

FIGURE 53

**Driving on Suspended License after a DWI –  
3rd Offense within 10 Years (§ 18.2-272(A))  
FY2007 – FY2011  
N=55**

Sentencing Guidelines	Recommendations under Sentencing Guidelines		Actual Practices Prior to Sentencing Guidelines	
	Recommendation	Percent	NO PRISON Percent	PRISON Percent
Section A Score				
Up to 8	No Prison	67.3%	73.0%	27.0%
9 or More	Prison	32.7%	61.1%	38.9%
		100.0%	69.1%	<b>OVERALL 30.9%</b>

## References

### Chapter 1

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### Chapter 4

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## ∞ APPENDICES

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Reasons for MITIGATION	Burg. of Dwelling (N=196)	Burg. Other Structure (N=89)	Sch. I/II Drugs (N=583)	Other Drugs (N=75)	Fraud (N=236)	Larceny (N=517)	Misc (N=50)	Traffic (N=139)	Weapon (N=66)
Plea agreement	55	35	192	35	78	172	33	45	24
No reason given	28	11	138	21	39	132	11	28	7
Judicial discretion	25	12	53	5	37	46	0	12	4
Offender cooperated with authorities	17	10	77	1	19	30	3	5	7
Offender is sentenced to an alternative punishment	29	5	30	5	11	48	1	4	0
Offender has minimal/no prior record	14	10	44	1	10	15	1	17	10
Minimal circumstances/facts of the case	11	3	27	0	12	31	1	9	13
Mitigating court circumstances/proceedings	5	2	37	2	9	20	3	8	3
Sentence recommended by Commonwealth Attorney	12	5	24	3	14	12	1	5	3
Offender's progress in rehabilitation	6	2	17	4	7	20	0	12	1
Offender health (mental, physical, emotional, etc.)	4	2	11	1	8	30	2	5	5
Offender has good potential for rehabilitation	5	2	13	1	10	11	0	8	4
Offender issues (age of offender, homeless, family issues, etc.)	8	4	16	0	5	10	0	1	3
Financial obligations (court costs, restitution, etc.)	5	3	3	0	8	15	1	3	0
Offender needs rehabilitation	7	4	6	0	3	3	1	3	2
Offender not the leader	4	1	6	0	4	4	1	0	1
Behavior positive since commission of the offense	0	0	8	0	5	6	0	2	0
Guidelines recommendation is too harsh	1	1	8	0	2	4	0	2	1
Victim request	5	0	0	0	5	4	1	2	0
Minimal property or monetary loss	1	0	1	0	2	10	1	1	0
Type of victim (drug dealer, relative, friend, etc.)	3	0	0	0	7	2	1	1	0
Offender's substance abuse issues	4	0	2	0	0	8	0	0	0
Judge had an issue scoring one of the guidelines factors	2	0	4	1	1	4	0	0	1
Current offense involves drugs/alcohol (small amount)	1	1	11	0	0	0	0	0	0
Multiple charges/events are being treated as one event	1	4	2	0	2	1	0	0	0
Victim cannot/will not testify	2	1	0	0	1	4	0	0	0
Jury sentence	1	2	2	1	0	1	1	0	0
Sentencing guidelines recommendation not appropriate	3	0	1	0	3	1	0	0	0
Little or no injury/offender did not intend to harm	1	0	2	0	0	0	2	2	0
Concealed weapon, but was not a firearm	0	1	0	0	0	0	0	0	5
Illegible written reason	0	0	4	0	0	2	0	0	0
Judge rounded guidelines minimum to nearest whole year	0	0	1	0	2	1	0	0	0
Judge had an issue scoring one of the risk assessment factors	0	0	0	2	2	0	0	0	0
Sentence recommended by Probation Officer	0	0	0	0	1	1	0	0	0
Sentencing guidelines incorrect/missing	0	0	1	0	0	0	0	1	0
Sentenced to Department of Juvenile Justice	0	0	0	0	0	0	1	0	0
Victim's role in the offense	1	0	0	0	0	0	0	0	0
Minimal circumstances involved with supervision violation	0	0	0	0	1	0	0	0	0
Judge thought sentence was in compliance	1	0	0	0	0	0	0	0	0
Victim circumstances (facts of the case, etc.)	0	0	0	0	0	0	0	1	0
	262	121	741	83	308	648	66	177	94

Note: Figures indicate the number of times a departure reason was cited.

