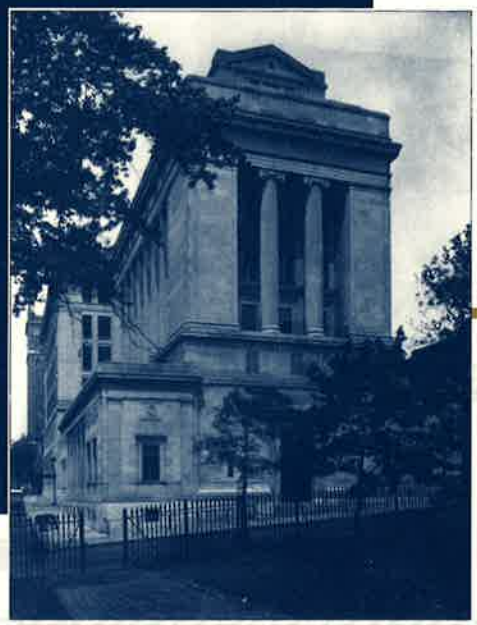

1997 Virginia Criminal Sentencing Commission

Annual Report




Original site and construction of Federal Reserve Bank of Richmond, circa 1920, present site of Virginia Supreme Court Building

Virginia
Criminal Sentencing Commission

1997 Annual Report

December 1, 1997

Virginia Criminal Sentencing Commission Members

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

Judge Ernest P. Gates
Chairman, Chesterfield County

Appointments by the Chief Justice of the Supreme Court

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

Attorney General

The Honorable Richard Cullen, Richmond

Senate Appointments

Reverend George F. Ricketts, Mathews County
Mark C. Christie, Richmond

House of Delegates Appointments

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

Governor's Appointments

G. Steven Agee, Roanoke
Jo Ann Bruce, Madison
Henry E. Hudson, McLean
The Honorable William G. Petty, Lynchburg

Hon. Ernest P. Gates
Chairman

Commonwealth of Virginia

Richard P. Kern, Ph.D.
Director

100 North Ninth Street
Richmond, Virginia 23219
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Supreme Court of Virginia
Virginia Criminal Sentencing Commission

December 1, 1997

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

§17-235(10) of the Code of Virginia requires the Virginia Criminal Sentencing Commission to report annually upon its work and recommendations. Pursuant to this statutory obligation, we respectfully submit for your review the 1997 Annual Report of the Criminal Sentencing Commission.

This report details the work of the Commission over the past year and outlines the ambitious schedule of activities that lie ahead. The report provides a comprehensive examination of judicial compliance with the felony sentencing guidelines for cases received by September 30, 1997. This report also provides the results of the research on the development of an offender risk assessment instrument and the Commission's recommendations to the 1998 session of the Virginia General Assembly.

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

Respectfully submitted,

Ernest P. Gates

Ernest P. Gates, Chairman

The Staff of the Commission

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The design and layout of the 1997 Annual Report
of the Virginia Criminal Sentencing Commission
was created by Judith Ann Sullivan.

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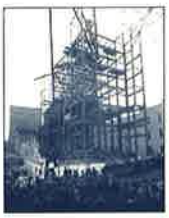
The photographs appearing on the cover and throughout this report were made available from the archives of the Federal Reserve Bank of Richmond.

Our appreciation is extended to Joseph C. Ramage, Senior Vice President, Federal Reserve Bank of Richmond




The building located at Ninth and Franklin Streets, designed and built as the Federal Reserve Bank of Richmond in 1920, is today the Virginia Supreme Court Building which houses the offices of the Criminal Sentencing Commission.

Introduction

Overview

This is the third annual report of the Virginia Criminal Sentencing Commission. The report is organized into six chapters. The first chapter provides a general profile of the Commission and its various activities and projects undertaken during 1997. The second chapter includes the results of a detailed analysis of judicial compliance with the discretionary sentencing guidelines system as well as other related sentencing trend data. The third chapter contains the Commission report on its work to develop an offender risk of recidivism assessment instrument and to implement it within the sentencing guidelines system. The fourth chapter presents a look at the impact of the no-parole/truth-in-sentencing system that has now been in effect for any felony committed on or after January 1, 1995. The fifth chapter presents the Commission's recommendations for 1998. Finally, the last chapter discusses some of the future plans of the Commission.

Commission Profile

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

In the past year, Virginia's Attorney General, James Gilmore, resigned his office and consequently stepped down as a Commission member. Deputy Attorney General, Frank Ferguson, had been designated by General Gilmore as his representative at Commission meetings. Richard Cullen was appointed Attorney General by Governor Allen to fulfill the remaining term of James Gilmore. General Cullen was already a Commission member serving a term as a gubernatorial

Activities of the Commission

The full membership of the Commission met four times in 1997: April 14, June 23, September 22 and November 10. The following report provides an overview of some of the Commission actions and initiatives during the past year.

appointment and consequently resigned this position to serve on the Commission as the Attorney General. This left a vacancy on the Commission which was filled when Governor Allen appointed William Petty, Commonwealth's Attorney of Lynchburg, to fill the remainder of Mr. Cullen's original term. With a full complement of 17 members, the Commission approved the designation of Frank Ferguson, Deputy Attorney General, as the Commission's Counsel.

During the past year, all of the initial appointment terms to the Commission expired. All but two of the Commission members have been reappointed to a new three year term. The new members of the Commission are G. Steven Agee who succeeds William H. Fuller, and Henry Edward Hudson who succeeds Robert C. Bobb.

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.

Monitoring and Oversight

Section 19.2-298.01 of the Code of Virginia requires that sentencing guidelines worksheets be completed in all felony cases for which there are guidelines and specifies that judges must announce during court proceedings that review of the forms has been completed. After sentencing, the guidelines worksheets must be signed by the judge and then become a part of the official record of each case. The clerk of the circuit court is responsible for sending the completed and signed worksheets to the Commission.

The 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 and properly. When problems are detected on a submitted form, it is sent back to the sentencing judge for corrective action. Since the conversion to the new truth-in-sentencing system involved newly designed forms and new procedural requirements, previous Annual Reports documented a variety of worksheet completion problems. These problems included missing judicial departure explanations, confusion over the post-release term and supervision period, missing worksheets, and lack of judicial signatures. However, as a result of the Commission's review process and the fact that users and preparers of the guidelines are more accustomed to the new system, fewer errors have been detected during the past year.

Once the guidelines worksheets are reviewed and determined to be complete, they are automated and analyzed. The principal analysis performed on the automated worksheets concerns judicial compliance with sentencing guidelines recommendations. This analysis is performed and presented to the Commission on a quarterly basis. The most recent study of judicial compliance with the new sentencing guidelines is presented in Chapter Two.

Training and Education

Training and education are on-going activities of the Commission. The Commission gives high priority to instructing probation and parole officers and Commonwealth's attorneys on how to prepare complete and accurate guidelines worksheets. The Commission also realizes there is a continuous need to provide training seminars and education programs to new members of the judiciary, public defenders and private defense attorneys, and other criminal justice system professionals.

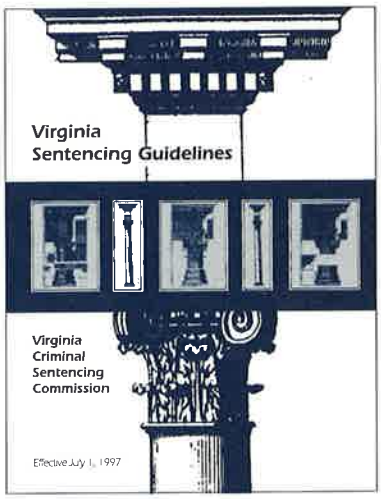
During the summer of 1997, the Commission held a total of 58 training seminars in 16 different locations covering each of the Commonwealth's geographic regions. Over 800 individuals attended these seminars including a significant number of probation officers, Commonwealth's attorneys, public defenders, private defense attorneys and other criminal justice professionals. By special request, training seminars were also held in specific probation or Commonwealth's attorneys' offices in Alexandria, Hampton, Lynchburg, Newport News, and Norfolk. Additionally, the Commission provided training on the guidelines and no-parole sentencing system to newly elected judges during their pre-bench training program.

The Commission will continue to place priority on providing sentencing guidelines training on request to any group of criminal justice professionals. The Commission regularly conducts sentencing guidelines training at the Department of Corrections' Training Academy as part of the curriculum for new probation officers. The Commission is also willing to provide an education program on the guidelines and the no-parole sentencing system to any interested group or organization.

In addition to the provision of training and education programs, the Commission staff maintains a "hot line" phone system (804-225-4398). This phone line is staffed from 7:45 a.m. to 6:00 p.m., Monday through Friday, to respond quickly to any questions or concerns regarding the sentencing guidelines. The hot line has proven to be an important resource for guidelines users around the Commonwealth. In the past year, the Commission staff has handled over 5,000 calls through its hot line service.

New Edition of Guidelines Manual

The Commission also distributes sentencing guidelines worksheets and instruction manuals. During the past year, the Commission completely redesigned the Guidelines Manual to incorporate the suggestions of the many criminal justice system professionals who routinely use the guidelines. The new manual features a number of modifications which are cosmetic in nature but which allow for more efficient and accurate completion of guidelines forms. Also, the new manual incorporates the modifications to the guidelines system which were proposed in last year's report and which took effect on July 1, 1997.



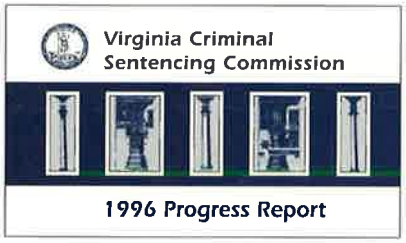
The new manual incorporates modifications to the guidelines system which took effect on July 1, 1997.

The Commission developed new sentencing guidelines worksheets which incorporated the 1997 modifications. The new sentencing guidelines manual and accompanying worksheets were distributed to justice system professionals prior to the effective date of the guidelines revisions. The Commission staff ensures that Commonwealth's attorneys and probation offices are amply stocked with a supply of sentencing guidelines worksheets and manuals, and fulfills requests for additional worksheets on a continual basis. Guidelines manuals are supplied free of charge to state and local government agencies and provided for a reasonable fee to non-governmental entities.

Brochures on New Criminal Sentencing System

During the course of providing educational seminars to justice system professionals, the seminar attendees brought to the Commission's attention their sense that many of the Commonwealth's citizens, particularly crime victims, were not aware of the dramatic changes in Virginia's sentencing system. Due to the fact that the revised sentencing guidelines for non-violent felons were calibrated to reflect historical time served, it is felt that some of our citizens may incorrectly view these sentences as more lenient than the terms imposed under the old parole/inmate good conduct credit system. Also, it was thought that the public may perceive the sentences imposed on violent offenders under the new guidelines as lenient despite the reality that they represent significant enhancements over historical time actually served. The Commission was repeatedly urged by these seminar attendees to make an effort to inform the public at large of the changes in our justice system.

The brochures have proven to be very popular and successful in educating the public on the key elements of Virginia's new sentencing system.



The Commission agreed that an educational effort should be focused on the general public and developed and printed a brochure that highlights the more salient features of the truth in sentencing system. The brochure is written in simple terms and employs several examples to demonstrate the impact of the no-parole policy. Approximately 20,000 brochures were distributed among courthouses, judges, court clerks, Commonwealth's attorneys' offices, probation offices, public defender offices, and victim-witness programs. In addition, the brochures are distributed to all crime victims by the Department of Corrections as part of the information packet sent to notify each crime victim of the pending release from prison of the offender in his or her case. The brochures have proven to be very popular and successful in educating the public on the key elements of Virginia's new sentencing system.

Offender Notification Program

Developed and initiated in 1996, the offender notification program is a joint effort of the Commission and the Department of Corrections to provide educational information about recent significant sentencing reforms to inmates about to depart Virginia's prison system and return to the community. The program provides all exiting inmates a brief review of the sentencing system since the 1995 abolition of parole and institution of new sentencing guidelines that are much tougher on violent offenders. On average, a violent offender sentenced under the new guidelines should expect to serve anywhere from 100% to 500% more time incarcerated than typically served under the state's old laws.

The rationale for the program is two-fold. First, the offender notification program advises inmates about to re-enter society about the dramatic changes in our sentencing and parole laws. Many offenders simply may be unaware of the monumental changes that have occurred while they have been incarcerated. Second, it is hoped that this program will prove to have some specific deterrent value in reducing the likelihood of recidivism. A number of criminological studies of the deterrent value of new punishment initiatives have produced mixed results, with some researchers concluding that many offenders were unaware of the sanctions that were enacted in

hopes of deterring their criminal behavior. Unlike other initiatives, the offender notification program communicates specific information about the sanctions the offender is likely to incur should he re-offend. Thus, the program should increase the potential deterrent effect of Virginia's sentencing reforms among this offender population.

Under the offender notification program, all inmates who are leaving the prison system due to a completed sentence or parole (under old sentencing system) are given a type of "exit interview" where they are informed about the abolition of parole and the old good conduct credit system. Each departing inmate is given a wallet-sized card which contains the specifics on the possible sentencing consequences of being reconvicted of a new felony offense. In simple terms, the information on the card clearly communicates the likely harsher consequences of recidivism and sentencing under the new system. Two cards were prepared for distribution – one for violent offenders and one for non-violent offenders. The use of multiple cards conveys a message to the inmate that is somewhat tailored to a particular offender's situation.

In 1996, the Commission worked closely with the Department of Corrections to implement this innovative program. The Commission instructed correctional staff from the state's prisons facilities during training sessions at three of the Department's four regional offices (Roanoke, Charlottesville and Richmond), and at Greensville Correctional Center in Jarratt, Virginia's largest prison. A booklet of written instructions was also prepared and distributed for use by prison staff. The program was operational statewide in January 1997.

Virginia's offender notification program is the first of its kind in the nation. This program is likely to generate intense interest from criminal justice practitioners and policy makers alike. The Commission has entered into a partnership with the National Center for State Courts in Williamsburg, Virginia and VisualResearch, a private research firm based in Richmond, to evaluate the efficacy of the program in reducing recidivism rates among released inmates. The National Institute of Justice, an agency of the United States Justice Department, has awarded this partnership a federal grant which will fund the study. The purpose of the project will be to evaluate the impact of the program on 1) inmate knowledge about how the sentencing laws will apply to them in the future, and 2) recidivism rates for inmates exposed to the program.

Evaluation of the impact on recidivism rates will be conducted in two stages. In the first stage, inmates released under the old parole laws (prior to sentencing reform and implementation of the offender notification program) will be studied and a baseline inmate recidivism rate established. To accomplish this, researchers will track a sample of inmates released from prison during 1994 and record the rate at which these offenders were reconvicted of felonies after their release. Starting in 1998, researchers will similarly follow a sample of offenders released under the offender notification program to establish a recidivism rate for comparison to the baseline rate. It is anticipated that the results of the study will be of interest to a wide audience of judges, legislators, executive branch agencies and others around the nation with an interest in sentencing reform.

Community Corrections Revocation Data System

Under §17-235(7) of the Code of Virginia, it is the responsibility of the Commission to monitor sentencing practices in felony cases throughout the Commonwealth. While the Commission maintains a wide array of sentencing information on felons at the time they are initially sentenced in circuit court, information on the re-imposition of suspended prison time for felons returned to court for violation of the conditions of community supervision has been largely unavailable and its impact difficult to assess. Among other uses, information on cases involving re-imposition of suspended prison time is critically important to accurately forecast future correctional bed space needs.

With the recent sentencing reforms that abolished parole, circuit court judges now handle a wider array of supervision violation cases. Violations of post-release supervision terms following release from incarceration, formerly dealt with by the Parole Board in the form of parole violations, are now handled by judges. Furthermore, the significant expansion of alternative sanction options available to judges means that the judiciary also are dealing with offenders who violate the conditions of these new programs.

In the fall of 1996, the Commission endorsed the implementation of a simple one-page form to succinctly capture a few pieces of critical information on the reasons for and the outcome of community supervision violation proceedings. Early in 1997, the Commission teamed with the Department of Corrections to implement the data collection form. Procedures were established for the completion and submission of the forms to the Commission. The state's probation officers are responsible for completing the top section of the form each time they request a capias or a violation hearing with the circuit court judge responsible for an offender's supervision. The top half of the form contains the offender's identifying information and the reasons the probation officer feels there has been a violation of the conditions of supervision. In a few jurisdictions, the Commonwealth's Attorney's office has requested that prosecutors actively involved in the initiation of violation hearings also be allowed to complete the top section of the form for the court. The Commission has approved this variation on the normal form completion process.

The sentencing revocation form is then submitted to the judge. The judge completes the lower section of the form with his findings in the case and, if the offender is found to be in violation, the specific sanction being imposed. The sentencing revocation form also provides a space for the judge to submit any additional comments regarding his or her decision in the case. The clerk of the circuit court is responsible for submitting the completed and signed original form to the Commission. The form has been designed to take advantage of advanced scanning technology, which enables the Commission to quickly and efficiently automate the information.

In the spring of 1997, Commission staff met with representatives from probation offices around the state to offer instruction about completion of the form and answer any questions about the form or the completion process. In addition, the Commission now includes training on the sentencing revocation form as part of the standard training provided to new probation officers at the Department of Corrections' Training Academy.

The sentencing revocation data collection form was instituted for all violation hearings held on or after July 1, 1997. The Commission plans to begin analyzing the data in the upcoming year. The Commission believes that the re-imposition of suspended time is a vital facet in the punishment of offenders, and that data in this area has, in the past, been scant at best. The community corrections revocation data system, developed under the auspices of the Commission, will serve as an important link in our knowledge of the sanctioning of offenders from initial sentencing through release from community supervision.

Offense Seriousness Survey

In 1996, the Commission initiated a research project to determine if it is possible to develop a more precise measure of the relative seriousness of crimes than that provided by the statutory penalty structure. Since weighing the relative seriousness of an offender's prior record on the sentencing guidelines is tied to statutory maximum penalties of past convictions, crimes such as the sale of a Schedule I or II drug (§18.2-248c) and second degree murder (§18.2-32), which both carry a maximum 40 year penalty, receive the same value in calculating a sentence recommendation. If the current research proves fruitful, the resulting offense seriousness measure could be adapted for use within the structure of the sentencing guidelines system as a more refined way of measuring an offender's prior criminal history.

Using methodology established in criminological literature, the Commission developed a questionnaire designed to survey criminal justice practitioners (judges, prosecutors, and defense attorneys), asking them to rate the perceived seriousness of 287 criminal acts defined in the Code of Virginia. All felonies which appeared as a conviction offense in 1995 and the 52 most frequent misdemeanors were included in the survey. In order to ensure the reliability of responses and limit respondent fatigue, no respondent was asked to rate more than 72 crimes. Four different survey books were constructed, three containing 72 crimes with the remaining book containing one fewer.

Respondents were asked to rate the seriousness of each crime compared to the same standard offense. The standard offense used for the survey was burglary of a structure other than a dwelling with intent to commit larceny (without a weapon), which was assigned a score of 100. If the respondent felt that a crime was only half as serious as this standard offense, he was instructed to give a score of 50. If, however, the respondent felt that a particular crime was twice as serious as the burglary standard, he was to enter a score of 200. Using this rating process, offenses can be not only ranked in order of most serious to least serious, but the degree of relative seriousness can be compared across offenses included in the survey.

In late 1996 and early 1997, the Commission surveyed Virginia's judges, the Commonwealth's Attorneys and their assistants, public defenders and a sample of members of the criminal defense bar, in order to ascertain the perspectives of all of these professionals in the criminal justice system. The survey was administered to circuit court judges, district court judges and public defenders during various annual conferences attended by these professional groups. A random sample of

private criminal defense attorneys was surveyed through the mail. Over half of the private attorneys in the sample responded to the Commission, an excellent return rate for a mailed survey. Currently, the Commission is in the process of administering a second round of surveys to Commonwealth's attorneys in order to provide the members of this group the opportunity to participate if they did not do so during the initial stage of the project. One of the central research questions to be addressed is whether there is consensus within and across justice system occupational groups with regard to perceptions of crime seriousness. No aggregation of survey responses across diverse groups of respondents will be used unless the research evidence supports it.