Because multiple reasons may be cited in each case, figures will not total the number of cases in each offense group.

Reasons for AGGRAVATION	Burg. of Dwelling (N=163)	Burg. Other Structure (N=64)	Sch. I/II Drugs (N=529)	Other Drugs (N=155)	Fraud (N=131)	Larceny (N=423)	Misc (N=84)	Traffic (N=223)	Weapon (N=98)
Plea agreement	38	16	131	52	26	98	22	28	37
No reason given	28	11	116	33	32	86	12	49	10
Offender has extensive prior record/same type of prior	19	8	79	13	19	95	11	58	8
Aggravating circumstances/flagrancy of offense	21	6	39	7	7	33	21	27	13
Offender has poor rehabilitation potential	13	3	22	6	5	29	7	24	2
Number of violations/counts in the event	9	3	30	11	6	26	5	7	10
Offender is sentenced to an alternative punishment	6	4	35	4	9	26	0	5	6
Current offense involves drugs/alcohol (large amount)	1	0	34	20	0	1	2	23	1
Jury sentence	6	0	18	4	8	15	4	12	6
Offense involved a high degree of planning/violation of trust	3	3	1	4	4	35	1	1	1
Guidelines recommendation is too low	7	3	14	9	1	10	3	5	1
Extreme property or monetary loss	5	3	0	0	7	36	0	1	0
Judicial discretion (time served, shock incarceration, etc.)	10	8	14	3	1	11	1	2	1
Offender's substance abuse issues	0	0	13	7	3	7	2	7	1
Degree of victim injury (physical, emotional, etc.)	4	1	7	0	0	6	1	17	4
Poor conduct since commission of offense	8	2	8	1	5	5	2	2	0
Type of victim (child, etc.)	4	1	3	0	4	7	5	3	1
Offender failed alternative sanction program	0	0	21	3	0	2	0	0	0
True offense behavior/more serious than offenses at conv.	0	0	10	3	1	4	0	2	5
Aggravating court circumstances/proceedings	0	2	4	4	2	6	1	4	0
Offender needs rehabilitation offered by jail/prison	0	0	13	1	1	4	0	3	1
Offender used a weapon in commission of the offense	5	0	4	0	1	0	1	0	9
Offender failed to cooperate with authorities	1	0	3	4	1	2	5	1	1
Aggravating facts involving the breaking and entering	13	0	1	0	1	3	0	0	0
Absconded from probation supervision	1	1	7	0	0	3	0	1	1
Current offense involves accident/reckless driving	0	0	2	0	0	0	1	11	0
Failed to follow instructions while on probation	2	0	4	1	2	3	1	0	0
Prior record not adequately weighed by guidelines	0	1	6	0	0	3	0	2	0
Mandatory minimum involved in event	0	1	3	0	0	0	1	2	4
Offender issues (age of offender, homeless, lacks support, etc.)	2	1	1	0	2	3	1	1	0
Victim circumstances (facts of the case, etc.)	5	0	0	0	2	2	0	0	2
Judge thought sentence was in compliance	0	0	2	1	0	3	0	3	0
Sentencing guidelines not appropriate	1	0	2	0	1	1	1	3	0
Multiple offenses in the sentencing event	0	0	5	1	1	1	0	0	0
Seriousness of offense	2	1	0	0	0	1	2	1	0
Sentence recommended by Commonwealth Attorney	2	0	1	1	0	2	0	0	0
Financial obligations (court costs, restitution, etc.)	0	0	1	0	0	3	2	0	0
Judge rounded guidelines maximum to nearest whole year	0	0	2	0	1	0	0	2	1
Violent/disruptive behavior in custody	2	1	1	0	0	0	0	1	0
Used, etc., drugs/alcohol while on probation	0	0	2	0	0	1	0	1	1
New offenses were committed while on probation	0	0	4	0	0	1	0	0	0
Gang-related offense	0	0	0	1	0	3	1	0	0
Child present at time of offense	0	0	1	1	0	1	1	0	1
Offender was the leader	1	1	1	1	0	0	1	0	0
Victim request	2	0	0	0	0	2	0	0	0
Degree of violence toward victim	4	0	0	0	0	0	0	0	0
Offender violated protective order or was stalking	3	0	0	0	0	0	0	0	0
	231	82	671	197	154	585	119	312	128

Note: Figures indicate the number of times a departure reason was cited.

Because multiple reasons may be cited in each case, figures will not total the number of cases in each offense group.