In the upcoming months, the Commission will carefully analyze the results of this study and attempt to assess if the results have produced a reliable and useful indicator of the relative seriousness of crimes. If so, the Commission can begin to explore potential applications of the crime seriousness measure within the sentencing guidelines system.

Row homes located at Ninth and Franklin Streets, Richmond, circa 1917, razed to build the Federal Reserve Bank, present site of Virginia Supreme Court Building.

Embezzlement Study

Since the inception of the truth-in-sentencing guidelines, the Commission has encouraged and welcomed feedback from judges, prosecutors and other criminal justice professionals. Concern has been voiced that the guidelines fail to explicitly account for the amount of money stolen in embezzlement cases. Indeed, the guidelines recommendation is not affected by dollar value, regardless of how much is embezzled. Critics argue that embezzlements which involve large monetary amounts deserve more severe sanctioning than cases characterized by small monetary loss and that the guidelines should be modified in some fashion to accommodate this concern.

Responding to the input of guidelines users, the Commission is completing a study of embezzlement cases to examine, among other things, the dollar value embezzled and its impact on sentencing. While Virginia is fortunate in having an extensive data system on felons convicted each year in the Commonwealth, details like the dollar value involved in embezzlement cases are not captured on any current criminal justice data base. Since there exists no automated source of the amount of money involved in embezzlement cases, the Commission initiated a plan for manual data collection of this and other related information. Between January 1, 1995, and June 30, 1997, the Commission received 572 guidelines cases involving convictions for felony embezzlement. All 572 cases were selected for inclusion in the study.

The Commission maintains automated data from all Pre-/Post-Sentence Investigation (PSI) reports. However, the detailed offense and offender descriptions contained in the narrative portions of the PSI are not entered into the automated system. Of particular interest to

the Commission is the offense narrative, which describes the facts and circumstances of the offense. It is the offense narrative that is most likely to report the amount of money stolen in an embezzlement crime. In July of 1997, the Commission requested copies of the offense narrative and the plan of restitution for each study case from probation offices around the state. Furthermore, due to the lag in time between the date of sentencing and the actual later automation of PSIs, many of the embezzlement cases on the sentencing guidelines data base could not be matched to a corresponding automated PSI record. In these cases, the Commission also requested a photocopy of the entire PSI in order to supplement the existing automated data. The Commission has received tremendous cooperation from the probation offices around the state and has now received the requested information.

Commission staff has nearly completed its review of the PSIs and the collection of information on the characteristics of the embezzlement offenses. In addition to dollar value in the case, the Commission is collecting other details about the embezzlement act. These include: the nature of the victim (whether the victim was an individual, a private (non-bank) business, a banking institution, a government agency, or some kind of charity or non-profit group), the duration of the embezzlement, and the status of restitution to the victim at the time of sentencing.

The Commission will soon be entering the analysis phase of the study. Through this special research effort, the Commission hopes to explore the relationship between sentencing and the value of dollar amount embezzled as well as other rich contextual details of these crimes.

Projecting Prison Bed Space Impact of Proposed Legislation

Section 30-19.1:5 of the Code of Virginia requires the Commission to prepare impact statements for any proposed legislation which might result in a net increase in periods of imprisonment in state correctional facilities. Such statements must include details as to any increase or decrease in adult offender populations and any necessary adjustments in guideline midpoint recommendations.

During the 1997 legislative session, the Commission prepared over 75 separate impact analyses on proposed bills. These proposed bills fell into four categories: 1) bills to increase the felony penalty class of a specific crime; 2) proposals to add a new mandatory minimum penalty for a specific crime; 3) proposals to create a new criminal offense; and 4) bills that increase the penalty class of a specific crime from a misdemeanor to a felony.

The Commission utilized its computer simulation forecasting program to estimate the projected impact of these proposals on the prison system. In most instances, the projected impact and accompanying analysis of the various bills was presented to the General Assembly within 48 hours of our notification of the bills introduction. When requested, the Commission provided pertinent oral testimony to accompany the impact analysis.

Prison & Jail Population Forecasting

Since 1987, Virginia has projected the size of its future prison and jail populations through a process known as "consensus forecasting." This approach combines technical forecasting expertise with the valuable judgment and experience of professionals working in all areas of the criminal justice system.

While the Commission is not responsible for generating the prison or jail population forecast, it is included in the consensus forecasting process. During the past year, Commission staff members served on the technical committee that provided methodological and statistical review of the forecasting work. Also, the Commission Director served on the Policy Advisory Committee.

Legislative Directives

House Joint Resolution 131 requests the Commission to study sentencing of juveniles. This study is to examine juvenile sentencing by the circuit courts when sentencing juveniles as adults and by the juvenile courts when sentencing serious juvenile offenders and delinquents.

Complicating the issue of studying juvenile sentencing practices was the fact that during the same session in which this study request was made, the General Assembly also passed major legislation concerning the sanctioning of serious juvenile offenders. It made sense to the Commission that, in light of this legislative action, the study should focus on the sentencing of juveniles under the new laws. While Virginia is second to none in terms of the ability to study our adult felon population, the same cannot be said for our population of offenders processed in the juvenile justice system. Given the lack of a reliable and comprehensive data system in the juvenile justice system, as well as the very recent changes to the juvenile laws, the Commission believes that the prudent course of action is to first put in place an information system to support this inquiry.

In discussing the most appropriate manner in which to complete this study, the Commission chose to employ a methodology which mirrors that previously used by the judiciary for a comprehensive study of adult sentencing practices over a decade ago. Unfortunately, at that time there was no information on felony sentencing practices that was being routinely collected in

an accessible manner. What little was known about adult felony sentencing practices at that time consisted of a one-time study of some non-randomly selected cases to support the work of the Governor's Task Force on Sentencing (1983). This particular task force was hampered in its work due to its inability to examine comprehensive and reliable information on sentencing practices across Virginia. Among other things, this task force recommended that the Commonwealth develop and implement a uniform data collection system on all felony conviction cases. This system was seen as critical to ensuring that policy makers in the future could be guided by sound and reliable information on matters related to our felon population.

This recommendation culminated in the creation of the automated pre-sentence investigation information system in 1985. Since February, 1985, every pre-sentence and post-sentence investigation completed on a convicted felon has been automated on a computer by the Department of Corrections. Each one of these investigations provides a great wealth of critical information on the characteristics of the crime, the court processing of the case, the offender's criminal record, and prior employment, education, family, health, and substance abuse history. This particular data base is, without question, one of the most comprehensive and reliable information sources on a felon population in the United States. Over the past decade, the analysis of this information for those in all branches of government has guided policy and decision making on numerous criminal justice policies, programs, and issues. The existence of this information system has provided sound and objective data which has fostered informed debate on critical criminal justice system issues. Most importantly to the Commission, this data system served as the information source for the judiciary's study of felony sentencing practices and for the sentencing guidelines system.

There is no parallel data collection system in the juvenile justice system to that maintained for adults by the Department of Corrections. While some recent strides have been made by the Department of Juvenile Justice in improving the information gathered on some segments of the juvenile offender population, these data systems still fall far short of what is required to complete a thorough study of sentencing practices.

In essence, the Commission has endorsed the idea of creating in the juvenile justice system a standardized pre-sentence investigation type form. In recognition that its members did not include individuals with much expertise in the area of the juvenile justice system, the Commission voted to create a Juvenile Sentencing Study Advisory Committee to oversee the creation of the new data system as well as the subsequent analysis and interpretation of the collected information.

The advisory committee met and discussed the pros and cons of developing and implementing the type of data system requested by the Commission. Among the issues discussed were defining how broad the data collection should be (e.g., juveniles charged with serious felonies, violent felonies, etc.), deciding who will gather the information, defining what specific information

to collect, and deciding how to pay for getting such a complicated system up and running. With regard to the last issue, the advisory committee endorsed the Commission's proposal to prepare and submit a grant request for federal funds to the Department of Criminal Justice Services. The requested funds would be used to support all aspects of designing, implementing, and maintaining this data system.

The process of developing a grant proposal and securing funds was completed over the past year and the Commission is now moving forward with these monies to hire temporary support staff to move the project forward.

The targeted timetable for initial implementation of the data system is late 1998. The subsequent analysis of the collected information will proceed as soon as a sufficient number of cases are gathered on the juvenile population affected by the new data system. It is, however, not likely that the Commission will be in a position to report findings on a juvenile sentencing study until the 1999 Annual Report.

In another legislative directive, §17-235, paragraphs 4, 5, and 6 of the Code of Virginia charge the Commission with developing an offender risk assessment instrument for use in all felony cases. Based on a study of Virginia felons, the risk assessment instrument will be predictive of the relative risk that an offender will pose a threat to public safety. The Commission must apply the risk assessment instrument to property and drug offenders as defined in §17-237. The purpose of this legislation and the goal of the risk assessment instrument is to determine, with due regard for public safety needs, the feasibility of placing 25% of property and drug offenders, who otherwise would be incarcerated in prison, in alternative punishment programs.

The Commission's report on this legislative directive is contained later in this report in the Offender Risk Assessment chapter.

Guidelines Compliance

Introduction

The sentencing guidelines instituted in 1995 were designed to provide sentencing recommendations which embodied the abolition of parole and the introduction of "truth-in-sentencing" in Virginia, whereby convicted felons serve at least 85% of the pronounced sentence. The guidelines apply to felony offenses committed on or after January 1, 1995. Because application of the guidelines is linked to the date of offense and because of the usually lengthy criminal justice processing time for felony offenses (from date of offense to date of sentencing), full implementation was not achieved until sometime well into the guidelines' second year. Cases sentenced today under these sentencing guidelines, the Commission believes, truly represent the full range of cases being processed through Virginia's criminal justice system.

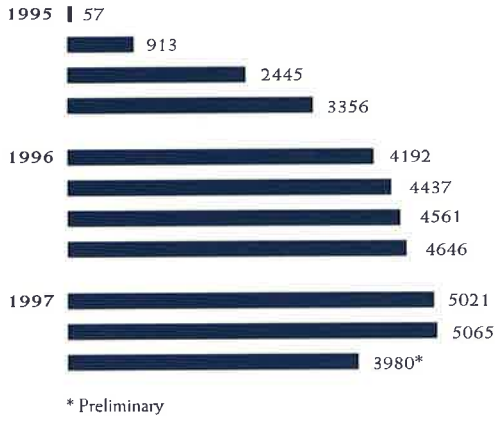
Between January 1, 1995, through September 30, 1997, the Commission received 38,969 cases sentenced under the truth-in-sentencing, or no-parole, guidelines. The majority of the analysis of guidelines compliance which follows includes all cases received during that period. However, recommendations which the Commission presented in its 1996 Annual Report became effective July 1, 1997. The impact of these recent changes on judicial sentencing and compliance will be the focus of a section of this chapter.

Case Characteristics

Because the application of the sentencing guidelines is associated with offenses committed on or after January 1, 1995, utilization of the guidelines in felony sentencings has grown dramatically since the Commission was established. While receiving only 57 cases in the first quarter of 1995, 5,065 cases were submitted to the Commission in the second quarter of 1997 (Figure 1). This quarterly figure translates into an annual rate of over 20,000 felony sentencings per year.

Figure 1

Number of Cases Received by Quarter of Sentencing



* Preliminary

Figure 2

Number and Percentage of Cases Received from each Circuit

Circuit	Number	Percent
1	1096	2.8%
2	2854	7.3
3	1346	3.5
4	3417	8.8
5	1037	2.7
6	615	1.6
7	2082	5.3
8	817	2.1
9	664	1.7
10	884	2.3
11	840	2.2
12	1032	2.6
13	2635	6.8
14	1651	4.2
15	1580	4.1
16	1034	2.7
17	1299	3.3
18	1016	2.6
19	2346	6.0
20	673	1.7
21	700	1.8
22	1070	2.7
23	1515	3.9
24	1539	3.9
25	1169	3.0
26	1126	2.9
27	857	2.2
28	483	1.2
29	361	0.9
30	207	0.5
31	1024	2.6

1,000 - 1,999 cases
2,000 + cases

By September 30, 1997, every circuit court in Virginia had experience with at least a few hundred felony cases under the sentencing guidelines. Two-thirds of the state's 31 circuits sentenced 1,000 felony cases or more during this time (Figure 2). Five urban circuits, following Virginia's "Golden Cresent" of the most populous areas of the state, submitted at least 2,000 sentencing guidelines cases to the Commission. Cases from Virginia Beach (Circuit 2), Norfolk (Circuit 4), Newport News (Circuit 7), the City of Richmond, (Circuit 13), and Fairfax (Circuit 19) together comprise 34% of all cases received by the Commission.

Virginia's criminal cases are resolved as the result of guilty pleas from defendants or plea agreements between the defendant and the Commonwealth, adjudication by a judge in a bench trial, or determination of a jury composed of Virginia's citizens. Of the 38,969 cases received by the Commission as of September 30, 1997, more than four out of every five felony cases in Virginia's circuit courts were resolved by guilty pleas or plea agreements (Figure 3). Only 15% of these cases were adjudicated by a judge. Under these sentencing guidelines, less than 3% of the felony cases have been tried by juries. See *Juries and the Sentencing Guidelines* in this chapter for more information on recent trends in rates of jury trials.

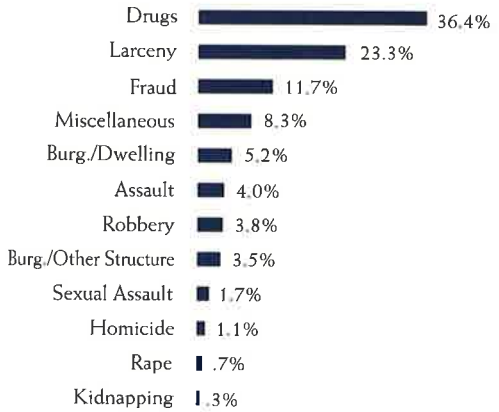
Figure 3

Percentage of Cases Received by Method of Adjudication

Of the 12 offense groups which comprise Virginia's sentencing guidelines (based on primary, or most serious, offense), drug offenses represent, by far, the largest share (36%) of the cases in Virginia circuit courts (Figure 4). The vast majority of the drug cases are convictions for the possession of a Schedule I/II drug, such as cocaine. In fact, one out of every five cases received by the Commission involved a conviction for this offense. The property offense groups of larceny and fraud are the next most frequent sentencing guidelines offense groups, representing 23% and 12% of the cases, respectively. The miscellaneous offense group, comprised of mostly habitual traffic offenders, captures about 8% of the guidelines cases.

Figure 4

Percentage of Cases Received by Primary Offense Group

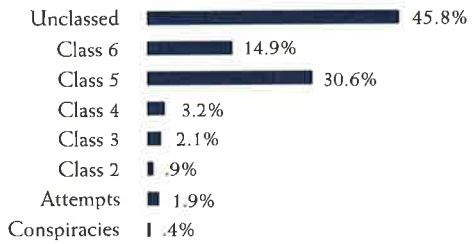


By comparison, the violent crimes of assault, robbery, homicide, rape and other sex crimes, represent a much smaller share of the cases under analysis. While the most common violent offense groups, assault and robbery, each represent about 4% of the guidelines cases, kidnapping cases make up less than one-half of one percent of the cases received to date.

The sentencing guidelines cover a wide range of felonies across many statutory seriousness levels. The felony classification of an offense indicates the statutory seriousness level of the crime. Class 1 crimes, the most serious, are capital murder crimes and are not covered by the sentencing guidelines, while Class 6 are the least serious felonies. An unclassed felony is one with a unique penalty which does not fall into one of the established Class 1 through Class 6 penalty ranges. Nearly one-half of guidelines cases (46%) involve these unclassed felonies, mainly due to the overwhelming number of unclassed drug offenses, particularly the sale of a Schedule I/II drug, and grand larceny offenses (Figure 5). Among the classed felonies, Class 5 felonies comprise the greatest share of guidelines cases due, in large part, to the fact that one Class 5 crime, the possession of a Schedule I/II drug, accounts for the greatest number of felony convictions.

Figure 5

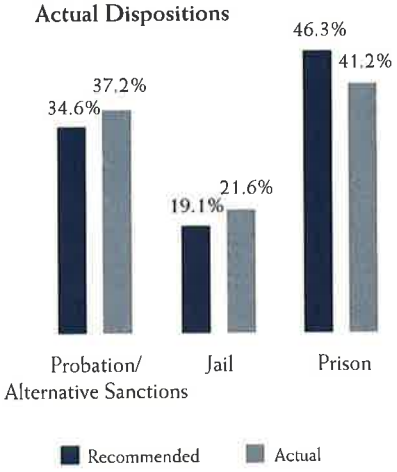
Percentage of Cases Received by Felony Class of Primary Offense



Since the inception of the sentencing guidelines, the correspondence between dispositions recommended by the guidelines and the actual dispositions imposed has been quite high. The sentencing guidelines provide for each case a recommendation for the type of disposition (probation/alternative sanction, incarceration up to six months or incarceration greater than six months), and the length of the incarceration in jail or prison. For the 38,969 cases under analysis, the guidelines recommended that 46% of the offenders be sentenced to imprisonment in excess of six months, with an additional 19% recommended for incarceration for some period less than that (Figure 6). The remaining 35% were recommended for probation or a non-incarceration sanction. The actual dispositions for these cases reflect a high degree of consensus with the guidelines recommendation for type of disposition. Over 41% of these offenders were sentenced to more than six months behind bars and 22% to terms of up to six months, while 37% were sentenced to probation or some other alternative sanction. The results reveal that, overall, judges impose an incarceration sanction slightly less often than recommended by the guidelines, instead utilizing probation or alternative sanctions more often than the guidelines recommend.

Figure 6

Recommended Dispositions and Actual Dispositions



Guidelines Compliance

Per the recommendation made by the Commission in last year's Annual Report, beginning July 1, 1997, sentences to the state's Boot Camp Incarceration, Detention Center Incarceration and Diversion Center Incarceration programs are defined as incarceration sanctions for the purposes of the sentencing guidelines. While they continue to be defined as "probation" programs in their enactment clauses in the Code of Virginia, these programs involve incarceration in a secure facility from three months up to six months, depending on the program. Moreover, the Detention Center and Diversion Center Incarceration programs require participation in mandatory substance abuse treatment and other programs, which when teamed with incarceration, may represent more of a punitive sanction than an otherwise traditional length of incarceration. The Commission felt that it was important to accurately portray these programs by defining them as incarceration terms under the sentencing guidelines, acknowledging that they are indeed a more restrictive sanction than probation supervision in the community. Of the 38,969 cases in the current analysis, cases sentenced since July 1 of this year to one of these alternative sanction programs are categorized as cases with dispositions of incarceration up to six months.

Compliance Defined

Judicial compliance with the sentencing guidelines is voluntary. A judge may depart from the guidelines recommendation and sentence an offender either to a punishment more severe or one less stringent than that called for by the guidelines. In cases in which the judge has elected to sentence outside of the guidelines recommendation, a reason for departure, as stipulated in §19.2-298.01 of the Code of Virginia, must be submitted to the Commission.

Compliance with the sentencing guidelines is measured by two distinct classes of compliance: strict and general compliance. 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 (probation, incarceration up to six months, incarceration more than six months) as the guidelines recommend and to a term of incarceration which falls exactly within the sentence range recommended by the guidelines. Three types of compliance together make up general compliance: compliance by rounding, time served compliance, and compliance by special exception in habitual traffic offender cases. General compliance results from the Commission's attempt to understand judicial thinking in the sentencing process, and is also meant to accommodate special sentencing circumstances.