Reasons for MITIGATION	Assault (N=235)	Homicide (N=28)	Kidnapping (N=23)	Robbery (N=247)	Rape (N=40)	Sexual Assault (N=69)
Plea agreement	91	11	8	46	11	28
No reason given	40	2	3	32	4	5
Minimal circumstances/facts of the case	22	3	4	17	3	10
Offender cooperated with authorities	5	1	0	39	0	2
Mitigating court circumstances/proceedings	16	2	0	18	4	7
Judicial discretion	13	0	2	28	2	4
Offender has minimal/no prior record	11	1	1	18	4	8
Sentenced to Department of Juvenile Justice	6	2	1	26	3	1
Sentence recommended by Commonwealth Attorney	8	0	2	19	5	2
Offender issues (age of offender, homeless, family issues, etc.)	4	2	1	19	3	3
Victim request	12	0	4	5	3	3
Offender not the leader	3	1	0	21	0	0
Offender health (mental, physical, emotional, etc.)	7	0	2	9	0	4
Offender has good potential for rehabilitation	4	0	0	11	3	4
Victim cannot/will not testify	7	1	0	3	4	6
Jury sentence	1	5	0	8	3	1
Offender is sentenced to an alternative punishment	4	0	0	13	0	0
Little or no injury/offender did not intend to harm	10	0	1	2	0	0
Offender's progress in rehabilitation	6	0	2	2	0	4
Concealed weapon, but was not a firearm	1	0	0	12	0	0
Victim's role in the offense	3	5	0	3	0	1
Offender needs rehabilitation	3	0	0	5	0	1
Type of victim (drug dealer, relative, friend, etc.)	7	0	1	1	0	0
Judge had an issue scoring one of the guidelines factors	2	0	0	5	0	1
Multiple charges/events are being treated as one event	0	0	0	6	1	1
Financial obligations (court costs, restitution, etc.)	4	0	0	0	0	1
Guidelines recommendation is too harsh	2	0	0	2	1	1
Judge rounded guidelines minimum to nearest whole year	5	0	0	0	0	0
Split trial (guilty plea/bench trial and jury trial combined)	0	0	0	4	0	0
Offender's substance abuse issues	2	0	0	1	0	0
Illegible written reason	3	0	0	0	0	0
Judge had an issue scoring one of the risk assessment factors	0	0	0	0	2	1
Behavior positive since commission of the offense	1	0	0	1	0	0
Sentencing guidelines recommendation not appropriate	0	0	0	1	0	1
Minimal property or monetary loss	0	0	0	0	0	0
Current offense involves drugs/alcohol (small amount of drugs)	1	0	0	0	0	0
Sentence recommended by Probation Officer	0	0	0	1	0	0
Minimal circumstances involved with supervision violation	0	0	0	1	0	0
	304	36	32	379	56	100

Note: Figures indicate the number of times a departure reason was cited.

Because multiple reasons may be cited in each case, figures will not total the number of cases in each offense group.