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

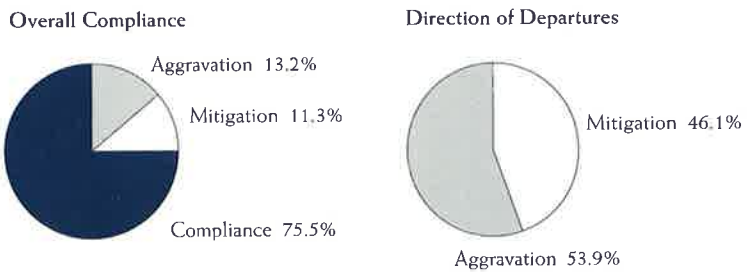
Compliance by special exception in habitual traffic cases arises as the result of amendments to §46.2-357(B2 and B3) of the Code of Virginia, effective July 1, 1997. The amendment allows judges, at their discretion, to suspend the mandatory minimum 12 month incarceration term required in habitual traffic felonies and sentence these offenders to a Boot Camp Incarceration, Detention Center Incarceration or Diversion Center Incarceration program. For cases sentenced since the effective date of the legislation, the Commission considers either mode of sanctioning 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 the recommendations of the sentencing guidelines, both in type of disposition and in length of incarceration. For the 38,969 cases received by the Commission as of September 30, 1997, the overall rate of compliance with the sentencing guidelines is nearly 76% (Figure 7). The rate at which judges sentence offenders more severely than the sentencing guidelines recommendation, known as the "aggravation" rate, is 13%. Conversely, the rate at which judges sentence offenders to sanctions which fall below the sentencing guidelines recommendation, or the "mitigation rate," is 11%. Isolating cases which resulted in departures from the guidelines does not reveal a strong bias toward sentencing above or below guidelines recommendations. Of the departures, 54% are cases of aggravation while 46% are cases of mitigation. These patterns of compliance and departure have been stable since the sentencing guidelines were instituted in 1995.

Figure 7

Overall Guidelines Compliance and Direction of Departures



Compliance by Sentencing Guidelines Offense Group

While the overall guidelines compliance rate is relatively high and departures from the guidelines do not tend strongly toward aggravation or mitigation, the same cannot be said for compliance rates within the guidelines primary offense groupings. Examining compliance by the 12 offense groups reveals that compliance is not uniform, nor is the departure pattern consistent, across the offense groups (Figure 8). It is pertinent to note that offenses in the violent offense groups, along with burglaries of dwellings and burglaries with weapons, receive statutorily mandated midpoint enhancements which increase the sentencing guidelines recommendation in such cases by a minimum of 100%-125% (§17-237 of Code of Virginia). Further midpoint enhancements are applied in cases in which the offender has a violent prior record, resulting in a sentence recommendation in some cases that is up to six times longer than historical time served by violent offenders convicted of similar crimes under the old parole laws. Undoubtedly, midpoint enhancements impact compliance rates, and the effect is not likely uniform across guidelines offense groups, but the impact cannot be disentangled from the compliance rates of offenses.

Figure 8

Guidelines Compliance by Offense

	Compliance	Mitigation	Aggravation	Number of Cases
Assault	68.7%	17.2%	14.1%	1598
Burglary/Dwelling	67.3	19.4	13.3	1884
Burg./Other Structure	71.5	14.9	13.6	1298
Drug	74.7	9.9	15.4	14193
Fraud	78.8	15.0	6.2	4725
Kidnapping	59.4	20.6	20.0	155
Larceny	82.8	6.9	10.3	8817
Miscellaneous	75.8	7.7	16.5	3178
Murder/Homicide	65.4	12.8	21.8	477
Rape	61.8	29.3	8.9	369
Robbery	64.0	21.6	14.4	1533
Sexual Assault	61.2	10.5	28.3	742

The compliance rate ranges from a high of 83% in the larceny offense group to a low of 59% among kidnapping offenses. In general, property offenses demonstrate rates of compliance higher than the violent offense group categories. Larceny, fraud, drugs, and the miscellaneous offense group all have compliance rates at or above 70%. The violent offenses (assault, homicide, rape, robbery, and sexual assault offenses) all have compliance rates below 70%, with kidnapping falling below 60%.

Burglary of a dwelling, which receives statutorily mandated midpoint enhancements like that of robbery, registers a compliance rate similar to assault and robbery crimes. Burglary of an other structure (non-dwelling), which does not receive a midpoint enhancement when a primary offense, exhibits the lowest compliance rate of all property offenses (72%).

The departure patterns do indeed differ significantly across the offense groups. Among the property offenses, fraud offenses have a marked mitigation pattern among the departures, while drug, larceny and miscellaneous offenses reveal patterns of aggravation. Only burglary of an other structure (non-dwelling) displays a balanced pattern between mitigation and aggravation in those cases in which the judge elected to depart from the guidelines. Departures from the burglary of dwelling guidelines show a marked tendency toward mitigation.

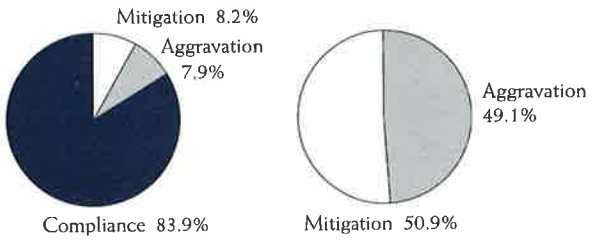
With regard to the violent offenses of assault, rape and robbery, all demonstrate strong mitigation patterns. In fact, in nearly a third of the rape cases and over a fifth of the robberies, judges sentenced below the guidelines recommendation. The kidnapping offense group, interestingly, maintains the lowest compliance rate of all the offenses, yet the departure pattern is evenly split between aggravations and mitigations of the guidelines recommendation. Despite the midpoint enhancements for violent current offenses and violent prior records, the guidelines offense groups of homicide and sexual assault show stronger aggravation patterns from the guidelines than those for the other crime categories. To a certain degree, the aggravation patterns for homicide and sexual assault offenses may reflect judicial sentencing for "true" offense behavior in cases in which, due to plea agreement, the offense at conviction is less serious than the actual offense behavior or the offense for which the offender was originally indicted. In its 1996 Annual Report, the Commission made a recommendation to address one aspect of "true" offense behavior in sexual assault cases by adding a factor which increases the likelihood of an incarceration recommendation for crimes committed against children under the age of 13. See the *Compliance and 1997 Guidelines Revisions* section of this chapter for more information regarding this modification.

Dispositional Compliance

Dispositional compliance is an important feature of overall compliance with guidelines. Indeed, the recommendation as to type of disposition serves as the foundation of the sentencing guidelines system. Dispositional compliance with the sentencing guidelines is the rate at which judges sentence offenders to the same type of disposition that is recommended by the guidelines for the case. For the cases received as of September 30, 1997, the dispositional compliance rate approaches 84% (Figure 9). Such a high rate of dispositional compliance rate indicates that judges agree with the type of sanction being recommended in the vast majority of cases. For instance, where the guidelines recommend incarceration greater than six months, 81% of the offenders actually received this penalty. Although some offenders received a shorter term of incarceration, only 11% of the offenders were given a sanction that did not involve any active term of incarceration. The rate of dispositional compliance has remained largely stable since the truth-in-sentencing guidelines were initiated. Of the relatively few cases not in dispositional compliance, those receiving more severe sanctions are nearly equal in number to those receiving sanctions less severe than the guidelines recommendation.

Figure 9

Dispositional Compliance and Direction of Departures



Dispositional compliance rates by primary offense group range from a high of 93% in robbery cases to 70% for sexual assault (Figure 10). With the exception of sexual assault and burglary of a dwelling, dispositional compliance rates for all other offense groups are 80% or better. The low dispositional compliance rate for sexual assault offenses is in large part due to cases in which judges sentence offenders convicted of aggravated sexual battery to prison or jail, despite the recommendation for probation for offenders with little or no prior criminal history. The Commission has attempted to address the desire on the part of judges to sentence sexual offenders more harshly, in part, by adding a factor to the guidelines which will more likely result in an incarceration recommendation if the crime victimized a child under 13 years old.

Figure 10

Dispositional Compliance by Offense

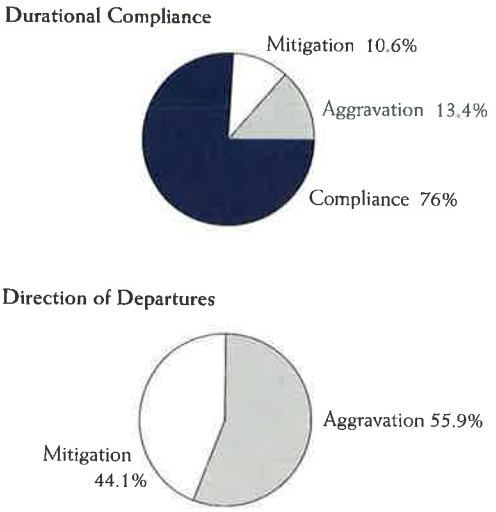
	Compliance	Mitigation	Aggravation	Number of Cases
Assault	83.3%	10.6%	6.1%	1598
Burglary/Dwelling	78.7	11.5	9.8	1884
Burg./Other Structure	81.4	9.8	8.8	1298
Drug	82.4	8.2	9.4	14193
Fraud	82.5	13.3	4.2	4725
Kidnapping	81.3	13.5	5.2	155
Larceny	85.9	5.6	8.5	8817
Miscellaneous	88.4	6.5	5.1	3178
Murder/Homicide	91.8	3.6	4.6	477
Rape	90.2	9.5	0.3	369
Robbery	92.5	5.4	2.1	1533
Sexual Assault	70.2	5.8	24.0	742

Durational Compliance

Considering durational compliance allows the Commission to assess the degree to which judges concur with the recommended range when the sentencing guidelines call for an offender to serve an active term of incarceration. Durational compliance is defined as the rate at which judges sentence offenders to terms of incarceration that fall exactly within the recommended guidelines range. For the analysis presented here, durational compliance considers only those cases in which the guidelines recommend an active term of incarceration and the offender actually received an incarceration sanction consisting of at least one day in jail. For the 1995-1997 cases received by the Commission, durational compliance is 76% (Figure 11). The rate of durational compliance is lower than the rate of dispositional compliance reported in the previous section.

Figure 11

Durational Compliance and Direction of Departures



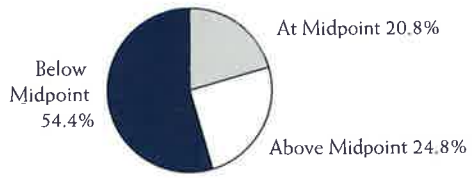
This result indicates that judges agree with the type of sentence recommended by the guidelines more often than they agree with the specific recommended sentence length in incarceration cases. For incarceration sentences not within the recommended range, judges are more likely to sentence above than below the guidelines (56% vs. 44%).

The sentencing ranges recommended by the guidelines are relatively broad, allowing judges to utilize their discretion in sentencing offenders to different incarceration terms while still remaining in compliance with the guidelines. The Commission, therefore, is interested in the sentencing patterns exhibited by judges for cases that are in durational compliance as well as those out of durational compliance.

Analysis of cases receiving incarceration in excess of six months that are in durational compliance reveals that over one-fifth were sentenced to prison terms equivalent to the midpoint recommendation (Figure 12). Altogether, 75% of the cases in durational compliance were sentenced at or below the sentencing guidelines midpoint recommendation; only 25% of these cases were sentenced above the recommended midpoint. It is interesting to note that this pattern of durational compliance in prison cases has been consistent since the sentencing guidelines took effect, and that judicial sentencing did not exhibit any transition or "adjustment" period.

Figure 12

Distribution of Sentences within Guidelines Range - Prison Cases in Compliance



With regard to incarceration cases not within durational compliance, "effective" mitigated sentences (sentences less any suspended time) fell short of the guidelines range by a median value of 8 months (Figure 13). For offenders receiving longer than recommended sentences, the effective sentence exceeded the guidelines range by a median value of 12 months. Thus, departures from the guidelines in these cases are typically short, indicating that disagreement with the guidelines recommendation is, in most cases, not of a dramatic nature.

Figure 13

Median Length of Durational Departures

Reasons for Departure from the Guidelines

While compliance with the guidelines recommendation is still voluntary, §19.2-298.01 of the Code of Virginia requires each judge to articulate and submit his or her reason(s) for sentencing outside the guidelines recommended range. The explanations that judges impart indicate to the Commission where judges disagree with the sentencing guidelines and where the guidelines may need adjustment or amendment. The opinions of the judiciary, as reflected in their departure reasons, are highly relevant to the Commission as it deliberates on revision recommendations. For instance, based on specific departure reasons cited by judges in drug cases, together with input from other criminal justice professionals, the Commission launched efforts to address concerns relating to the drug guidelines. Effective July 1, 1997, the Commission modified the drug sentencing guidelines to explicitly account for the amount of drug involved in cases of offenders convicted of selling larger amounts of cocaine. See the *Compliance and 1997 Guidelines Revisions* section of this chapter for more information regarding this modification.

Figure 14

Most Frequently Cited Reasons for Mitigation

Represents most frequently cited reasons only. Multiple reasons may be cited in each case.

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. The Commission studies departure reasons in this context.

For the 38,969 cases in the current analysis, the rate at which judges sentence offenders to sanctions which fall below the sentencing guidelines recommendation, or the "mitigation rate," is 11%. Isolating these mitigation cases reveals that judges reported the decision to sentence an offender to an alternative sanction or community treatment more frequently than any other mitigation departure reason (Figure 14). These alternatives include, but are not limited to: Boot Camp Incarceration, Detention Center Incarceration, Diversion Center Incarceration program, intensive supervised probation, and the day reporting center program. These mitigation cases represent diversions from a recommended incarceration term in those cases in which the judge felt the offender was amenable to such punishment. The legislation which abolished parole and instituted truth-in-sentencing in Virginia also authorized appropriations for a wide array of state and local alternative sanctioning and community-based programs to be established throughout the Commonwealth. As these programs have expanded to accommodate more offenders, judges using them have advised the Commission through their departure reasons. Use of alternative sanctions has increased from one out of every seven mitigation departure reasons in 1995 to one out of every four mitigations in 1997.

The next most popular mitigation reason, other than sentences to alternative sanctions or community programs, is the assertion by judges of the offender's potential for rehabilitation, which was cited in one out of every six cases sentenced below the guidelines. For instance, judges may cite the offender's general rehabilitation potential or they may cite more specific reasons such as the offender's excellent progress in a drug rehabilitation program, an excellent work record, the offender's remorse, a strong family background, or the restitution made by the offender. An offender's potential for rehabilitation is often cited in conjunction with the use of an alternative sanction.

In over 10% of the mitigation cases, judges referred to the offender's cooperation with authorities, such as aiding in the apprehension or prosecution of others. Judges, in 9% of the low departures, indicated only that they sentenced in accordance with a plea agreement. Only slightly less often, however, judges noted that the evidence against the defendant was weak or that a relevant witness refused to testify in the case.

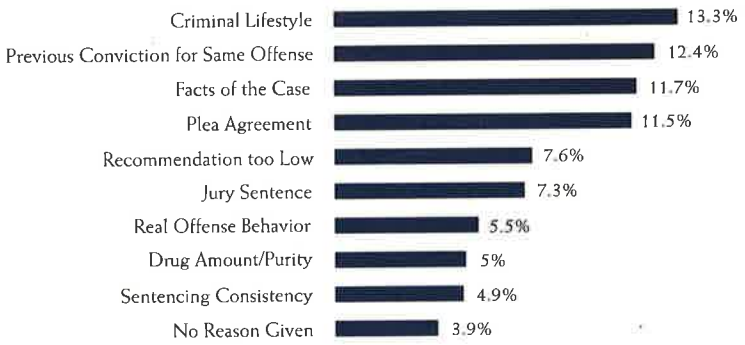
According to departure reasons submitted to the Commission, judges considered the offender's age in 6% of the mitigations. In nearly as many cases, judges specified the lack of a prior criminal record, or at least the lack of any serious prior record offenses, as the reason for sentencing below the guidelines recommendation. In some cases, judges sentenced below the guidelines indicating that the offender had already been sentenced to incarceration by another jurisdiction or in a previous proceeding (5%). Judges indicated in a few cases only that they were guided by the specific facts of the case in their decision to mitigate the guidelines recommendation (5%).

In less than 6% of the mitigation cases, no reason for departure was submitted to the Commission. Cases lacking departure reasons are typically those cases submitted in 1995 and 1996, during the initial implementation period of the sentencing guidelines, as judges adjusted to the new requirement to report departure reasons. By 1997, only about 1% of mitigation cases lacked departure reasons. The Commission attempts to obtain the reasons for departure in these cases whenever possible.

Overall, the rate at which judges sentence offenders more severely than the sentencing guidelines recommendation, or the "aggravation" rate, is 13%. Examining only the aggravation cases, the Commission finds that the most common reason for sentencing above the guidelines recommendation, cited in over 13% of the aggravations, is that the offender's criminal lifestyle or history of criminality far exceeds the contents of his formal criminal record of convictions or juvenile adjudications of delinquency (Figure 15). Only slightly less often, however, judges indicated the offender's prior convictions for the same or a very similar offense as the current case.

Figure 15

Most Frequently Cited Reasons for Aggravation



Represents most frequently cited reasons only. Multiple reasons may be cited in each case.

In almost 12% of the aggravation cases, judges reported that the facts of the case, or extreme aggravating circumstances, existed such that the offender deserved a higher than recommended sentence. In almost as many cases, judges recorded "plea agreement" as the only departure reason. Judges stated in 8% of the upward departures that they felt the guidelines recommendation was too low. Judges related to the Commission that 7% of the aggravation cases were the result of sentences imposed by a jury. Judges also reported that the offender's actual offense behavior in some cases was more serious than the offenses for which the offender was ultimately convicted and sometimes referred to sentencing consistency with a codefendant's case or with similar cases. In 5% of the aggravation cases, judges cited the large quantity of drug involved or above average drug purity. The Commission anticipates that this reason for departure, applicable only in drug cases, will decline in the future, since the Commission has recently modified the drug guidelines to account for quantity of cocaine in a sales related offense.

Among the aggravation cases, overall, 4% were submitted without a reason for departure. In 1997, however, less than 1% lacked a reason for aggravation.

Appendices 1 and 2 contain detailed analysis of the reasons for departure from guidelines recommendations for each of the 12 guidelines offense groups.

Specific Offense Compliance

The Commission studies compliance by specific felony crime, not only because overall compliance and departure figures are largely driven by the most frequently occurring offenses, but because such analysis assists the Commission in detecting and pinpointing those crimes where judges disagree with the sentencing guidelines most often. Because the guidelines are assembled into 12 offense groups, crimes which exhibit very high compliance and those which demonstrate low compliance may be collected into the same guidelines offense group, thereby masking the underlying compliance and departure patterns that are of interest to the Commission.

The guidelines cover 159 distinct felony crimes specified in the Code of Virginia, and collectively encompass about 95% of all felony sentencing events in Virginia's circuit courts. For only 46 of those crimes has the Commission received 100 or more cases, but, together, these crimes account for nearly all (93%) of the 38,969 cases submitted to the Commission as of September 30, 1997 (Figure 16).