Reasons for AGGRAVATION	Assault (N=181)	Homicide (N=59)	Kidnapping (N=23)	Robbery (N=88)	Rape (N=27)	Sexual Assault (N=115)
Aggravating circumstances/flagrancy of offense	31	15	4	20	6	32
Plea agreement	26	8	5	19	3	21
No reason given	33	8	2	11	3	14
Degree of victim injury (physical, emotional, etc.)	37	6	3	9	3	8
Jury sentence	19	16	1	13	10	6
Offender has poor rehabilitation potential	23	7	5	10	0	11
Type of victim (child, etc.)	6	1	5	9	8	27
Offender has extensive prior record/same type of prior offense	18	5	1	8	1	4
Degree of violence toward victim	19	2	1	6	1	0
Number of violations/counts in the event	10	3	0	5	1	9
True offense behavior was more serious than offenses at conv.	7	3	0	3	0	5
Offense involved a high degree of planning/violation of trust	1	1	1	2	1	7
Guidelines recommendation is too low	1	1	0	2	1	5
Facts of sex offense	0	0	0	0	0	9
Victim circumstances (facts of the case, etc.)	2	1	0	4	1	1
Seriousness of offense	5	1	0	0	0	2
Violent/disruptive behavior in custody	3	0	3	0	0	1
Mandatory minimum involved in event	3	0	0	3	0	1
Sentencing guidelines not appropriate	1	0	0	5	0	0
Offender used a weapon in commission of the offense	1	0	2	3	0	0
Offender violated protective order or was stalking	1	1	2	0	0	0
Victim request	0	0	0	2	2	0
Gang-related offense	1	0	1	1	0	0
Current offense involves drugs/alcohol	0	3	0	0	0	0
Judge thought sentence was in compliance	1	1	0	1	0	0
Prior record not adequately weighed by guidelines	1	1	0	1	0	0
Judicial discretion (time served, shock incarceration, etc.)	0	1	0	0	1	1
Offender issues (age of offender, homeless, lacks support, etc.)	3	0	0	0	0	0
Illegible written reason	0	0	1	0	0	1
Offender is sentenced to an alternative punishment	2	0	0	0	0	0
Offender failed to cooperate with authorities	0	1	1	0	0	0
Poor conduct since commission of offense	1	0	0	0	1	0
Current offense involves accident/reckless driving	0	2	0	0	0	0
Multiple offenses in the sentencing event	0	0	0	2	0	0
Offender health (mental, physical, emotional, etc.)	2	0	0	0	0	0
Poor sex offender rehabilitation potential	0	0	0	0	0	2
Sentenced to Department of Juvenile Justice	0	0	0	2	0	0
Aggravating court circumstances/proceedings	0	0	1	0	0	0
Sentence recommended by Commonwealth Attorney	0	0	0	1	0	0
Offender's substance abuse issues	0	0	0	0	0	1
Offender was the leader	0	0	0	1	0	0
	259	88	40	143	43	168

Note: Figures indicate the number of times a departure reason was cited.

Because multiple reasons may be cited in each case, figures will not total the number of cases in each offense group.

**BURGLARY OF DWELLING**

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	75.6%	6.7%	17.8%	45
2	64.6	21.5	13.9	79
3	74.6	16.4	9.0	67
4	70.2	22.8	7.0	57
5	73.1	11.5	15.4	26
6	63.2	13.2	23.7	38
7	54.2	33.3	12.5	24
8	74.2	25.8	0.0	31
9	72.2	2.8	25.0	36
10	91.4	5.7	2.9	35
11	65.0	25.0	10.0	20
12	75.6	9.8	14.6	41
13	77.8	14.8	7.4	27
14	46.9	28.1	25.0	32
15	58.9	19.2	21.9	73
16	71.9	18.8	9.4	32
17	66.7	33.3	0.0	3
18	60.0	30.0	10.0	10
19	70.7	19.5	9.8	41
20	70.0	10.0	20.0	10
21	60.0	30.0	10.0	20
22	61.5	9.6	28.8	52
23	48.5	33.3	18.2	33
24	67.4	25.6	7.0	43
25	67.9	17.0	15.1	53
26	81.1	13.2	5.7	53
27	78.4	9.8	11.8	51
28	81.8	4.5	13.6	22
29	59.5	14.3	26.2	42
30	53.6	17.9	28.6	28
31	75.0	25.0	0.0	20
Total	68.4	17.2	14.3	1,144

**BURGLARY/OTHER**

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	71.4 %	14.3 %	14.3 %	21
2	80.0	16.7	3.3	30
3	83.3	16.7	0.0	6
4	76.0	20.0	4.0	25
5	64.3	14.3	21.4	14
6	72.7	0.0	27.3	11
7	70.0	20.0	10.0	10
8	66.7	33.3	0.0	6
9	57.1	0.0	42.9	7
10	88.0	8.0	4.0	25
11	90.0	10.0	0.0	10
12	73.3	6.7	20.0	15
13	93.8	6.3	0.0	16
14	53.3	46.7	0.0	15
15	75.6	14.6	9.8	41
16	50.0	36.4	13.6	22
17	90.0	0.0	10.0	10
18	75.0	25.0	0.0	8
19	66.7	11.1	22.2	18
20	66.7	11.1	22.2	9
21	93.3	0.0	6.7	15
22	63.6	13.6	22.7	22
23	48.0	36.0	16.0	25
24	82.8	17.2	0.0	29
25	66.7	14.8	18.5	27
26	77.4	9.7	12.9	31
27	83.3	13.9	2.8	36
28	70.0	5.0	25.0	20
29	50.0	33.3	16.7	18
30	78.3	8.7	13.0	23
31	75.0	0.0	25.0	4
Total	72.9	15.6	11.4	569

**DRUG/OTHER**

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	83.7 %	2.3 %	14.0 %	43
2	93.5	5.2	1.3	77
3	80.0	6.7	13.3	30
4	76.9	10.3	12.8	39
5	88.5	0.0	11.5	26
6	81.8	3.0	15.2	33
7	88.9	3.7	7.4	27
8	73.3	20.0	6.7	15
9	78.3	4.3	17.4	23
10	77.4	6.5	16.1	31
11	100	0.0	0.0	25
12	78.9	7.0	14.1	71
13	91.3	0.0	8.7	46
14	80.4	3.9	15.7	51
15	79.6	2.0	18.4	98
16	97.9	2.1	0.0	48
17	86.7	6.7	6.7	15
18	87.5	0.0	12.5	16
19	86.3	6.3	7.4	95
20	89.7	0.0	10.3	39
21	100	0.0	0.0	14
22	92.0	4.0	4.0	25
23	73.3	11.1	15.6	45
24	91.5	4.9	3.7	82
25	80.0	15.4	4.6	65
26	86.3	2.1	11.6	95
27	91.5	7.6	0.8	118
28	93.1	1.0	5.9	102
29	69.2	1.9	28.8	52
30	76.5	4.9	18.5	81
31	85.7	5.7	8.6	35
Total	85.3	4.8	9.9	1,562



### APPENDIX 3

### Sentencing Guidelines Compliance by Judicial Circuit: Property, Drugs, and Miscellaneous Offenses

#### SCHEDULE VI/DRUGS

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	75.4%	10.1%	14.5 %	228
2	86.9	8.1	5.0	221
3	71.9	10.1	18.1	199
4	80.3	12.4	7.3	314
5	84.2	9.5	6.3	95
6	80.5	8.5	11.0	118
7	91.9	4.1	4.1	270
8	89.4	6.2	4.4	113
9	80.6	10.7	8.7	103
10	79.2	11.2	9.6	125
11	87.6	4.5	7.9	89
12	83.9	6.0	10.0	249
13	76.4	16.3	7.3	560
14	83.0	11.0	6.0	182
15	76.9	6.7	16.4	359
16	76.3	14.9	8.8	194
17	86.1	6.9	6.9	72
18	93.8	4.7	1.6	64
19	86.4	9.4	4.2	286
20	89.2	5.4	5.4	167
21	69.6	23.9	6.5	46
22	83.7	5.7	10.6	141
23	81.7	12.7	5.6	142
24	75.4	14.5	10.2	256
25	77.5	13.9	8.7	231
26	81.4	11.6	7.0	388
27	92.5	4.7	2.8	358
28	89.7	3.0	7.4	203
29	75.3	5.9	18.8	186
30	83.9	2.5	13.6	118
31	90.7	4.3	4.9	162
Total	82.2	9.4	8.5	6,239

#### FRAUD

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	86.6 %	7.3 %	6.1%	82
2	87.9	9.3	2.8	107
3	80.4	15.2	4.3	46
4	83.5	13.2	3.3	91
5	87.8	8.2	4.1	49
6	86.5	2.7	10.8	37
7	94.7	0.0	5.3	38
8	82.6	17.4	0.0	23
9	78.0	8.5	13.6	59
10	83.7	16.3	0.0	49
11	80.8	7.7	11.5	26
12	74.2	11.8	14.0	93
13	75.0	20.8	4.2	48
14	87.9	7.3	4.8	124
15	80.0	13.2	6.8	205
16	83.5	12.9	3.5	85
17	80.4	4.3	15.2	46
18	68.8	27.1	4.2	48
19	83.2	8.6	8.1	185
20	92.1	2.6	5.3	76
21	81.8	13.6	4.5	22
22	88.9	3.2	7.9	63
23	71.1	19.6	9.3	97
24	77.8	17.3	4.9	81
25	87.9	11.0	1.1	91
26	88.3	11.0	0.7	145
27	92.9	5.0	2.1	140
28	95.4	1.5	3.1	65
29	90.6	4.7	4.7	85
30	91.9	2.7	5.4	37
31	98.6	0.0	1.4	70
Total	84.7	9.8	5.4	2,413