Figure 16

Compliance for Specific Felony Crimes

	Compliance	Mitigation	Aggravation	Number of Cases
Person				
Malicious Injury	63.4%	23.3%	13.3%	655
Unlawful Injury	73.8	12.4	13.8	751
Abduction by Force without Justification	63.8	22.9	13.3	105
1st Degree Murder	81.8	15.2	3.0	198
2nd Degree Murder	55.1	7.5	37.4	107
Aggravated Sexual Battery, Victim Less than 13 years old	56.8	10.3	32.9	252
Carnal Knowledge, Victim 13 or 14 years old	67.7	9.1	23.2	164
Rape by Threat, Force or Intimidation	58.0	32.9	9.1	143
Robbery of Business with Gun or Simulated Gun	62.3	26.0	11.7	350
Robbery in Street with Gun or Simulated Gun	61.8	22.6	15.6	314
Robbery of Business, No Gun or Simulated Gun	72.2	17.0	10.8	194
Robbery in Street, No Gun or Simulated Gun	64.7	19.0	16.3	448
Grand Larceny from a Person	77.1	7.8	15.1	643
Property				
Possess Burglary Tools	75.8	7.5	16.7	120
Burglary of Dwelling with Intent to Commit Larceny, No Deadly Weapon	67.9	19.6	12.5	1596
Burglary of Other Structure with Intent to Commit Larceny, No Deadly Weapon	71.2	15.8	13.0	1139
Burglary of Dwelling at Night with Intent to Commit Larceny, No Deadly Weapon	59.9	23.8	16.3	172
Credit Card Theft	78.9	16.2	4.9	598
Credit Card Forgery	88.5	5.4	6.1	130
Forgery of Public Record	77.0	15.0	8.0	727
Forgery	78.6	16.7	4.7	1422
Uttering	79.4	14.9	5.7	576
Bad Check, Valued $200 or more	78.2	13.8	8.0	312
Credit Card Fraud, Valued $200 or more over 6 months	78.9	13.2	7.9	114
Welfare Fraud, Valued $200 or more	86.9	6.1	7.0	114
Bad Checks- 2 or More over 90 days, Combined Value $200 or more	81.1	15.0	3.9	207
Obtain Money by False Pretenses, Valued $200 or more	75.7	15.3	9.0	387
Shoplifting Goods Valued Less than $200 (3rd conviction)	80.9	11.1	8.0	674
Shoplifting Goods Valued $200 or more	79.8	4.9	15.3	183
Grand Larceny, Not from Person	82.9	5.9	11.2	3583
Petit Larceny- 3rd Conviction	81.8	10.6	7.6	1201
Grand Larceny Auto	81.7	7.9	10.4	608
Unauthorized Use of Vehicle Valued $200 or more	87.8	5.0	7.2	558
Embezzlement of $200 or more	88.3	1.5	10.2	678
Receive Stolen Goods Valued $200 or more	84.1	7.5	8.4	440
Drug				
Obtain Drugs by Fraud	88.9	1.3	9.8	460
Possession of Schedule I/II Drug	80.2	3.3	16.5	8163
Sale of .5 oz - 5 lb of Marijuana	78.5	5.4	16.1	796
Sale of More than 5 lb of Marijuana	62.4	20.8	16.8	101
Sale of Schedule I/II Drug for Accomodation	74.2	10.6	15.2	329
Sale, etc. of Schedule I/II Drug	62.6	25.0	12.4	3952
Sale, etc. of Schedule I/II Drug-Subsequent Conviction	53.0	11.4	35.6	149
Other				
Hit and Run with Victim Injury	86.0	3.2	10.8	249
Habitual Traffic Offense with Endangerment to Others	76.1	2.1	21.8	620
Habitual Traffic Offense- 2nd Offense, No Endangerment to Others	78.3	3.0	18.7	888
Possession of Firearm or Concealed Weapon by Convicted Felon	74.2	17.4	8.4	811

The compliance rates for the crimes listed in Figure 16 range from a high of 89% for obtaining drugs by fraud to a low of 53% for offenders convicted of selling, distributing, manufacturing or possessing with intent to distribute a Schedule I/II drug for a subsequent time. The single most common felony offense, simple possession of a Schedule I/II drug, which comprises one out of every five guidelines cases, registers a compliance rate of 80%.

Two types of assault, malicious injury, a Class 3 felony, and unlawful injury, a Class 6 felony, appear in Figure 16. While the compliance in unlawful injury cases (74%) approximates overall compliance, malicious injury cases exhibit compliance more than ten percentage points lower, with departures that decidedly favor mitigation. Both first degree and second degree murder surpassed the 100 case mark. Compliance in first degree murder cases is exceedingly high (82%), but second degree murder has the lowest compliance rate of all offenses (55%) in the list except one. Nearly all the departures in second degree murder cases are sentences which exceed the guidelines range. Some of these aggravated terms for second degree murder convictions may represent a product of "real offense sentencing" where the sanction is based on the nature of the actual criminal conduct which is more representative of behavior associated with a conviction for first degree murder.

Rape by threat, force or intimidation is an offense with a compliance rate of only 58%. In a third of these rapes, judges sentenced offenders to punishment less severe than that recommended by the guidelines. This departure pattern should not necessarily be interpreted as an indication of leniency in the punishment of rapists. Many of these cases involve circumstances that necessitate plea negotiations that ensure a felony conviction and some degree of incarceration time when the alternative might be no conviction at all. Two other sexual assault offenses, aggravated sexual battery (victim less than 13 years old) and carnal knowledge (victim 13 or 14 years old), persistently yield low compliance rates accompanied by high rates of aggravation. See the *Compliance and 1997 Guidelines Revisions* section of this chapter for more information regarding modifications to the sexual assault guidelines designed to address low compliance in crimes committed against very young victims.

Of the four robbery offenses in Figure 16, those committed without a gun or simulated gun have higher compliance rates than those with a gun or simulated gun, though all are below the overall compliance rate. Departures in these robbery cases favor mitigation. Burglaries of other structures (non-dwellings) with intent to commit larceny (no weapon) demonstrate the highest compliance rate of all burglaries in Figure 16 (71%), except for possession of burglary tools (76%), while the compliance for burglary of dwelling at night (no weapon) is about 60%.

Every fraud and larceny offense listed in Figure 16 has a compliance rate which meets or exceeds the overall compliance rate, with many reaching into the 80%-89% range. The most common of these, grand larceny (not from person), has a compliance rate of 83%.

For many drug offenses in Figure 16 compliance is quite high, particularly for the act of obtaining drugs by fraud and possession of a Schedule I/II drug, as previously discussed. Most sales related drug offenses, however, are characterized by substantially lower compliance rates. Sentences for the sale, distribution, manufacture, or possession of a Schedule I/II drug with intent to distribute comply with guidelines only 63% of the time. Such acts involving more than five pounds of marijuana have a compliance rate of 62%.

Departures for both offenses favor mitigation. In many of the mitigations, judges have deemed the offender amenable for placement in an alternative punishment such as Boot Camp Incarceration or Detention Center Incarceration, programs the General Assembly intended to be used for nonviolent offenders who otherwise would be incarcerated for short periods of time. In stark contrast, however, offenders convicted for a second or subsequent sale of a Schedule I/II drug are sentenced to incarceration terms in excess of the guidelines recommendation in more than a third of the cases. This particular departure pattern is based on a relatively small number of cases and will be more fully investigated by the Commission as more data accumulates on this offense.

Compliance by Circuit

Compliance rates and departure patterns vary significantly across Virginia's 31 circuits (Figure 17). The map and accompanying table on the following pages detail the specific location of Virginia judicial circuits.

Overall, 15 of the state's 31 circuits demonstrate compliance rates in the 70% to 79% range, with an additional seven circuits reporting compliance rates 80% or above. Only nine circuits have compliance rates below 70%. There are likely many reasons for the variations in compliance across circuits. Certain jurisdictions may see atypical cases not reflected well in statewide averages. In addition, the availability of intermediate or community-based punishment programs currently differs from locality to locality.

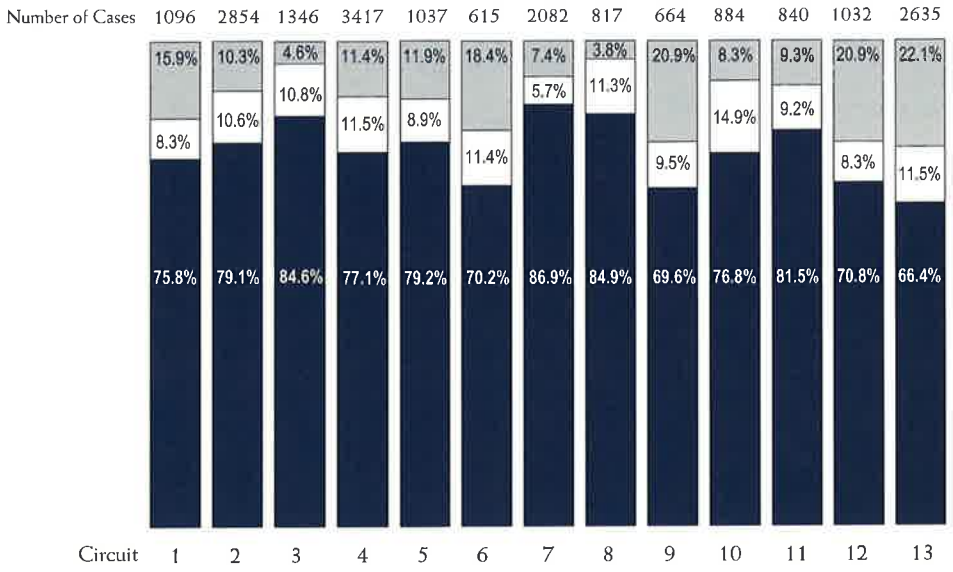
Both high and low compliance circuits are found in close geographic proximity, with no geographic pattern discernible. The degree to which judges follow guidelines recommendations does not seem to be primarily related to geography. Many of the circuits in Hampton Roads area of Virginia, however, maintain compliance rates at or above the statewide average.

The highest compliance rate under the sentencing guidelines, 87%, is found in Newport News (Circuit 7), but both Hampton (Circuit 8) and Portsmouth (Circuit 3) report 85% compliance figures. Newport News is one of the five jurisdictions which has submitted more than 2,000 sentencing guidelines cases to the Commission. The others, Virginia Beach (Circuit 2), Norfolk (Circuit 4), the City of Richmond (Circuit 13) and Fairfax (Circuit 19), report compliance rates between 77% and 80%, except for the City of Richmond, which has a compliance rate of 66%.

The lowest compliance rates originate in Circuit 29 in Southwest Virginia (65%) and Circuit 23, encompassing the city and county of Roanoke (65%).

Figure 17

Compliance by Circuit

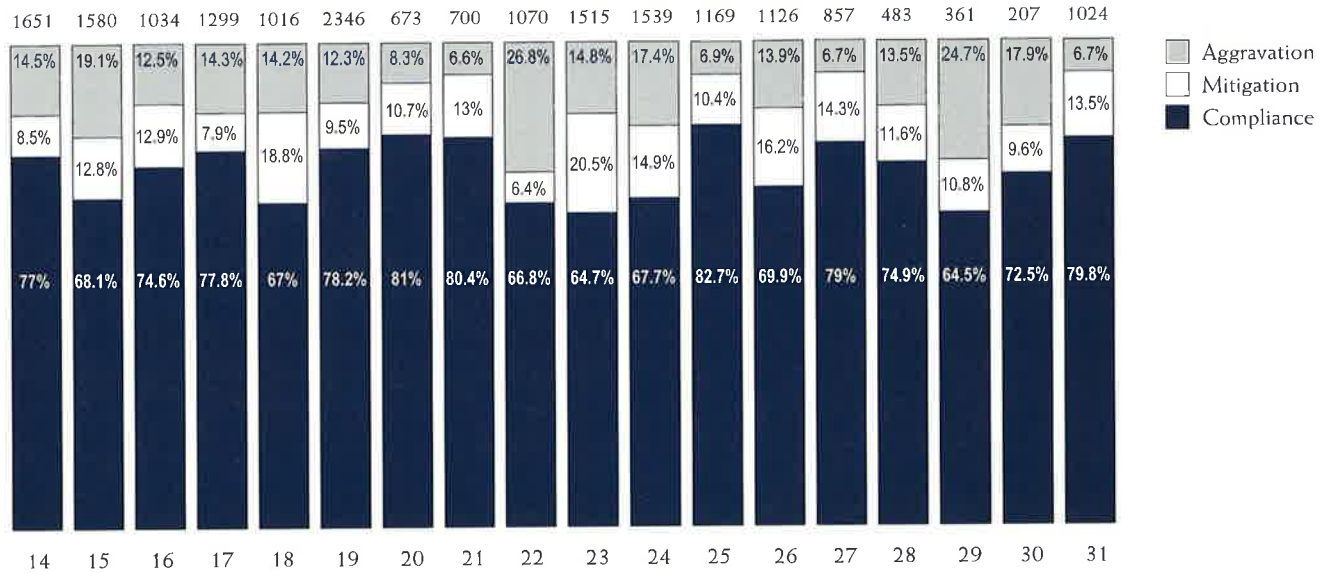


Of all Virginia's circuits, Roanoke (Circuit 23) and Alexandria (Circuit 18) yield the highest rates of mitigation, 21% and 19% respectively. Roanoke is the only circuit in the state which has developed a specialized drug court during the period under analysis, and this may explain at least some portion of the mitigations. Of the five circuits with 2,000 or more cases, Norfolk (Circuit 4) and Richmond (Circuit 13) have the highest rates of mitigation, over 11%.

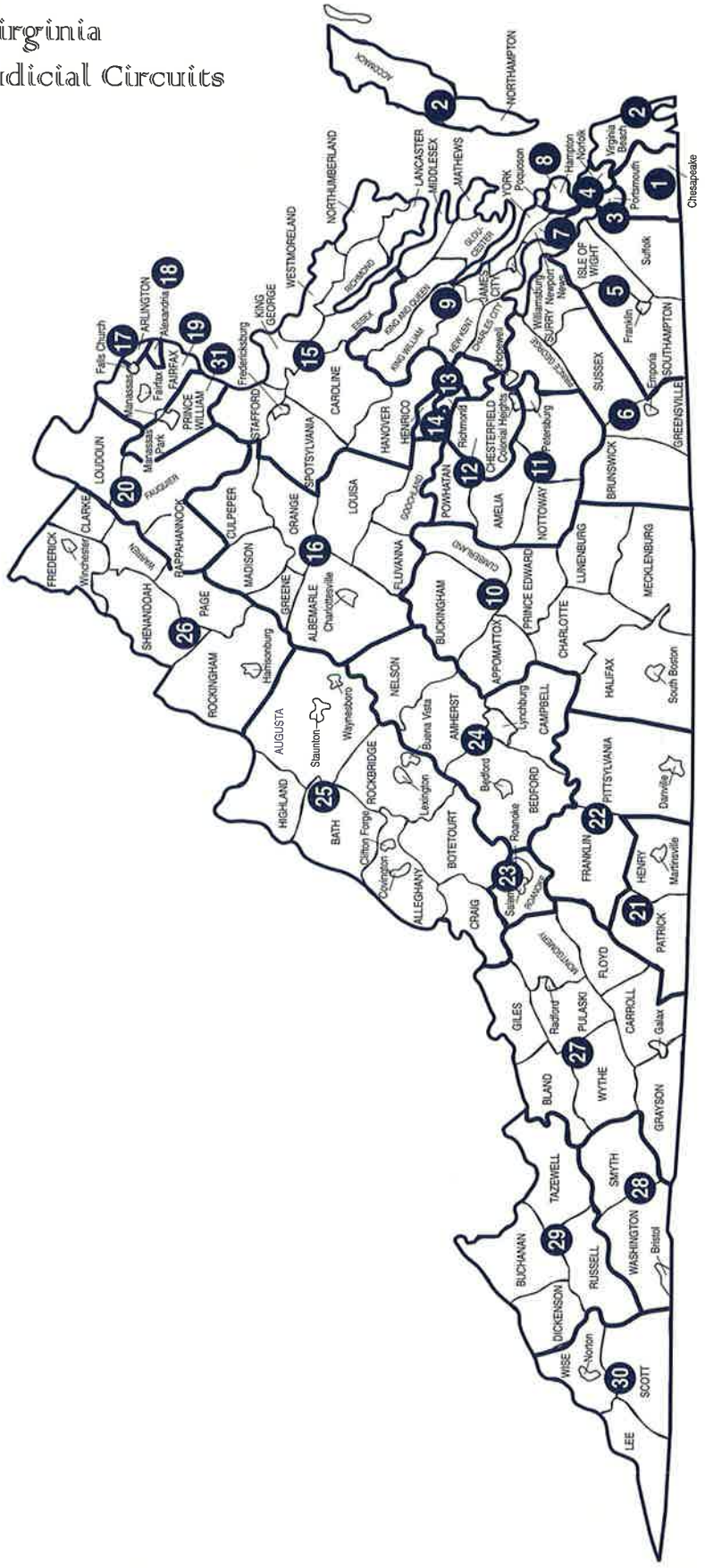
With regard to high mitigation rates, it would be too simplistic to assume that this reflects an area with lenient sentencing. As noted above, the new intermediate punishment programs are not uniformly available throughout the Commonwealth. Those jurisdictions with better access to these sentencing options may be using them as intended by the General Assembly – for non-violent offenders who otherwise would be incarcerated for short periods of time. Such sentences would appear as mitigations from the guidelines.

Inspecting aggravation rates reveals that Circuit 22 (the City of Danville, Franklin and Pittsylvania counties) and Circuit 29 in Southwest Virginia retain the highest rates of aggravation in the state, 27% and 25% respectively. The City of Richmond (Circuit 13) records by far the highest aggravation rate, 22%, among the five circuits with 2,000 or more cases, and is the only one of these circuits with an aggravation rate above the statewide average.

Appendices 3 and 4 present compliance figures for judicial circuits by each of the 12 sentencing guidelines offense groups.



Virginia Judicial Circuits



Virginia Localities and Their Judicial Circuits

Accomack	2
Albemarle	16
Alexandria	18
Alleghany	25
Amelia	11
Amherst	24
Appomattox	10
Arlington	17
Augusta	25
Bath	25
Bedford City	24
Bedford County	24
Bland	27
Botetourt	25
Bristol	28
Brunswick	6
Buchanan	29
Buckingham	10
Buena Vista	25
Campbell	24
Caroline	15
Carroll	27
Charles City	9
Charlotte	10
Charlottesville	16
Chesapeake	1
Chesterfield	12
Clarke	26
Clifton Forge	25
Colonial Heights	12
Covington	25
Craig	25
Culpeper	16
Cumberland	10
Danville	22
Dickenson	29
Dinwiddie	11
Emporia	6
Essex	15
Fairfax City	19
Fairfax County	19
Falls Church	17
Fauquier	20

Floyd	27
Fluvanna	16
Franklin City	5
Franklin County	22
Frederick	26
Fredericksburg	15
Galax	27
Giles	29
Gloucester	9
Goochland	16
Grayson	27
Greene	16
Greensville	6
Halifax	10
Hampton	8
Hanover	15
Harrisonburg	26
Henrico	14
Henry	21
Highland	25
Hopewell	6
Isle of Wight	5
James City	9
King and Queen	9
King George	15
King William	9
Lancaster	15
Lee	30
Lexington	25
Loudoun	20
Louisa	16
Lunenburg	10
Lynchburg	24
Madison	16
Manassas	31
Martinsville	21
Mathews	9
Mecklenburg	10
Middlesex	9
Montgomery	27
Nelson	24
New Kent	9
Newport News	7
Norfolk	4
Northampton	2
Northumberland	15
Norton	30
Nottoway	11
Orange	16
Page	26
Patrick	21
Petersburg	11
Pittsylvania	22
Poquoson	9
Portsmouth	3
Powhatan	11
Prince Edward	10
Prince George	6
Prince William	31
Pulaski	27
Radford	27
Rappahannock	20
Richmond City	13
Richmond County	15
Roanoke City	23
Roanoke County	23
Rockbridge	25
Rockingham	26
Russell	29
Salem	23
Scott	30
Shenandoah	26
Smyth	28
South Boston	10
Southampton	5
Spotsylvania	15
Stafford	15
Staunton	25
Suffolk	5
Surry	6
Sussex	6
Tazewell	29
Virginia Beach	2
Warren	26
Washington	28
Waynesboro	25
Westmoreland	15
Williamsburg	9
Winchester	26
Wise	30
Wythe	27
York	9

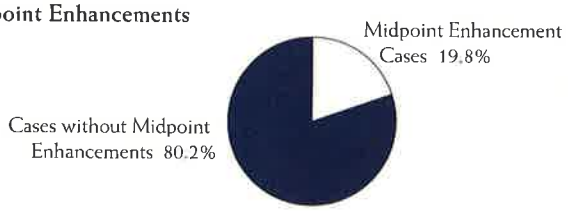
Compliance under Midpoint Enhancements: Longer Sentence Recommendations for Violent Offenders

Based on §17-237 of the Code of Virginia, the sentencing guidelines are designed to provide increased sentence recommendations for certain categories of crimes, prescribing prison sentence recommendations that are significantly greater than historical time served for these crimes. Midpoint enhancements for the current most serious offense are given for certain assaults, burglaries, homicide, rape, robbery and sexual assault offenses. Also, there are specified degrees of enhancements for prior record based on the nature and seriousness of the offender's criminal history. The most serious prior record receives the most extreme enhancement. A prior record labeled "Category II" contains at least one violent prior felony which carries a statutory maximum penalty of less than 40 years, whereas a "Category I" prior record includes at least one violent offense with a statutory maximum penalty of 40 years or more. These statutorily mandated adjustments were implemented by raising, or "enhancing," the score on the sentencing guidelines work sheets.