#### LARCENY

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	79.5%	8.5 %	11.9 %	293
2	82.6	9.8	7.6	264
3	83.1	9.0	7.9	89
4	82.4	14.5	3.1	227
5	85.7	8.8	5.5	91
6	78.9	14.1	7.0	71
7	90.4	7.4	2.1	94
8	88.2	9.7	2.2	93
9	67.5	10.6	22.0	123
10	84.6	8.5	6.8	117
11	84.2	7.9	7.9	76
12	82.4	8.5	9.1	307
13	85.5	9.4	5.1	117
14	85.5	12.1	2.4	338
15	80.6	8.2	11.1	377
16	78.9	11.3	9.9	142
17	76.5	10.4	13.0	115
18	87.1	7.1	5.9	85
19	75.9	13.9	10.2	303
20	89.1	3.1	7.8	128
21	74.3	20.0	5.7	70
22	80.8	5.2	14.0	172
23	81.9	10.3	7.8	232
24	82.7	16.0	1.2	162
25	74.9	16.0	9.1	175
26	87.9	8.1	4.0	297
27	90.2	5.6	4.3	234
28	88.2	3.7	8.1	136
29	81.0	7.1	12.0	184
30	71.6	11.8	16.7	102
31	88.5	6.6	4.9	122
Total	82.3	9.7	8.0	5,336



### APPENDIX 3 Sentencing Guidelines Compliance by Judicial Circuit: Property, Drugs, and Miscellaneous Offenses

TRAFFIC				
Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	73.7 %	8.4%	17.9 %	95
2	89.6	4.7	5.7	106
3	87.5	6.3	6.3	32
4	87.0	9.1	3.9	77
5	70.0	5.0	25.0	40
6	90.0	2.5	7.5	40
7	88.9	2.2	8.9	45
8	78.3	17.4	4.3	23
9	71.6	3.7	24.7	81
10	79.7	11.9	8.5	59
11	90.9	6.1	3.0	33
12	86.6	7.2	6.2	97
13	84.8	3.0	12.1	33
14	74.4	9.8	15.9	82
15	72.3	12.6	15.1	159
16	83.7	2.3	14.0	86
17	81.3	3.1	15.6	32
18	81.3	0.0	18.8	16
19	77.0	6.9	16.1	87
20	71.2	0.0	28.8	66
21	68.2	27.3	4.5	22
22	85.2	3.3	11.5	61
23	74.3	11.4	14.3	70
24	84.5	10.7	4.8	84
25	88.1	7.5	4.5	67
26	85.9	7.8	6.3	128
27	89.9	7.2	2.9	69
28	87.8	7.3	4.9	41
29	75.0	2.5	22.5	40
30	85.7	4.8	9.5	21
31	93.2	2.7	4.1	73
Total	81.6	7.1	11.3	1,965

MISCELLANEOUS				
Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	71.4%	14.3%	14.3 %	14
2	76.9	15.4	7.7	13
3	71.4	0.0	28.6	7
4	80.0	0.0	20.0	15
5	80.0	0.0	20.0	25
6	80.0	0.0	20.0	10
7	66.7	5.6	27.8	18
8	33.3	50.0	16.7	6
9	72.2	0.0	27.8	18
10	78.9	15.8	5.3	19
11	81.3	6.3	12.5	16
12	80.0	20.0	0.0	15
13	88.9	11.1	0.0	18
14	66.7	13.3	20.0	15
15	71.9	9.4	18.8	64
16	88.5	7.7	3.8	26
17	37.5	25.0	37.5	8
18	100.0	0.0	0.0	2
19	70.4	11.1	18.5	27
20	66.7	20.0	13.3	15
21	75.0	12.5	12.5	8
22	78.6	0.0	21.4	14
23	61.5	7.7	30.8	13
24	75.0	14.3	10.7	28
25	66.7	25.0	8.3	24
26	81.6	7.9	10.5	38
27	88.5	3.8	7.7	26
28	66.7	11.1	22.2	9
29	73.3	10.0	16.7	30
30	44.4	44.4	11.1	9
31	85.0	5.0	10.0	20
Total	74.7	10.5	14.7	570