Among the 38,969 cases sentenced under the guidelines, 80% of the cases have not involved midpoint enhancements of any kind (Figure 18). Only 20% of the guidelines cases have qualified for a midpoint enhancement.

Figure 18

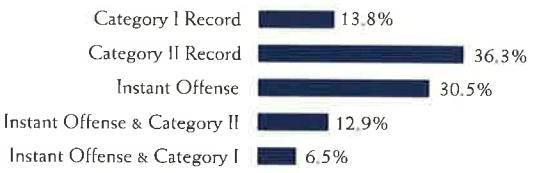
Application of Midpoint Enhancements



Of the 7,723 cases involving midpoint enhancements, nearly one-third received these upward adjustments due to the violent nature of the instant (current) offense (Figure 19). Despite having a current offense considered to be non-violent, another 36% received an enhancement because of a violent criminal history that was defined as a Category II prior record. The most substantial midpoint adjustments for prior record, relating to Category I offenders, were applied in only 14% of the enhancement cases. Nearly 13% of the cases, however, qualified for enhancements due to both a current violent offense and a Category II prior record. Only a small minority of cases (7%) were targeted for the most extreme midpoint enhancements triggered by a combination of a current offense of violence and a Category I prior record.

Figure 19

Type of Midpoint Enhancement Received

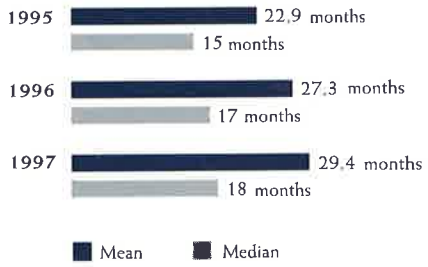


The compliance rate for cases involving midpoint enhancements is 66%, which is significantly lower than the overall compliance rate of 76% . Low compliance in midpoint enhancement cases is suppressing the overall compliance rate. When departing from the guidelines in these cases, judges are choosing to mitigate in three out of every four departures. This departure pattern is the reverse of the general departure pattern seen when all cases are examined in total (46% mitigation to 54% aggravation). The guidelines are designed to provide sentence recommendations for violent offenders that are up to six times longer than the historical time served in prison by these criminals. Given the relatively low compliance rate and overwhelming mitigation pattern, this is evidence that judges feel the midpoint enhancements are too extreme in certain cases.

Compliance in midpoint enhancement cases has hovered between 65% and 66% since 1995, and the percent of downward departures has been substantial and persistent. Examining the mitigations in midpoint enhancement cases, however, reveals that the length of departure has been increasing. The average departure from the low end of the guidelines range has increased from 23 months in 1995 to nearly 30 months in 1997 (Figure 20). The median departure has risen from 15 months to 18 months. Of course, mitigations in midpoint enhancement cases represent only 5% of all cases sentenced under the guidelines.

Figure 20

Length of Mitigation Departures in Midpoint Enhancement Cases by Year



Compliance rates across the different types of midpoint enhancements are not consistent (Figure 21). Enhancements for a Category II prior record generate the highest rate of compliance of the midpoint enhancements (71%), and the lowest mitigation rate (22%). The most extreme midpoint enhancements, that for a combination of a current violent offense and a Category I prior record, yield the lowest rate of compliance (less than 62%), although compliance in cases receiving a Category I enhancement is almost as low (62%). In each category of midpoint enhancements, the ratio of mitigation to aggravation is at least 3 to 1, except for instant offense enhancements, in which the ratio is 2 to 1.

Figure 21

Compliance by Type of Midpoint Enhancement*

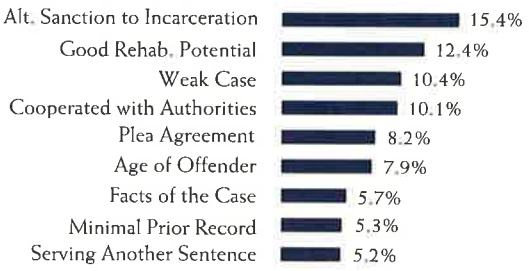
	Compliance	Mitigation	Aggravation	Number of Cases
None	77.8%	7.9%	14.3%	31246
Category II Record	71.2	21.7	7.1	2807
Category I Record	62.0	33.1	4.9	1068
Instant Offense	63.9	23.7	12.4	2353
Instant Offense & Category II	62.8	28.2	9.0	996
Instant Offense & Category I	61.5	30.5	8.0	499

* Midpoint enhancements prescribe prison sentence recommendations for violent offenders which are significantly greater than historical time served under the parole system during the period 1988 to 1992.

The tendency for judges to impose sentences below the sentencing guidelines recommendation in midpoint enhancement cases is readily apparent. Analysis of departure reasons in cases involving midpoint enhancements, therefore, is focused on downward departures from the guidelines (Figure 22). Such analysis reveals that the most frequent reason for mitigation in these cases is based on the judge's decision to use alternative sanctions to traditional incarceration (15%). In over 12% of the mitigation cases, the judge sentenced based on the perceived potential for rehabilitation of the offender. In one out of every ten cases, judges indicated that the evidence against the defendant was weak or that a key witness refused to testify. In 72% of the instances where weak evidence was cited, the judge reported that he accepted and sentenced according to a plea agreement.

Figure 22

Most Frequently Cited Reasons for Mitigation in Midpoint Enhancement Cases



In numerous instances involving mitigated departures in midpoint enhancement cases, judges imposed a shorter than recommended sentence because of the defendant's cooperation with authorities (10%), due to a plea agreement (8%), due to the offender's age (8%), based on mitigating facts of the case (6%) or because the offender already had other sentences to serve in other jurisdictions or from previous proceedings (5%).

In the year ahead, the Commission plans to undertake a complete reanalysis of all cases sentenced under the no-parole guidelines. This will allow the Commission to better assess the relationships between an offender's current offense, his prior record, guidelines midpoint enhancements and judicial sentencing.

Compliance and 1997 Guidelines Revisions

In its 1996 Annual Report, the Commission presented several specific recommendations regarding revisions to the sentencing guidelines. Under §17-238 of the Code of Virginia, any such recommendations adopted by the Commission shall become effective the next following July 1, unless otherwise provided by law. Since the General Assembly did not act to override the Commission's recommendations during its 1997 session, the changes were incorporated into the guidelines as of July 1 of this year. This section will address the impact of some of these changes on sentencing and compliance.

Cocaine Sales Offenses

In response to criticism that the guidelines did not explicitly account for the amount of drug involved in sales related offenses, the Commission dramatically altered the sentencing guidelines pertaining to drug offenses. Critics had argued that drug sales of larger amounts deserve longer prison term recommendations. Moreover, the reason most frequently cited by judges for imposing a term above the guidelines in these cases has been the quantity of the drug. Responding to input of guidelines users, the Commission studied drug quantity and its impact on sentencing. Results of the study indicated that the majority of drug sales cases involved small amounts of powder or crack cocaine and that the severity of sentence imposed was not significantly different for cases characterized by larger amounts of cocaine than those involving smaller amounts of cocaine. Although not purely

grounded in analysis of historical data, it was the consensus of the Commission that the guidelines should recommend longer terms for those involved with unusually large amounts of cocaine. Based on the concerns of guidelines users, and after careful review of the steps taken by the Federal system and other states in this area, the Commission proposed a tiered system to specifically account for drug quantity in cocaine sales offenses.

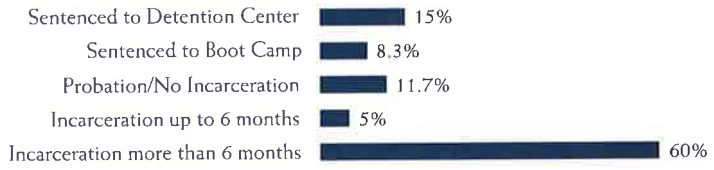
Beginning July 1, 1997, the new drug guidelines took effect. Under the revised drug guidelines, the midpoint recommendation is increased by three years in cases involving 28.35 grams (1 ounce) up to 226.7 grams of cocaine. The midpoint recommendation is increased by five years in cocaine sales cases involving 226.8 grams (1/2 pound) or more. Concurrently, the Commission expanded the sentencing recommendation options for cases of offenders convicted of selling small amounts of cocaine (1 gram or less) who have no prior felony record. The guidelines maintained the traditional sentencing recommendation of a seven to 16 month prison term for these offenders, but the sentence recommendation has been expanded to include the option of sentencing these low level, first-time felons to a Detention Center Incarceration Program in lieu of traditional incarceration. As noted previously, Detention Center Incarceration involves incarceration in a secure facility from four to six months, while requiring offenders to participate in a 20 week substance abuse treatment program.

Since the modifications to the drug guidelines took effect this past July 1, the Commission has received 15 cases which merited the three year enhancement and two cases which triggered the five year enhancement for the sale of large quantities of cocaine. So far, judges have elected to sentence approximately half of these offenders within the new range recommended by the guidelines, and have departed below the new guidelines in all remaining cases. The number of cases is far too few to draw any conclusions about compliance under the new quantity enhancements.

Conversely, 60 first-time felons convicted of selling a gram or less of cocaine have been targeted for the dual option guidelines recommendation of either a traditional prison term (seven to 16 months) or Detention Center Incarceration.[1] To date, in 15% of these cases, judges have opted for incarceration in a detention center (Figure 23). In 8%, it appears that the judge felt the boot camp incarceration program to be a more appropriate sanction. Another 12% of these low level, first-time cocaine felons received no incarceration and 5% received incarceration of six months or less. The remainder of these cocaine sellers, about 60%, received a traditional incarceration term of seven months or more.

Figure 23

Sentence Outcomes for First Time Felons Selling 1 Gram or Less of Cocaine - Cases Recommended for Prison or Detention Center Incarceration



One important caveat must accompany the discussion of the early impact of the revisions to the drug guidelines. This analysis is based on a small number of cases and it may be that the Commission has simply not yet received many of the drug cases which are being sentenced to Detention Center Incarceration. The Commission has asked judges to hold guidelines worksheets in these cases during the Department of Corrections' (DOC) evaluation period, which can be up to 45 days. Once the offender is accepted or rejected, the judge is to fill out the guidelines worksheets with the final sentence. The Commission must receive the final disposition information in these cases which requires waiting for work sheets until the offender has been evaluated and either accepted or rejected by the program. The Commission will be studying the impact of this change to drug guidelines over the next year.

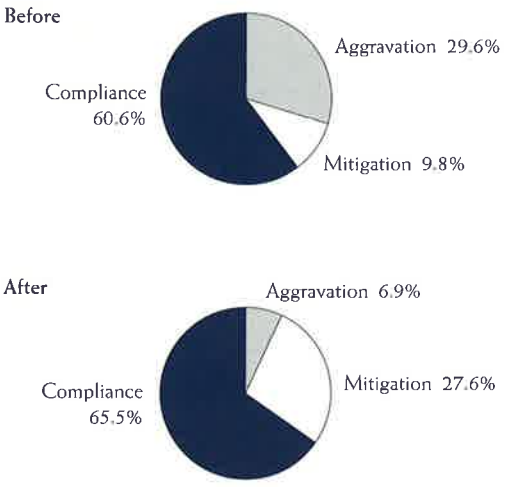
Sex Offenses Against Children

Since the inception of the guidelines in 1995, sexual assault offenses have consistently exhibited some of the lowest compliance rates. In nearly a third of sexual assault cases, judges have elected to impose a sentence that is more severe than that recommended by the guidelines. Until recently, the sexual assault sentencing guidelines did not consider victim age in the guidelines computations. Detailed analysis of the sexual assault cases revealed that two-thirds of them were crimes committed against victims who were under the age of 13 at the time of the offense, and that, in cases involving these young victims, judges sentenced the offender to prison much more frequently than the guidelines recommended. The Commission responded by modifying the guidelines to include victim age.

Sexual assault crimes committed against victims under the age of 13 receive additional points on the sentencing worksheets such that it is much more likely that the offender will be recommended for incarceration, particularly a prison term. The Commission has received 29 sexual assault cases since July 1 involving victims less than 13. Judges have complied with the new sentence recommendation at a rate of nearly 66% (Figure 24). While this compliance rate is somewhat higher than before the modification, it is interesting to note that, among these initial cases, the pattern of departure has shifted toward a greater percentage of mitigated sentences (mitigation 28%). However, the number of cases in this early analysis of these revisions is too small on which to base any conclusions of the impact of this change to the guidelines.

Figure 24

Compliance in Sexual Assault Cases Before and After the Enhancement for Victim Age



Habitual Traffic Offenses

Changes in the sentencing of habitual traffic offenders are not the result of any changes to the sentencing guidelines but instead have resulted from amendments to the Code of Virginia during the 1997 session of the General Assembly. Revision of §46.2-357(B2 and B3) allows judges, at their discretion, to suspend the 12 month mandatory minimum incarceration term for habitual traffic crimes, and instead sentence offenders to one of the Detention Center Incarceration, Diversion Center Incarceration or Boot Camp Incarceration programs.

Of the 128 habitual traffic cases sentenced since July 1, 1997, only 7% have had the mandatory minimum suspended and been sentenced to one of the alternative sanctions (Figure 25). Nearly two-thirds still received the 12 month mandatory minimum sentence. Another 14% received a sentence between 12 and 14 months.

Figure 25

Sentence Outcomes in Habitual Traffic Cases Since July 1, 1997

Suspension of Mandatory Minimum	7.0%
12 Months	63.3
More than 12 up to 14 Months	14.1
More than 14 up to 24 Months	10.9
More than 24 Months	4.7

If judges are holding the guidelines worksheets until the evaluation for acceptance into one of the alternative sanctioning programs is completed, as they have been instructed by the Commission, then the Commission will not see a substantial number of these cases until program acceptance is verified or the final sentence has been determined. Because of its potential impact on Virginia's prison population, the Commission will be closely monitoring the impact of this change during the upcoming year.

Juries and the Sentencing Guidelines

Virginia is one of only six states that currently use juries to determine sentence length in non-capital offenses. Past analysis has revealed that jury sentences have traditionally not been in compliance with guidelines recommendations. Juries composed of Virginia's citizens typically hand down sentences that are more severe than the sentencing guidelines recommendations. Some have speculated that many citizens may be unaware of Virginia's conversion to a truth-in-sentencing system, with its 85% time served requirement for felons, and that jurors may be inflating their sentences in anticipation that much of the term won't be served. Moreover, juries are not allowed, by law, to receive any information regarding the sentencing guidelines to assist them in their sentencing decisions.

Differing opinions, however, have recently arisen regarding the instruction of juries during the sentencing phase of a trial. Some have argued that juries should be instructed as to the abolition of parole and the 85% time served requirement so that they may make their sentencing decisions without speculation and guessing about how much time an offender will serve. Others support the long standing Supreme Court opinion that juries should not be informed of the parole eligibility of the defendant and should not concern themselves with what happens after sentencing (Jones v. Commonwealth, 1952).

Recently, several cases, each having been appealed from circuit courts on the argument that the jury should have been instructed as to abolition of parole, reached a panel of the Virginia Court of Appeals. For instance, in Newman v. Commonwealth (1997) and Hakspiel v. Commonwealth (1997), one judge of the panel stated that the juries in the cases, both of which asked the judge during their deliberations about the defendant's parole eligibility, should have been told that parole was abolished. Each of these cases will be heard next by the full Court of Appeals. The Commission will closely observe the outcome of these proceedings.

In addition to the differing opinions over jury instruction on parole abolition, the Commission has been monitoring trends in the rate of jury trials in Virginia's circuit courts. The Commission has observed that, since fiscal year (FY) 1986, the overall rate at which cases in the Commonwealth are adjudicated by a jury has been declining (Figure 26). Between FY1986 and FY1989, the overall rate of jury trials was around 6%. Starting in the 1990s, however, the rate began to subtly fall. According to the most recently available data, the rate of jury trials was just over 4% in FY1994.

The trend in decreased jury trials over the period 1986 through 1994, though relatively small in size, has, nonetheless, been consistent in its downward pattern. Some justice system professionals have offered a possible explanation for this observed pattern of decreased jury trials. Prior to 1985 very little was known about felony convictions and sentencing outcomes in Virginia. Before that time, information about felony sentencing in Virginia was largely anecdotal. Beginning in 1985, an enormous statewide data collection effort was launched to create a systematic compilation of data on felony convictions and sentences in Virginia's circuit courts. Starting in 1987, data and analysis on felony sentencings became available in reports released to criminal justice professionals and the public, which, for the first time, documented the significantly longer sentences imposed in cases adjudicated by juries throughout the Commonwealth, than in similar cases sentenced by circuit court judges. Furthermore, the newly established data system was utilized by the Judicial Sentencing Guidelines Committee of the Judicial Conference of Virginia to develop the first set of voluntary sentencing guidelines, implemented statewide in 1991. These voluntary guidelines were reserved for judicial use and not provided to juries. These events, which transpired in the late 1980s and early 1990s, widely disseminated and greatly enhanced knowledge of felony sentencing by Virginia's judges and juries, and may have influenced the rate of trials by jury in the succeeding years.

Figure 26

Percentage Rate of Jury Trials FY1986 - CY1997
Parole System v. Truth-in-Sentencing (No Parole) System

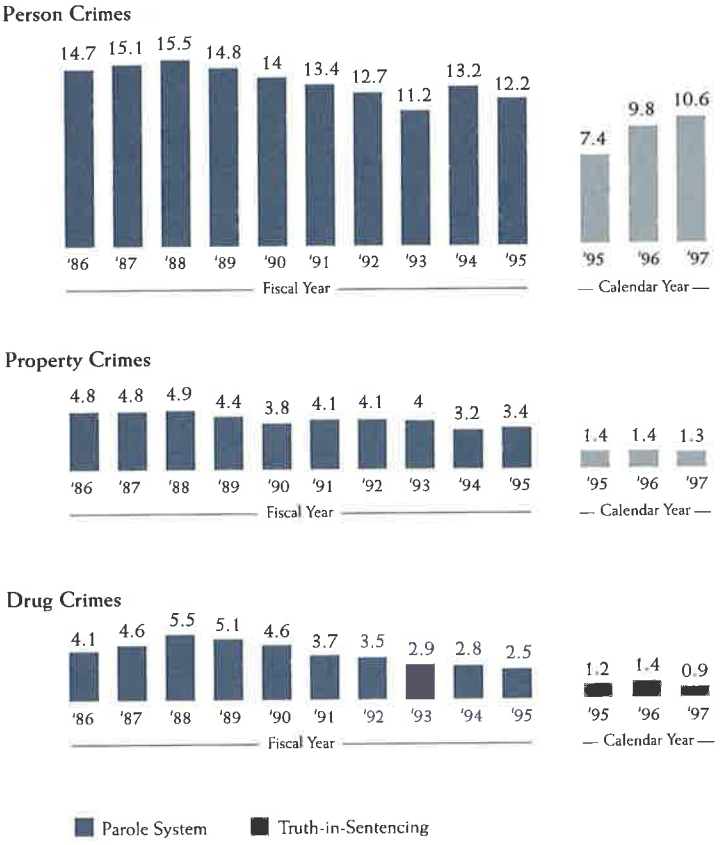
During its 1994 legislative session, the General Assembly enacted provisions for a system of bifurcated jury trials which became effective beginning July 1, 1994 (FY1995). In bifurcated trials, the jury establishes the guilt or innocence of the defendant in the first phase of the trial, and then, in a second phase, the jury is presented with information on the offender's background and prior record to assist jury members in making a sentencing decision. During the first year of the bifurcated trial process, the overall rate of jury trials dropped slightly to just under 4%, the lowest rate since the data series began. It should be noted that this figure for FY1995 includes only those cases sentenced under the old parole system.

Starting January 1, 1995, parole was abolished and truth-in-sentencing was instituted in Virginia for felony offenses committed on or after that date. In the first year of cases subject to truth-in-sentencing provisions, the overall rate of jury trials sank to 2%, or half the rate during the last year before the abolition of parole. Thus, while the shift to bifurcated trials may have been associated with the small decrease in the rate of jury trials in FY1995, the introduction of truth-in-sentencing coincided with a dramatic reduction in jury trials in its first year. The rate of jury trials has risen slightly since calendar year (CY) 1995 to 2.6% of all felony cases adjudicated in Virginia's circuit courts.

Inspecting jury trial rates by offense type reveals the highly divergent trends for person, property and drug crimes that are not ascertainable in the general trends discussed above. Through FY1995, the jury trial rate for crimes against the person (homicide, robbery, assault, kidnapping, rape and sexual assault) traditionally has been three to four times the rates for property and drug crimes, which are roughly equivalent to one another (Figure 27). Virginia, however, has witnessed a slow decline in the rates of jury trials across all offense types since the late 1980s. With the implementation of truth-in-sentencing, jury trial rates for person, property and drug crimes all dropped by nearly half. Since CY1995, the jury trial rate for crimes against the person has rebounded from 7% to 11%, approaching the rate just prior to truth-in-sentencing. On the contrary, rates for property and drug crimes have not rebounded. While the jury trial rate for property crimes has leveled off at just over 1%, the jury trial rate for drug crimes has continued to fall. For CY1997 cases, less than 1% of felony drug crimes in Virginia were adjudicated by juries.

Figure 27

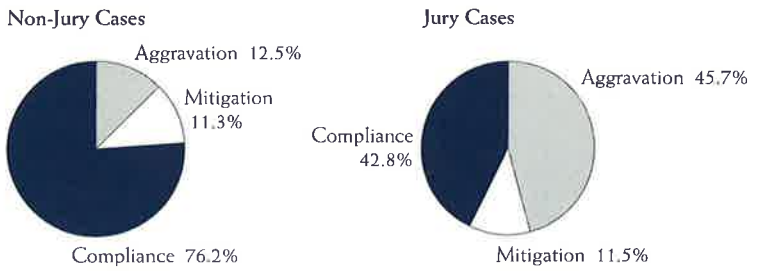
Percentage Rate of Jury Trials by Offense Type FY1986 - CY1997 Parole System v. Truth-in-Sentencing (No Parole) System



Of the 38,969 cases under analysis for this report, the Commission has received 902 cases tried by juries. While the compliance rate for cases adjudicated by a judge or resolved by a guilty plea exceeds 76%, the sentences handed down by juries fell into compliance with the guidelines in only 43% of the cases they heard (Figure 28). In fact, jury sentences are more likely to fall above the guidelines (46%) than within the guidelines. Additionally, the rate of aggravation, or sentencing above the guidelines recommendation, is nearly four times that of non-jury cases.

Figure 28

Sentencing Guidelines Compliance in Jury Cases and Non-Jury Cases



Judges are permitted by law to lower a jury sentence they feel is inappropriate but, more often than not, do not amend the sanction. Of the current data, judges modified jury sentences in 29% of the cases in which juries found the defendant guilty. When the judge did modify the jury sentence, nearly half (44%) were cases in which the final sentence was still out of compliance with the guidelines recommendation for the case.

Judges brought a high jury sentence into compliance with the guidelines recommendation in 41% of the modification cases. For 8% of the modifications, both the original jury sentence and the judicially modified sentence fell within the recommended range. Only in 7% of the modifications did the judge lower a jury sentence, which was considered in compliance, to a sentence which fell short of the guidelines recommendation.

In those jury cases in which the final sentence fell short of the minimum in the guidelines, it did so by a median value of 16 months (Figure 29). In cases where the ultimate sentence resulted in a sanction more severe than the guidelines recommendation, the sentence exceeded the guidelines maximum by a median value of nearly 4 years. In many cases, juries sentenced offenders to terms which far exceeded the guidelines recommendation.

Figure 29

Median Length of Durational Departures in Jury Cases

Offender Risk Assessment

Introduction

In the 1994 Special Session II of the Virginia General Assembly, parole was abolished and sentencing guidelines recommendations were restructured. This restructuring was designed to substantially increase the amount of time served in prison for selected violent offenses and for those with a record of prior violent offenses. At the same time, the General Assembly required the newly formed Virginia Criminal Sentencing Commission to undertake a study of those incarcerated for property and drug crimes. The Commission is required to study the feasibility of placing 25% of these offenders in alternative sanctions based on a risk assessment instrument that identifies those offenders with the lowest risk to public safety.

This chapter provides the result of the Commission's effort to develop a risk assessment instrument. The risk assessment instrument presented herein is intended to be an additional tool for judges: an instrument specifically designed to assess the risk of recidivism posed by the offender at sentencing. The risk assessment instrument has been designed for integration into the existing sentencing guidelines system that provides information to a judge prior to each felony sentencing event. The primary measure of risk being assessed is the probability of reconviction for a felony crime within a three year period.

This chapter is divided into several parts. First, the legislative directive for risk assessment is reviewed. The general nature of risk assessment research is then discussed. Next, the research methodology used by the Commission in addressing the legislative directive is detailed and is followed by a section which presents a summary of the data analysis and derivation of the risk scale. This chapter then discusses the Commission's decision to pilot test the risk assessment instrument and the process used to identify interested circuits. The Chapter concludes with a discussion of the implementation of the risk assessment component within the guidelines structure and the evaluation plan to assess its effectiveness.

Risk Assessment Legislation

Section 17-235 of the Code of Virginia discusses the General Assembly's charge to the Virginia Criminal Sentencing Commission:

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

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

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

The legislation is somewhat ambiguous. Overall, more than 25% of property and drug offenders, the goal specifically stated in the legislation, are given sanctions such as probation that do not require incarceration. The Commission understands that the intent of the legislation is to direct 25% of property and drug offenders who otherwise would receive traditional incarceration sentences into alternative means of punishment.

Using alternative forms of punishment for property and drug offenders rather than expensive prison space can be an appropriate path to more efficient use of correctional resources. However, alternative punishments are only truly cost efficient if they do not increase the danger to public safety. Risk assessment is viewed as a necessary component to help maximize the movement of property and drug offenders to alternatives and, at the same time, to minimize threat to public safety.

The Nature of Risk Assessment

Risk assessment involves estimating an individual's likelihood of continued involvement in crime, and classifying offenders regarding their relative risk of such continued involvement. Risk assessment is already being practiced informally at many points of the criminal justice process such as at the pre-trial confinement, prosecution, and sentencing stages. Statistical risk assessment is formal rather than informal, and developed from offender profiles based on factors that are at least partially successful in predicting recidivism.

Using risk assessment means developing profiles or composites based on overall group outcomes. Groups that statistically demonstrate a high degree of re-offending are labeled high risk. Among the many factors studied, some proved to be statistically relevant to predicting the likelihood of repeat offending. This methodological approach to studying criminal behavior is not unlike that used in the medical field. In medical studies, cohorts of individuals are studied in an attempt to identify the correlates of the development or progression of certain diseases. The risk

profiles for medical purposes, however, do not always fit every individual. For example, some very heavy smokers may never develop lung cancer. Similarly, not every offender that fits the lower risk profile will refrain from criminal activity. No risk assessment research can ever predict a given outcome with 100% accuracy. Rather, the goal is to produce an instrument that is broadly accurate and provides useful additional information to decision makers. The standard used to judge the success of risk classification is not perfect prediction, but the degree to which the use of the instrument improves over decisions made without reference to this tool. In the criminal justice system, the standard by which failure is usually measured is the recidivism rate. Thus, the success of the risk assessment tool will be judged by its ability to improve upon our existing recidivism rate for property and drug felons.

Offender recidivism can be measured in several ways ranging from any new arrest to a recommitment to prison. While any type of recidivism represents failure, not all new criminal behavior entails an equal risk to public safety. Re-offending with a misdemeanor crime is less serious than re-offending with a felony. Re-offending with a property felony is less serious than re-offending with a violent felony. The Commission's primary operational definition of re-offending is a subsequent felony conviction.

Research Methodology

Sampling Design

The Virginia Criminal Sentencing Commission appointed its Research Subcommittee to oversee the risk assessment research work. The Subcommittee determined that the state's existing data, while useful in answering the question of potential risk, was limited in important ways relating to criminal records and offender experiences in their formative years. Consequently, the Subcommittee approved a specific methodology for executing the risk assessment study.

The Commission studied a cohort of released offenders to determine which offenders can be classified as having a relatively low risk of re-offending. Re-offending, as previously discussed, was defined as reconviction for a felony crime during a three year period. From the large numbers of offenders released from prison, jail, or probation, a sample of approximately 4,000 offenders was drawn. While the primary study involved drug, larceny, and fraud offenders who had been incarcerated, comparison groups were drawn from probation cases and from burglary offenders. The final sample was composed of 2,013 drug, larceny, and fraud offenders who had been released from incarceration between July 1, 1991, and December 31, 1992. Initially, the Commission approved analyses that included offenders with certain burglary offenses to determine if some of these offenders proved to be lower risk. It was found, however, that as a group they were among the higher recidivists. This finding, combined with the legislative restrictions, persuaded the Commission to exclude offenders with a current or past burglary conviction from consideration for alternative punishment recommendation.

A stratified sampling technique was used to increase the chance of including offenders with juvenile criminal records, as juvenile experiences and especially criminal behavior have 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, and equal numbers between prison and jail. This step is necessary to ensure that each offense group is represented with a similar degree of precision. This sampling strategy ensures that there are 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 conviction cases.

Data Sources

The principal data source for this study was the automated pre- and post-sentence investigation (PSI) data base complemented with the supplemental data gleaned from the PSI narratives. Reliance on the PSI as the data source has several advantages. The PSI contains the most complete account of the offender's prior criminal record and major portions of the PSI are already automated. Also, the information contained on the PSI is considered to be highly reliable since its accuracy can be challenged in court.

To support the effort to gather supplemental information the Commission received a federal grant from the Edward Byrne Memorial Fund. Grant funds were used to hire research assistants to manually gather supplemental information that was theoretically important to assessing risk but was missing from the Commonwealth's existing automated data bases. The specific focus of this intensive data collection effort was information on an individual's experiences during his formative years, such as juvenile contacts with the justice system, family life and educational achievement. This data collection effort also gathered more information on recidivism than was previously available to the Commission. A survey instrument was developed to capture over 100 factors relating to criminal history, substance abuse, family background, physical or sexual abuse, and school performance. PSI reports were obtained for sample members. The survey instrument was completed based on a review of the PSI narrative.

For a large proportion of the sample with PSI's, an attempt was made to supplement juvenile history information with local court visits and a review of the offender's juvenile court files. However, the research team found very little useful data on an offender's childhood experiences and early environmental influences. If these experiences contribute substantially to the future likelihood of adult criminality in ways not already captured by the automated juvenile record information, then the relative impact of this factor in the risk assessments is understated.

Descriptive Portrait of Offender Sample

It is important to understand what types of offenders are eligible for risk assessment consideration. It is also important to determine whether or not the sample is representative of the general universe of offenders to ensure valid generalizations to other groups of offenders. Although the risk assessment analyses included some burglary offenders, the following description of the risk assessment sample only includes fraud, larceny and drug cases since this reflects the Commission's final decision concerning risk assessment eligible offenses.

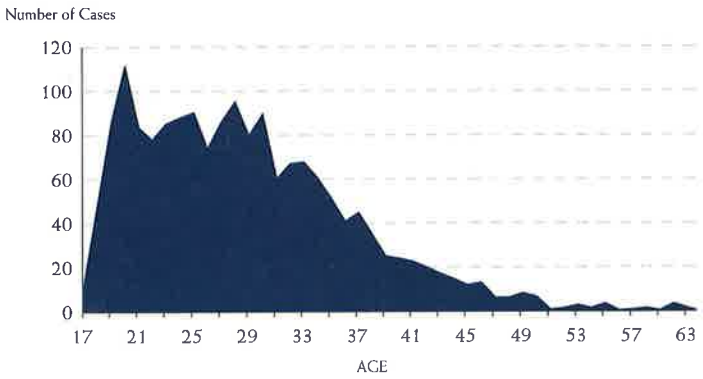
Of the offenders used in the weighted risk assessment sample, 17% were convicted of fraud, 30% of larceny offenses, and 53% of drug crimes (Figure 30). The majority of the offenders were males (78.4%). The offenders ranged in age from 17 to 64 (Figure 31). Almost all of the offenders were over the age of 18. The average offender age in the sample cohort was 29. About 36% of the sample were Caucasians and 62% were African-Americans. A majority of the offenders had never been married (59.8%). Over half of the sample (56.7%) had not completed high school.

Figure 30

Risk Assessment Sample by Type of Crime

Figure 31

Risk Assessment Sample by Age



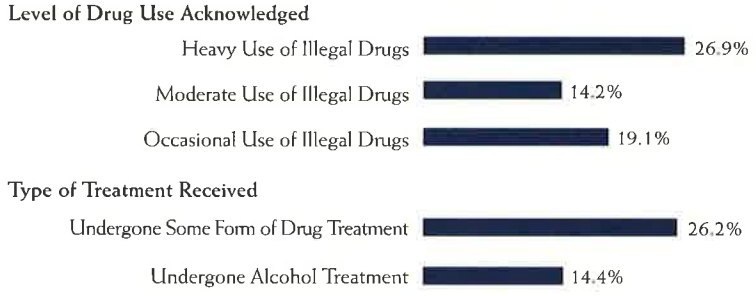
In terms of employment at the time of the instant offense, 36% were working full-time while 10% were holding part-time work. About half (50.4%) of the sample were unemployed. Almost 25% of the sample had a relatively stable employment history, 14% reported steady employment with frequent job changes, and almost 42% had an irregular work record. Of the offenders who were working, almost half (48.1%) were unskilled, 14% were involved in skilled labor, and 35% in semi-skilled positions.

A large share of the offenders listed a job (44.1%) as their source of subsistence with about 21% relying on their families and 8% citing public assistance as their source of subsistence. About eight in ten offenders were represented by an attorney appointed by the court. This is generally indicative of the offender's income level. In 1996, to qualify for a court-appointed counsel an offender living alone must have had less than $9,675 in annual average funds.

Multiple indicators of substance abuse suggest a high level of use and abuse among sample offenders, perhaps partially explained by the high percentage of drug offenders in the study sample. Figure 32 illustrates the pervasiveness of substance abuse among these felons.

Figure 32

Substance Abuse Indicators for Risk Assessment Sample



Most of the offenders had prior criminal records. The majority (85.1%) had prior adult records and approximately 29% had known prior juvenile records. About 72% had at least one previous criminal misdemeanor conviction. Over half (56.4%) had been incarcerated before their current instant offense.

To ascertain whether the offender sample was representative, it was compared to the universe of felons convicted during 1995; this is the most recent full year of PSI data available to the Commission at this time. Specifically, the comparison was made between the study sample and the universe of felons who would be, according to the legislation, eligible for risk assessment consideration. An examination of these cases reveals that over half of the cases represented drug convictions, about 29% were larceny convictions, and 18% involved fraud crimes. Most of the offenders were male. The average offender age was about 30 and most of the offenders were single. Almost half of the offenders were unemployed and, for those employed, work histories were erratic. Among the 1995 risk-assessment eligible felons, over half did not complete high school and the majority were represented by a court-appointed attorney. This offender population exhibited a great deal of substance abuse. Finally, the majority of these felons had prior adult records while more than one-fourth had documented prior juvenile records.

In sum, this comparison demonstrates a very high degree of similarity between the sample used to examine risk assessment and the universe of felons who would be eligible for risk assessment consideration. Accordingly, the Commission is confident that the findings from the risk assessment sample can be generalized to offenders eligible for risk assessment consideration.

Statistical Prediction

Offender probability of reconviction for a felony is the measure of risk in this research. Several statistical methods were considered to predict probability of reconviction. The statistical analysis tool for this prediction is logistic regression. This method can be used to predict the proportion of offenders who are likely to be convicted of a new felony within three years.

In the sample of 2,013 offenders, each offender's probability of recidivism is predicted based on characteristics associated with reconviction. For example, if the group of offenders with a large number of prior misdemeanors is disproportionately reconvicted, then prior misdemeanors will likely prove statistically significant as a predictor of felony reconviction. Therefore, offenders with several prior misdemeanors would be more likely to reoffend than those with no misdemeanor convictions.

Multivariate logistic regression allows several predictors to be included in the model simultaneously. Each predictor is given a weight based on its contribution to the prediction of reconviction, taking into account the other significant factors associated with recidivism. As a result, an offender's reconviction probability can be determined using the unique contribution of several factors to that offender's overall likelihood of conviction for a new felony crime.

The factors proving statistically significant in making this prediction are included in the final statistical model. Using the results from a companion technique, discriminant analysis, the statistically significant predictors, and the values for those predictors associated with higher levels of reconviction, are converted to work sheet scores.

The resulting predictions assess the probability of felony reconviction for similarly situated offenders. It should not be interpreted as an individualized prediction for a particular offender. Rather, an offender fits a profile for either a lower or higher risk of felony reconviction, much as a patient may fit the profile for lower or higher risk of heart disease.

The General Assembly's directive to the Commission requires the development of an instrument that assesses offender risk only. It is important to note that risk assessment does not involve evaluating alternative sanction programs or the needs of individual offenders. Risk assessment only addresses whether the offender is a public safety risk. Risk assessment is distinct from needs assessment, which identifies an offender's needs and matches the offender to programs designed to address those needs. Risk assessment does not evaluate alternative punishment programs and does not recommend specific programs. Future goals for the Virginia criminal justice community include identifying programs that work and offenders that are well matched to particular program objectives.

Selection of Risk Factors

Four general types of factors were selected for initial models from the data sources described earlier. These general types are current offense information, offender characteristics and demographics, prior adult criminal record, and prior juvenile contact with legal authorities.

In developing the risk assessment instrument the Commission took the empirical approach of adopting factors and their relative weights (degree of importance) as determined by the statistical analysis. The lone exception to this empirical modeling of risk involved a Commission decision to exclude one factor that proved statistically significant in predicting future recidivism. That factor is the race of the offender. The Commission believes that the importance of race as a predictor of recidivism is based on a spurious relationship. In essence, it is believed that this factor is "standing-in" for other factors. These other factors are very difficult to gather information on and are related to the occurrence of recidivism. These factors include economic deprivation, access to poor educational facilities, family instability, and limited employment opportunities. Many of these factors disproportionately apply to the African-American population.

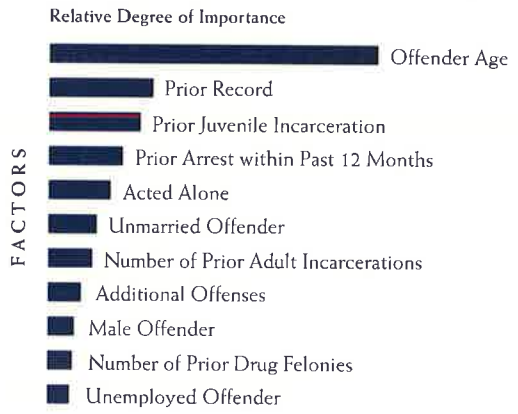
The Commission concluded that the inclusion of offender race in risk assessment would therefore be inappropriate. Scientifically accepted methods of removing the factor of race from the risk assessment model were used to avoid contaminating the validity of the other significant factors.

The remaining significant indicators were incorporated into a worksheet, in a manner consistent with the guidelines format, based on their relative degree of importance (Figure 33). These factors were:

- offender age,
- the offender's prior criminal and juvenile record,
- whether the offender had been incarcerated as a juvenile,
- whether the offender had been arrested or confined within the past 12 months,
- whether the offender acted alone when committing the crime,
- offender marital status,
- whether the offender had been incarcerated as an adult,
- whether there were additional offenses at conviction,
- offender gender,
- whether the offender had prior drug felony convictions, and
- offender employment status.

Figure 33

Significant Factors in Assessing Risk



Risk Probabilities

Statistical risk assessment must be tested to determine the accuracy of predictions. The question to be addressed is: Do these models help predict who, among convicted property or drug felons, will not be convicted of a new felony following release? In this context, there are two basic forms of statistical prediction error that are pertinent. First, the model may err with a false reconviction prediction. In this instance, case attributes place the person in the "higher likelihood of re-offending group," but no reconviction was discovered within three years of release. Second, the model may err with a false non-reconviction prediction. In this situation, case attributes place the person in the "lower likelihood of re-offending group," but a reconviction was discovered within three years of release.