WEAPONS				
Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	76.0%	12.0%	12.0 %	25
2	72.0	16.0	12.0	25
3	78.6	14.3	7.1	14
4	82.7	5.8	11.5	52
5	63.2	15.8	21.1	19
6	38.9	22.2	38.9	18
7	92.0	8.0	0.0	25
8	66.7	16.7	16.7	6
9	60.0	0.0	40.0	5
10	61.3	25.8	12.9	31
11	73.3	0.0	26.7	15
12	76.9	7.7	15.4	26
13	70.4	9.3	20.4	54
14	80.0	5.0	15.0	20
15	72.5	10.0	17.5	40
16	82.6	4.3	13.0	23
17	80.0	20.0	0.0	5
18	0.0	0.0	0.0	0
19	25.0	0.0	75.0	4
20	77.8	0.0	22.2	9
21	81.8	18.2	0.0	11
22	68.2	4.5	27.3	22
23	92.3	0.0	7.7	13
24	59.4	21.9	18.8	32
25	81.8	9.1	9.1	22
26	85.7	9.5	4.8	21
27	84.2	7.9	7.9	38
28	89.5	5.3	5.3	19
29	33.3	20.0	46.7	15
30	66.7	8.3	25.0	12
31	100.0	0.0	0.0	7
Total	73.9	10.5	15.6	628



**APPENDIX 4 Sentencing Guidelines Compliance by Judicial Circuit: Offenses Against the Person**

ASSAULT				
Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	66.7 %	16.7 %	16.7 %	36
2	72.6	11.6	15.8	95
3	78.2	12.7	9.1	55
4	74.7	16.1	9.2	87
5	71.4	11.9	16.7	42
6	64.7	29.4	5.9	34
7	76.9	9.6	13.5	52
8	65.4	23.1	11.5	26
9	76.1	8.7	15.2	46
10	67.2	23.4	9.4	64
11	85.7	11.4	2.9	35
12	82.9	7.3	9.8	41
13	70.5	15.4	14.1	78
14	82.1	10.7	7.1	56
15	75.2	17.7	7.1	113
16	74.3	10.8	14.9	74
17	50.0	28.6	21.4	14
18	42.1	15.8	42.1	19
19	67.6	8.8	23.5	68
20	77.8	5.6	16.7	18
21	84.6	0.0	15.4	13
22	72.4	13.8	13.8	29
23	67.1	25.3	7.6	79
24	65.5	22.4	12.1	58
25	74.5	20.0	5.5	55
26	72.1	19.7	8.2	61
27	78.1	12.5	9.4	64
28	90.9	0.0	9.1	33
29	62.5	25.0	12.5	40
30	65.0	20.0	15.0	20
31	82.8	10.3	6.9	29
Total	72.9	15.3	11.8	1,534

KIDNAPPING				
Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	66.7 %	33.3 %	0.0 %	3
2	100.0	0.0	0.0	3
3	57.1	28.6	14.3	7
4	80.0	20.0	0.0	5
5	33.3	33.3	33.3	3
6	50.0	50.0	0.0	4
7	80.0	0.0	20.0	5
8	100.0	0.0	0.0	2
9	0.0	66.7	33.3	3
10	50.0	50.0	0.0	2
11	100.0	0.0	0.0	1
12	0.0	0.0	100	1
13	66.7	16.7	16.7	6
14	80.0	0.0	20.0	5
15	87.5	0.0	12.5	8
16	71.4	28.6	0.0	7
17	20.0	0.0	80.0	5
18	100.0	0.0	0.0	1
19	40.0	10.0	50.0	10
20	33.3	0.0	66.7	3
21	75.0	25.0	0.0	4
22	100.0	0.0	0.0	4
23	50.0	33.3	16.7	6
24	80.0	20.0	0.0	10
25	0.0	0.0	100	1
26	0.0	50.0	50.0	2
27	57.1	28.6	14.3	7
28	100.0	0.0	0.0	1
29	100.0	0.0	0.0	4
30	0.0	0.0	0.0	9
31	88.9	11.1	0.0	9
Total	65.2	17.4	17.4	132

HOMICIDE				
Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	80.0%	0.0%	20.0 %	5
2	81.8	0.0	18.2	11
3	75.0	0.0	25.0	4
4	77.8	11.1	11.1	18
5	100	0.0	0.0	5
6	75.0	0.0	25.0	4
7	50.0	16.7	33.3	12
8	50.0	50.0	0.0	2
9	50.0	0.0	50.0	2
10	25.0	25.0	50.0	4
11	57.1	14.3	28.6	7
12	63.6	9.1	27.3	11
13	20.8	37.5	41.7	24
14	42.9	14.3	42.9	7
15	66.7	6.7	26.7	15
16	75.0	0.0	25.0	4
17	0.0	0.0	100	1
18	100	0.0	0.0	1
19	33.3	16.7	50.0	12
20	80.0	0.0	20.0	5
21	100	0.0	0.0	3
22	66.7	33.3	0.0	6
23	57.1	14.3	28.6	7
24	83.3	0.0	16.7	6
25	57.1	0.0	42.9	7
26	100.0	0.0	0.0	6
27	44.4	0.0	55.6	9
28	0.0	0.0	0.0	0
29	50.0	33.3	16.7	6
30	100	0.0	0.0	1
31	55.6	22.2	22.2	9
Total	59.3	13.1	27.6	214