In the Commission's view, the different types of prediction error are not equally important. An error that results in failing to incarcerate an offender who subsequently re-offends is considered more serious since it can endanger public safety.

Determining which offenders are lower risks depends on a policy decision. How much risk is society willing to accept in an alternative corrections setting? The statistical models assign a probability of being reconvicted within three years to each offender, based on risk factors discussed previously. No offender has a zero risk of reconviction, and conversely none has a 100% risk of reconviction.

Selection of Risk Threshold

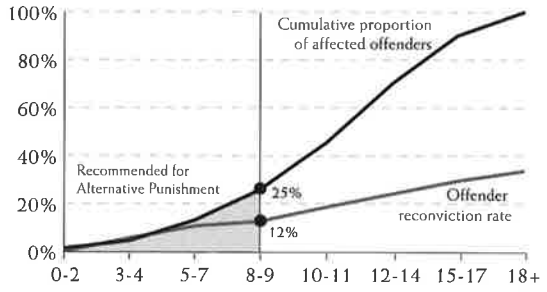
The General Assembly directed the Commission to determine if 25% of qualified felons could be safely redirected away from prison to an alternative punishment. The Commission determined that it is feasible to recommend 25% of otherwise prison-bound felons for alternative sanctions. The decision of the Commission was based on the sample of offenders released from incarceration. By focusing on those released from prison, the Commission found that placing all offenders who scored nine points or less on the risk assessment instrument in an alternative punishment program would divert 25% of those who would otherwise be prison-bound. A score of nine points or under represents less than one chance in eight (12%) on average that a particular offender will be reconvicted of a felony within three years.

Selecting the number of prison-bound offenders to be recommended for alternative punishment programs involves a tradeoff between correctional costs and public safety. The greater the number of prison-bound offenders who are punished in alternative programs, the lower the correctional costs. However, redirecting from prison a very large proportion of these offenders would involve the placement in alternative punishment programs of higher risk individuals who pose a greater threat to public safety.

To illustrate this tradeoff, Figure 34 presents offender reconviction rates and the cumulative proportion of affected offenders with their differing risk assessment scores. The higher the risk assessment score, the higher the probability of recidivism. For example, offenders scoring four points or less had a failure rate (reconviction) of only 5%, but if all were given alternative punishment only 4% of the prison-bound property and drug offenders would be affected.

Figure 34

Offender Reconviction Rates and Cumulative Proportion of Affected Offenders



In order to direct more of these prison-bound felons to alternative punishments, the threshold of risk (point value on risk scale) has to be increased. Consider if all of the offenders scoring 17 points or less on the risk scale were given alternative punishments; almost all of the prison-bound offenders (90%) would be affected, yet, these offenders would have the relatively high reconviction rate of almost 30%.

In selecting an appropriate point threshold on the risk scale at which alternative punishment would be recommended in lieu of prison, the Commission took into consideration the legislative target of addressing 25% of prison-bound property and drug felons. To ensure that this number of offenders would be recommended for alternative punishment, the risk scale point threshold must be placed at a score of nine. Those offenders who scored nine points or less on the risk scale had a failure rate (reconviction) of 12%. This failure rate was viewed as an acceptably low level of risk to attain the targeted goal of impacting 25% of the prison-bound offenders. Raising the recommended point threshold any higher than nine would result in a much higher risk to public safety. For instance, those offenders scoring 11 or less points on the risk scale had a reconviction rate of 19%.

The Commission decided to apply the risk assessment instrument to jail-bound offenders as well. Using the same threshold of nine points or less, 47% of otherwise jail-bound offenders could be recommended for alternative punishment, with the same one in eight chance of felony reconviction within three years.

It should be noted, however, that not all offenders who receive a Commission recommendation of alternative punishment will be sentenced to such a program. Judges still retain the discretion to sentence as deemed appropriate; risk assessment is viewed by the Commission as an added piece of information for judges to consider as a sentencing decision is being made. Additionally, some alternative punishment programs require, for placement, the consent of the offender; without the offender's consent, the range of available alternative programs would be diminished.

Risk Assessment Criteria

Criteria for deciding whether a particular offender is eligible for risk assessment were drawn from several sources: (1) the enabling legislation, (2) direction from the Commission, and (3) practicality.

The enabling legislation instructed the Commission to develop a risk assessment instrument based on a study of Virginia felons. This legislation also excluded specific types of offenders from being eligible for risk assessment consideration. In general terms, the excluded offenders are those who have committed a violent felony either among their current offenses or among the offenses in their prior record.

The Commission made two explicit decisions that would impact eligibility for risk assessment consideration. First, the goal of the enabling legislation was to allow for redirection of felons from prison into alternative punishment programs. The Commission, however, decided to expand the felon eligibility pool beyond just those recommended to prison, to include any who would otherwise be recommended for incarceration, including incarceration in jail. Second, the Commission also decided to exclude offenders with increased sentence-length recommendations based on cocaine or crack sales of one ounce or more. See *Compliance and 1997 Guidelines Revisions* in the Guidelines Compliance chapter of this report for more information on enhancements for cocaine sales offenses.

The criteria for risk assessment eligibility based on practicality came about during the stage when decisions were being made about the study sample. During the planning stages of the risk assessment study, a major concern was that offenders with different underlying offenses may not conform well to a single list of risk assessment factors. To better isolate the factors involved in risk assessment for various offenses, it was decided to limit the number of offenses to three general types: drug, fraud, and larceny. These offense types also represent by far the three largest groups of offenders who could be considered for risk assessment under the 1994 legislation.

Figure 35 Final Risk Assessment Instrument

Drug — Section D

Form #

INELIGIBILITY CONDITIONS

Was the offender recommended for **No** incarceration on Section B? ..... ____ Yes

Do any of the offenses at sentencing involve the sale, distribution, or possession with intent, etc. of cocaine of a combined quantity of 28.35 grams (1 ounce) or more? ..... ____ Yes

Are any of the offenses in the offender's prior record listed on pp. 51-59 in the Virginia Sentencing Guidelines Manual? ..... ____ Yes

Are any of the offenses at sentencing listed on pp. 51-59 in the Virginia Sentencing Guidelines Manual? ..... ____ Yes

Do NOT complete Section D if any of the above conditions are met.

◆ Offender Score factors A – D and enter the total score

A. Offender is a male ..... 1 ☐

B. Offender's age at time of offense ☐
- Younger than 20 years 6
- 20 - 27 years 4
- 28 - 33 years 3
- 34 years or older 0

C. Offender never married at time of offense ..... 1 ☐

D. Offender unemployed at time of offense ..... 1 ☐

Score → Enter A-D Total: 0 ☐

◆ Offender Alone (no accomplice) When Primary Offense (any counts) Committed — If YES, add 2 → 0 ☐

◆ Additional Offenses Total the maximum penalties for additional offenses, including counts

Years:
- Less than 6 0
- 6 - 27 1
- 28 - 48 2
- 49 or more 3

→ 0 ☐

◆ Prior Arrest or Confinement Within Past 12 Months — If YES, add 2 → 0 ☐

◆ Total Felony/Misdemeanor Convictions and Adjudications

Select the combination of prior felonies and criminal misdemeanors that characterize the offender's prior record

0 Felonies
- 1 - 2 Misdemeanors 1
- 3 + Misdemeanors 2

1 Felony
- 0 Misdemeanors 1
- 1 - 2 Misdemeanors 2
- 3 - 7 Misdemeanors 3
- 8 + Misdemeanors 4

2 - 3 Felonies
- 0 - 2 Misdemeanors 3
- 3 - 7 Misdemeanors 4
- 8 + Misdemeanors 5

4+ Felonies
- 0 Misdemeanors 3
- 1 - 7 Misdemeanors 4
- 8 + Misdemeanors 5

→ 0 ☐

◆ Prior Felony Drug Convictions/Adjudications

Number:
- 1 1
- 2 2
- 3 3
- 4 or more 4

→ 0 ☐

◆ Prior Adult Incarcerations

Number:
- 1 - 2 1
- 3 - 4 2
- 5 or more 3

→ 0 ☐

◆ Prior Juvenile Incarcerations/Commitments — If YES, add 4 → 0 ☐

Total Score → ☐☐

If total is 9 or less, an alternative punishment is recommended.
If total is 10 or more, incarceration is recommended.

EFF. 12-1-97

Implementation of the Risk Assessment Instrument

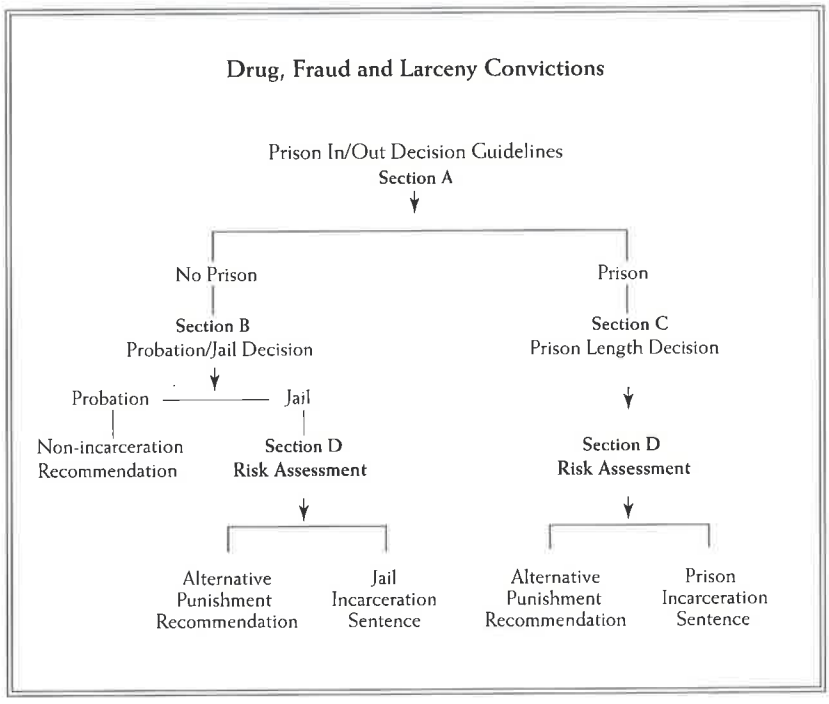
Risk assessment will be incorporated within the current guidelines system as an additional worksheet, known as Section D (Figure 35), to be filled out when the primary offense is either a drug, fraud, or larceny and the recommended sentence includes incarceration (Figure 36). If the sentencing guidelines recommendation is no incarceration, then Section D is not completed.

The risk assessment instrument will be pilot tested in several judicial circuits before full scale implementation across the state. This has been standard practice with sentencing guidelines efforts in Virginia. In 1988, the original guidelines were pilot tested before guidelines were introduced statewide. The Commission believes it is important to closely monitor the application of the instrument as a new component in the guidelines process. Experience gained during the pilot phase will be used to gauge the instrument's effect on judicial decision-making, sentencing outcomes, and criminal justice system resources. This will enable the Commission to make modifications as necessary.

Several factors were considered in selecting potential pilot judicial circuits. The Commission believed it was important to select jurisdictions where the case volume was large enough to enable valid conclusions to be drawn regarding the application of the risk assessment instrument. The availability of alternative sanction options was also deemed important. Unfortunately, in some judicial circuits alternative punishment programs are not available; local programs have not been developed, and the state programs have located elsewhere, closer to population centers. Another criterion was the percentage of presentence investigation reports ordered by judges in the circuit. In order to apply the instrument in an equitable manner, it is believed that quality information must be available regarding the offender's current status and criminal record.

Figure 36

Sentencing Guidelines System/Risk Assessment



This includes complete and accurate information subject to verification in court. When a PSI report is not available at sentencing, the chances of having missing and incorrect information increases. Therefore, the Commission believes that completion of a pre-sentence report optimizes the chances the judge will have thorough, relevant information at the time the offender is considered for an alternative punishment program. The judicial circuits selected as pilot sites are among those with higher percentages of pre-sentence reports completed. While the statewide average for completed pre-sentence reports in felony conviction cases is 54%, the selected circuits have PSI completion rates higher than 70%.

After selecting potential circuits, staff from the Commission met with judges and other professionals such as Commonwealth's attorneys, probation officers, and defense attorneys who will be involved in the project in each of the circuits to explain the legislative mandate and what is being requested.

Three judicial circuits have agreed to serve as pilot jurisdictions: Circuit 5, (the cities of Franklin and Suffolk and the counties of Southampton and Isle of Wight), Circuit 14 (Henrico), and Circuit 19 (Fairfax). Implementation of the risk assessment project began on December 1, 1997.

Risk Assessment Pilot Site Training

Substantial staff time was devoted to training at the pilot sites in October and November of 1997. The goals of the training and education seminars were to familiarize individuals with the risk assessment component of the guidelines and explain how the risk assessment worksheets and cover sheets should be completed. A manual explaining how to score these new worksheets was made available to those in attendance.

Judges, probation officers, Commonwealth's attorneys, and defense attorneys from each circuit were contacted about the training and encouraged to attend. The Commission offered mandatory continuing legal education credit for attorneys and Department of Corrections educational credits for probation officers.

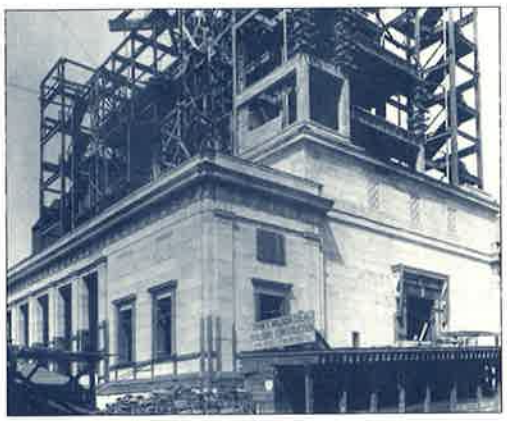
The new risk assessment worksheets have been printed and are being distributed to the pilot circuits. As with the other guidelines worksheets, the Commission staff will ensure that pilot site probation offices are stocked with an ample supply of risk assessment worksheets and training manuals.

Monitoring and Evaluation

The Commission feels it is important to pay close attention to how this new guidelines component integrates into the existing guidelines structure. This evaluation process has three main goals: 1) to evaluate the development of the risk assessment instrument; 2) to evaluate the implementation, use, and effectiveness of the instrument; and 3) to establish a database and methodology for a complete follow-up study on recidivism for offenders recommended for alternative sanctions through the use of risk assessment. This will be the first comprehensive evaluation that examines how risk assessment and intermediate sanctions are integrated into a sentencing guidelines structure, and what effect such a program has on the criminal justice system. The Commission, in conjunction with the National Center for State Courts, has applied for a grant from the National Institute of Justice, an agency of the United States Justice Department, for funds to supplement efforts to monitor and evaluate the risk assessment instrument.

As with any good evaluation of a new intervention or program, monitoring and evaluation is essential for determining its validity as well as its success. With this new component of the sentencing guidelines, it is important to know what happens to lower risk offenders and whether or not they subsequently re-offend. The original sentencing guidelines cover sheet has been modified to elicit judges' responses to the new risk assessment instrument. Space has been provided on the cover sheet for the judge to indicate why an alternative punishment is not the best choice for a particular offender. This is not a legislative requirement but participating judges have been encouraged to provide this information to assist the Commission in its evaluation efforts.

The Commission will compare offenders who were recommended for and received alternative punishment to those offenders who were recommended for alternative punishment but were given traditional incarceration. Such a comparison will allow an assessment of whether or not these alternative sanctions make *any* significant difference in future criminal activity for offenders considered to be lower risk. This type of monitoring work will both enhance our understanding of the risk assessment component of the guidelines and provide direction for change to the risk assessment instrument in the future. The following is an explanation of how the two different sentencing outcomes for lower risk offenders will be evaluated.



Federal Reserve Bank of Richmond under construction, Ninth and Franklin Streets, circa 1920; several additions followed to become the Supreme Court Building.

Lower Risk Offenders NOT GIVEN Alternative Punishments

In those instances where the risk instrument recommends alternative punishment and judges do not follow the recommendation, data will be obtained from existing automated sources. The study of these cases will focus largely on what type of sentence offenders actually receive as compared to the risk assessment recommendation. In addition to the risk assessment instruments themselves, sources of data for these offenders not given alternative punishment include the PSI data base and the sentencing guidelines database. Any reasons or comments cited by judges for departures will also be coded and examined. Examining eligible offenders who were not given alternative punishments provides an important context for analyzing and assessing those who were given an alternative sanction. Allowing enough time for offenders to be sentenced, released, and to subsequently re-offend, it will be possible to answer questions concerning the impact of risk assessment and the use of alternative punishments on recidivism rates for all offenders.

Lower Risk Offenders GIVEN Alternative Sanctions

The Commission plans to collect detailed information on cases where judges follow the risk assessment recommendation during the pilot study. If judges follow the recommendation in the case of all offenders who qualify, approximately 360 offenders may be sentenced to alternative punishments in the first year of the pilot phase. In these instances, measuring case outcomes at several points in time during participation in an alternative punishment program will be central to the data analysis. Data collection and survey instruments will be developed and executed in two separate phases of the evaluation.

The first data collection effort will occur as soon as possible following the judicial decision to place an offender in an alternative sanction. After a risk assessment scoring sheet is obtained, staff will verify the placement of an offender in a particular program or set of programs. This occurs after the Department of Corrections conducts an assessment (usually a 45 day process) to determine eligibility in a specific program.

Programs and services are divided into those funded or mandated by the state and administered by the Department of Corrections, and those funded or provided at the local level through a community corrections plan. State sanctioning programs administered include: regular/intensive probation, home incarceration/ electronic monitoring, diversion centers, boot camp, detention centers, work release, adult residential centers (ARC), day reporting centers (DRC), halfway houses, and drug testing/treatment programs. Local programs include commu-

nity service, public inebriate diversion, probation supervision, home incarceration/electronic monitoring, and substance abuse assessment, testing, and treatment services. Staff will code the type of services received, the standard or projected length of stay in the program and the dates of entry into the program.

Staff will also identify the process by which offenders are accepted into programs, considering the existence and extent of such factors as psychological assessments, substance abuse testing, and other initial placement procedures. This will occur through site visits and interviewing court officials and community corrections personnel from a variety of organizations at each pilot site. The collection and maintenance of detailed and accurate administrative information for all offenders at this early stage will be critical, since following individuals through the study period will be a difficult task even under ideal conditions. All of the data collected will be entered into a special data base designed for tracking the estimated 360 offenders who will be monitored throughout the pilot phase. The format of the data base will allow for later integration with other automated data.

The second phase of data collection pertains to offender progress and success or failure in alternative sanction programs. Case file information will be coded and structured interviews conducted to measure failure or drop-out rates, behavioral adjustment, level and extent of services provided, and other factors that describe resulting sanctions and how offenders have adapted to the alternative punishment. Since offenders can be sentenced to multiple sanction types (e.g., probation, electronic monitoring, and substance abuse counseling), dates will be captured to describe movement within and across program types.

The amount of time between the two phases of data collection will vary for offenders depending on the type of sanction received. For example, a boot camp program lasts for four months, while a detention center sanction can last between four and six months. In detention center cases it will be necessary to individualize follow-up periods depending on offender length of stays. Likewise, offenders participating in a substance abuse program may have individualized treatment plans that vary from others in the program.

During the second phase of data collection, evaluators will also examine the extent to which alternative sanctions are available for judges to use. Further, the study will also examine whether or not the recommendation for alternative sanctions is affected by program availability and jurisdictional differences across the state.

Research assistants will also gather data on success and failure rates, plans for continued treatment, job placement, and the use of other aftercare services. Interviews of key staff and judicial officers in the pilot sites will give an overall picture of how the study group is affected by organizational behaviors and polices concerning the administration of the sanctioning programs. In addition, judges as well as probation officers in the pilot sites will be interviewed regarding their perceptions of the risk assessment process.