**APPENDIX 4 Sentencing Guidelines Compliance by Judicial Circuit: Offenses Against the Person**

**ROBBERY**

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	65.0 %	32.5 %	2.5 %	40
2	67.5	25.3	7.2	83
3	61.5	26.9	11.5	26
4	57.7	35.9	6.4	78
5	57.9	31.6	10.5	19
6	50.0	37.5	12.5	16
7	71.7	17.4	10.9	46
8	69.2	26.9	3.8	26
9	20.0	20.0	60.0	15
10	50.0	25.0	25.0	8
11	53.3	26.7	20.0	15
12	50.0	36.4	13.6	44
13	62.6	30.8	6.5	107
14	73.6	18.9	7.5	53
15	53.2	38.3	8.5	47
16	65.0	30.0	5.0	20
17	72.7	0.0	27.3	11
18	50.0	43.8	6.3	16
19	66.7	27.1	6.3	48
20	55.6	44.4	0.0	9
21	60.0	40.0	0.0	15
22	71.4	4.8	23.8	21
23	43.8	50.0	6.3	16
24	58.8	5.9	35.3	17
25	62.5	25.0	12.5	8
26	70.4	22.2	7.4	27
27	100	0.0	0.0	10
28	63.6	18.2	18.2	11
29	20.0	40.0	40.0	5
30	100	0.0	0.0	1
31	57.1	38.1	4.8	21
Total	61.8	28.2	10.0	879

**RAPE**

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	75.0 %	25.0%	0.0 %	8
2	75.0	12.5	12.5	8
3	40.0	20.0	40.0	5
4	77.8	22.2	0.0	9
5	50.0	33.3	16.7	6
6	100	0.0	0.0	2
7	70.0	10.0	20.0	10
8	100.0	0.0	0.0	2
9	75.0	0.0	25.0	4
10	100	0.0	0.0	3
11	33.3	33.3	33.3	3
12	40.0	40.0	20.0	5
13	62.5	37.5	0.0	8
14	63.6	9.1	27.3	11
15	69.2	30.8	0.0	13
16	88.9	0.0	11.1	9
17	80.0	0.0	20.0	5
18	100	0.0	0.0	1
19	75.0	16.7	8.3	12
20	57.1	0.0	42.9	7
21	100	0.0	0.0	2
22	54.5	18.2	27.3	11
23	44.4	44.4	11.1	9
24	100	0.0	0.0	5
25	54.5	36.4	9.1	11
26	72.7	18.2	9.1	11
27	70.0	30.0	0.0	10
28	100	0.0	0.0	1
29	87.5	12.5	0.0	8
30	0.0	0.0	100	1
31	63.6	18.2	18.2	11
Total	68.2	19.0	12.8	211

**OTHER SEXUAL ASSAULT**

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	75.0%	0.0%	25.0 %	4
2	66.7	16.7	16.7	24
3	80.0	0.0	20.0	5
4	83.3	11.1	5.6	18
5	36.4	9.1	54.5	11
6	70.0	10.0	20.0	10
7	90.9	9.1	0.0	11
8	80.0	20.0	0.0	5
9	71.4	9.5	19.0	21
10	82.6	0.0	17.4	23
11	70.0	20.0	10.0	10
12	69.2	11.5	19.2	26
13	66.7	11.1	22.2	9
14	72.7	9.1	18.2	11
15	62.2	17.8	20.0	45
16	64.0	8.0	28.0	25
17	30.0	20.0	50.0	10
18	83.3	0.0	16.7	6
19	70.5	4.9	24.6	61
20	53.8	23.1	23.1	13
21	50.0	0.0	50.0	2
22	66.7	16.7	16.7	6
23	52.9	41.2	5.9	17
24	82.8	6.9	10.3	29
25	73.1	11.5	15.4	26
26	53.2	19.1	27.7	47
27	67.9	17.9	14.3	28
28	60.0	0.0	40.0	5
29	55.6	11.1	33.3	18
30	60.0	20.0	20.0	10
31	81.6	5.3	13.2	38
Total	67.8	12.2	20.0	574