These interviews will tell evaluators how smoothly the risk assessment program was implemented and how judicial officers are using the program to sentence offenders. The interviews will also be used to test whether or not judges perceive the risk assessment instrument accurately measures offender risk, and whether or not they perceive an effect on prison and/or jail bed space.

Data from both phases will be keyed and merged into a single database using standard statistical analysis software. The final data base will be merged with information from the risk assessment, sentencing guidelines, and PSI data bases to serve as the complete project data base.

Workload Impact Analysis

Because pre-sentence reports will be completed for nonviolent property and drug offenders, the pilot sites, despite their relatively high rate of pre-sentence report completion, are expected to experience some increase in workload. By surveying and interviewing probation officers, the Commission will try to quantify this impact on the probation office serving each of the pilot circuits. Ultimately, information obtained from the pilot sites will help estimate the increase in workload in probation offices across the state if the project is expanded statewide. In addition, some pilot circuits may experience an increase in case processing time. Court hearings may be delayed in some cases pending completion of a pre-sentence report. Again, surveys and interviews will be used to determine if this occurs, and if so, for what reasons.

Analysis Plan to Assess Risk Instrument's Validity

The data base used for tracking lower risk offenders will form the foundation for an analysis of the instrument's validity. After approximately three years, sufficient time will have elapsed following sentencing to collect and analyze data on new crimes. Recidivism rates of those offenders who were sentenced to alternative punishments will be compared to those who were not.

Additionally, the Commission plans to examine the error rate of the instrument. Most often criminal justice research aims to predict higher risk offenders. However, the task of the Commission is the converse: to predict lower risk offenders. In this context, the case of an offender recommended for an alternative sanction who subsequently re-offends is classified as a "false positive". Conversely, the case of an offender not recommended for an alternative sanction who does not re-offend is categorized as a "false negative". While no instrument will predict perfectly, the obvious goal is to minimize error. Though the error rate is important, it does not tell the whole story. The type of new offense will also be scrutinized since a new violent offense has more serious public safety implications than a series of low level nuisance crimes.

Projected Impact of Expanded Implementation

Forecasting the future local and state responsible bed space savings derived from the implementation of risk assessment necessitates a number of assumptions. First, the simulation program from which these forecasts are developed is largely driven by an admissions forecast. There are two types of beds that are affected by risk assessment recommendations, state-responsible beds (usually prison) and local-responsible beds (jail). For all of the state-responsible beds, and a small portion of the local-responsible beds, the admissions forecast was obtained from the Committee for Inmate Forecasting.[1] An existing forecast is not available for any aspect of the remaining local-responsible admissions. Consequently, the Commission staff developed local-responsible admissions forecasts of its own for the three offense groups using a statistical method accepted by forecasters as standard.

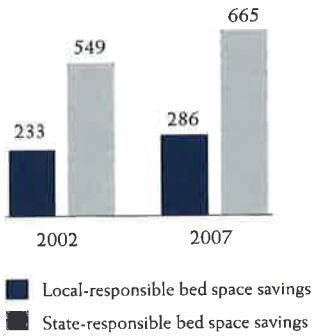
Second, the simulation assumed a three-stage phase-in for risk assessment implementation. The Commission decided that risk assessment would be implemented in three phases; a small pilot phase of about three or four circuits would begin late in 1997, many of the circuits joining the program in the following year, and the remainder in the third year.

Third, the rate of implementation used in the simulation program differed by offense and admissions forecast. The Commission recognizes that not all offenders who are recommended for an alternative punishment due to risk assessment will subsequently be sentenced to an alternative punishment program. The Commission decided to consider existing sentencing guidelines compliance information to estimate what proportion of those recommended for alternative punishment would be diverted from traditional incarceration. Specifically, the simulation model used the proportion of cases found to be in compliance with the sentencing guidelines recommendation or had been sentenced below the recommended range.

Fourth, the proportion of offenders who met the general eligibility conditions for using the risk assessment instrument, discussed previously, was assumed to remain constant throughout the simulation's forecast time horizon.

Given the above assumptions, the bed space impact should be substantial. The local responsible bed space savings are forecast to be 233 for June of 2002, and 286 for June of 2007. The comparable state responsible bed space savings are even larger: 549 in June of 2002, and 665 in June of 2007 (Figure 37).

Figure 37
Projected Bed Space Savings



[1] Inmate Population Forecasts: FY1998 to FY2007. (1997) Committee for Inmate Forecasting, Secretary of Public Safety, Commonwealth of Virginia, Richmond, VA.

Tentative Timetable

It is anticipated that the remaining circuits will gradually be added until all circuits are participating. Tentatively, statewide implementation of this new guidelines' component would be achieved by January, 2000.

Impact of New Sentencing System

Introduction

During its September 1994 Special Session, the Virginia General Assembly passed sweeping legislation which revised the system by which felons are sentenced and serve incarceration time in the Commonwealth of Virginia. The legislation abolished parole for offenders sentenced for felony offenses committed on or after January 1, 1995, and established a system of earned sentence credits which allows for a reduction in sentence not to exceed 15%. Under this new system, dubbed "truth in sentencing," felony offenders must serve at least 85% of their incarceration sentences behind bars. Under the previous system, generous good conduct credits (which could reduce a sentence by as much as half) combined with the granting of parole, meant that many inmates were released from incarceration after serving as little as one-fourth of the sentence imposed by a judge or jury.

With the third anniversary of the implementation of the new sentencing system upon us, it seems appropriate to examine its effectiveness in addressing the problems it was designed to address and what other impacts it has had on the criminal justice system.

Impact on Percentage of Sentence Served on Felony Sentences

A goal of sentencing reform was to establish truth-in-sentencing in Virginia by requiring each inmate to serve at least 85% of his sentence has been accomplished through the abolition of parole release and the implementation of a system of earned sentence credits limiting the amount of time a felon can work off his sentence to 15%. The intent of the reform was to establish a system where offenders are required to actively earn time off their sentences by participating in work, education, or treatment programs while incarcerated. Under the new earned sentence credit system, more was to be required of the offender than simply good behavior or staying out of trouble.

The Department of Corrections (DOC) has developed policies for the application of earned sentence credits. Under the program established by DOC, there are four different rates at which inmates can earn credits: $4^1/_2$ days for every 30 served (Level 1), three days for every 30 served (Level 2), $1^1/_2$ days for every 30 served (Level 3) and zero days (Level 4). Inmates who serve at Level 1, the highest level, for their entire sentence would end up serving 85% of the time imposed. Inmates are automatically placed in Level 2 upon entry into DOC, and an annual review is performed to determine if the level of earning is appropriate based on the inmate's conduct and participation in the preceding 12 months. In determining or adjusting an inmate's earning level, five areas are evaluated: the inmate's personal conduct, institutional infractions, work/vocational program performance,

educational program performance, and treatment program participation. An inmate who refuses assignment to a work, vocational or treatment program is ineligible for any earned sentence credits (DOC Division Operating Procedure 807). Inmates are not penalized for lack of participation if corrections staff do not recommend them to a program (e.g., if a disabled inmate cannot participate in a work program, or if certain programming is not available at the inmate's facility).

Analysis of earned sentenced credits gained by inmates sentenced under truth-in-sentencing and confined in Virginia's prisons on June 30, 1997, reveals that the majority (69%) are earning at Level 2, or three days for every 30 served (Figure 38). Over one-fifth (22%) are earning at the highest level, Level 1, meriting $4^1/_2$ days for every 30 served. Only 4% of inmates are earning at Level 3 ($1^1/_2$ days for 30 served) and 5% are earning no sentence credits at all (Level 4). According to this "snapshot" of the prison population, inmates sentenced under the new system are, on average, serving nearly 90% of the sentences imposed in Virginia's courtrooms.

Figure 38

Levels of Earned Sentence Credits among Prison Inmates (June 30, 1997)

Level	Days Earned	Percent
Level 1	4.5 days per 30 served	21.7%
Level 2	3.0 days per 30 served	69.3
Level 3	1.5 days per 30 served	4.0
Level 4	0 days	5.0

The rate at which inmates are earning sentence credits does not vary significantly across major offense groupings. For instance, larceny and fraud offenders, on average, are earning credits such that they are serving a little more than 89% of their sentences, while inmates convicted of robbery are serving about 90% of their sentences. As of June 30, 1997, murderers are serving the highest portion of their sentences, on average, than any other offense category, at just over 91%. This is largely due to fact that offenders sentenced to life in prison, which includes a disproportionate number of murderers, are not eligible to earn sentence credits.

Impact on Incarceration Periods for Violent Offenders

Achieving truth-in-sentencing, by abolishing parole and restructuring the system of good conduct allowance, was not the only goal of sentencing reform. A priority of the legislation was also to ensure that violent felons were targeted for longer lengths of incarceration in prison than they historically had served. With the creation of a system of midpoint enhancements, the sentencing guidelines yield longer sentence recommendations for offenders with current or prior convictions for violent offenses. Those convicted of nonviolent crimes with no history of violence receive guidelines recommendations based on historical incarceration time served. The sentencing guidelines were structured so as not to alter the historical rate at which these offenders were sentenced to incarceration in prison, but to increase the length of stay for violent offenders for whom judges deemed that a prison term was the most suitable punishment.

Despite the tendency of judges to mitigate from some of the sentencing recommendations involving midpoint enhancements (see *Compliance under Midpoint Enhancements* in the Guidelines Compliance chapter), thereby producing terms slightly shorter than if the guidelines were followed in every case, there is considerable evidence that, overall, sentences imposed for violent offenders under the new system are resulting in dramatically longer lengths of stay than those historically seen. Thus, in this regard, the intent of sentencing reform has been fulfilled.

The sentencing guidelines were crafted specifically to maintain the historical rate of prison incarceration terms, which was defined as any sentence exceeding six months. Indeed, offenders subject to truth-in-sentencing provisions have been sentenced to more than six months of incarceration at nearly the same rate as recommended under the new sentencing guidelines. For crimes against the person, ranging from unlawful injury (a Class 6 felony) to first degree murder (Class 2), the guidelines have recommended that 77% of the offenders serve more than six months, while 75% have actually received such a sanction (Figure 39). The guidelines have recommended 41% of property offenders for incarceration more than six months and, overall, 35% have been sentenced accordingly. In drug crimes, offenders have been recommended for and sentenced to terms exceeding six months in 36% and 31% of the cases, respectively.

Across all offense types, fewer offenders are sentenced to incarceration terms over six months than are recommended by the guidelines. The difference between recommended and actual rates of incarceration to terms over six months is larger in property and drug cases than for person crimes. A concurrent goal of sentencing reform was the expansion of alternative sanctions to traditional incarceration for nonviolent offenders who are considered amenable to such punishment, particularly those who would otherwise be serving time in prison. Many property and drug offenders recommended by the guidelines to more than six months of incarceration in a traditional correctional setting are instead being placed in these newly expanded state and local alternative sanction programs. See *Impact on Expansion of Alternative Sanction Options* in this chapter for information regarding the development of alternative punishment programs under truth-in-sentencing.

Figure 39

Recommended Dispositions and Actual Dispositions by Offense Type

	Recommended Disposition			Actual Disposition		
Type of Offense	Probation/ Alternative Sanctions	Jail Incarceration Up to 6 mos.	Prison Incarceration More than 6 mos.	Probation/ Alternative Sanctions	Jail Incarceration Up to 6 mos.	Prison Incarceration More than 6 mos.
Person	12.9%	10.0%	77.1%	15.4%	9.9%	74.7%
Property	38.5	20.3	41.2	41.5	23.7	34.8
Drug	41.1	23.1	35.8	43.6	24.9	31.4
Other	18.2	9.1	72.7	18.9	13.7	67.4

In assessing the impact of the new system, there is significant evidence that violent offenders are indeed serving longer terms behind bars than they historically served prior to sentencing reform. The majority of violent offenders convicted under truth-in-sentencing can expect to serve longer than they would have under the old good conduct credit and parole laws. For instance, first degree murderers who had no prior record of violence, typically served $12^{1}/_{2}$ years under the parole system (1988-1992), based on the time-served median (the middle value, with half serving less time, half serving more). After sentencing reform, offenders convicted of first degree murder with no prior record of violence are receiving sentences with a median expected time to serve of 36 years in prison, or nearly three times what they historically served under the parole system (Figure 40). First degree murderers with a less serious violent record (i.e., a Category II prior record: a prior violent felony which carries a maximum statutory penalty of less than 40 years), who served a median of 14 years under the previous sentencing system, are now receiving terms which will result in a typical time to serve of over 46 years. The most violent offenders, those convicted of first degree murder who have a more serious violent record (i.e., a Category I prior record: a prior violent felony which carries a maximum statutory penalty of 40 years or more), having served, on average, less than 15 years in the past, are being sentenced to terms which will produce a median time to serve of 85 years under truth-in-sentencing.

As with first degree murder cases, an examination of prison terms for offenders convicted of second degree murder reveals considerably longer lengths of stay in the post-sentencing reform period. Offenders with no violent prior convictions historically served less than five years under the parole system, and only six and one-half years and seven years in cases involving increasingly serious violent records (Figure 41). Since sentencing reform, offenders convicted of second degree murder who have no record of violence are receiving terms which will produce a median time served of nearly 14 years, almost three times

This discussion reports values of incarceration time served under parole laws (1988-1992) and after sentencing reform (January 1, 1995 - September 30, 1997) that are represented by the median (the middle value, where half of the time served values are higher and half are lower). Values for current practice represent expected time served on no-parole sentences (90%) for cases recommended for, and sentenced to, more than six months of incarceration.

Figure 40

Prison Time Served
Parole System v. Truth-in-Sentencing (in years)

First Degree Murder

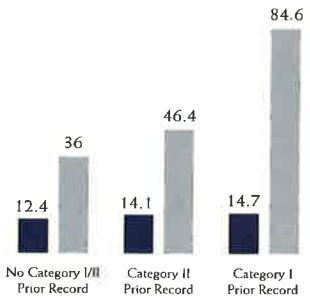
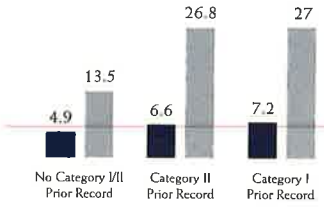


Figure 41

Prison Time Served
Parole System v. Truth-in-Sentencing (in years)

Second Degree Murder



the historical length of stay. The effect of the new legislation is even more prominent when examining violent recidivists. Under the old laws, offenders convicted of second degree murder who had violent criminal histories typically served between six and seven years in prison. Under truth-in-sentencing, these repeat violent offenders now will typically serve between 27 and 28 years.

Likewise, offenders convicted of voluntary manslaughter are serving more time behind bars than in the past. For voluntary manslaughter, offenders typically served two to three years in prison under the parole system, regardless of the nature of their prior record. Persons who commit this act of violence, but who have no previous convictions for violent crimes, are now receiving sentences which will result in a median time served in excess of four years, doubling historical terms (Figure 42). Median sentences in cases involving a voluntary manslaughter conviction and less and more serious violent prior records are now yielding an anticipated time served figures of six and nine years, respectively, or more than double that which offenders fitting this profile served under the old parole laws.

Also readily discernible is the impact of sentencing reform in rape and sexual assault cases. Offenders convicted of forcible rape (no violent prior record) under the parole system were released after serving, typically, $5^{1}/_{2}$ years in prison (Figure 43). However, having a prior record of violence increased the rapist's median time served by only one year. After sentencing reform, rapists with no previous record of violence are being sentenced such that they will serve a median term of nine years, nearly two times the historical midpoint time served. Rapists with a less serious violent record are also expected to serve terms twice as long as the seven years they served prior to sentencing reform. For offenders with a more serious violent prior record, such as a prior rape, the sentences imposed under truth-in-sentencing are equivalent to time to be served of over 42 years, effectively a life sentence for many offenders.

Figure 42

Prison Time Served
Parole System v. Truth-in-Sentencing (in years)

Voluntary Manslaughter

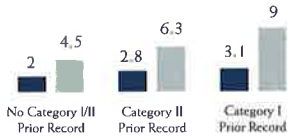
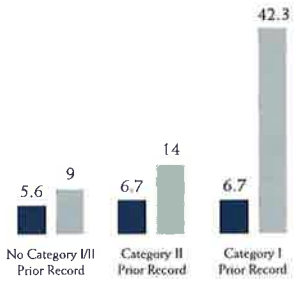


Figure 43

Prison Time Served
Parole System v. Truth-in-Sentencing (in years)

Forcible Rape



Category II is defined as any prior conviction or juvenile adjudication for a violent crime with a statutory maximum penalty less than 40 years.

Category I is defined as any prior conviction or juvenile adjudication for a violent crime with a statutory maximum penalty of 40 years or more.

1988-1992 Practice

Truth-in-Sentencing

Results are similar for another violent sexual crime, forcible sodomy. Historically, under the parole system, offenders convicted of forcible sodomy served about 4 to $5^{1}/_{2}$ years, even if they had a prior conviction for a serious violent felony (Figure 44). Now, such offenders are expected to serve terms typically ranging from nine years, if they have no prior violent convictions, up to nearly 23 years if they have very serious violent prior record.

Offenders convicted of a lesser sexual assault crime, that of aggravated sexual battery, can also expect to serve longer than they did under the previous sentencing system. Aggravated sexual battery convictions under the parole system yielded prison stays typically of one to two years (Figure 45). Recommendations of the sentencing guidelines have led to increases in time served for many of these offenders. Of those sentenced to terms exceeding six months for aggravated sexual battery, those with no prior violence are expected to serve close to three years, while those who have exhibited repeat violent behavior are going to serve $4^{1}/_{2}$ to 5 years. Sentencing reform has effectively doubled the time to be served for most offenders convicted of this crime.

Aggravated malicious injury is the most serious assault covered by the sentencing guidelines. Offenders convicted of aggravated malicious injury with no prior violent convictions served, on average, less than four years behind bars prior to reform, but sentencing reform has resulted in a median term of nine years for these offenders (Figure 46). After sentencing reform, time served for this offense when accompanied by a less serious violent prior conviction increased from $4^{1}/_{2}$ years to 9 years, and from $4^{1}/_{2}$ years to 20 years when accompanied by a more serious violent record. Sentencing in malicious injury cases demonstrates a similar pattern. Sentencing reform has more than doubled time served for those convicted of malicious injury who have no prior violent record or a less serious violent record, and more than tripled time served for those with the most serious violent record (Figure 47).

Figure 44

Prison Time Served
Parole System v. Truth-in-Sentencing
(in years)

Forcible Sodomy

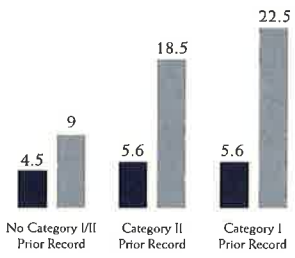


Figure 45

Prison Time Served
Parole System v. Truth-in-Sentencing
(in years)

Aggravated Sexual Battery

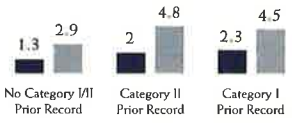
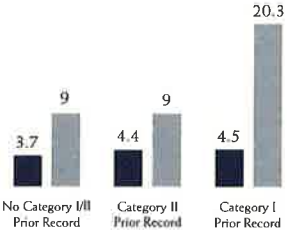


Figure 46

Prison Time Served
Parole System v. Truth-in-Sentencing
(in years)

Aggravated Malicious Injury



The effect of sentencing reform on time served for robbery has been profound. Robbers who committed their crimes with firearms, but who had no prior record of violence, typically spent less than three years in prison under the parole system (Figure 48). Even robbers with the most serious type of violent prior record (Category I) only typically served a little more than four years in prison prior to the no-parole legislation. After sentencing reform, offenders who commit robbery with a firearm are receiving prison terms that will result in a median time to serve of over seven years, even in cases in which the offender has no prior violent convictions. This is more than double the typical time served by these offenders under the previous system. For robbers with the more serious violent prior record, such as a prior conviction for robbery, who are convicted under the new system the expected time served in prison is now 16 years, or four times the historical time served for offenders fitting this profile.

Success of the sentencing reform in achieving longer lengths of stay for violent felons can also be seen in cases of offenders whose current offense is considered nonviolent but who have a prior record of violence. Prior to sentencing reform, an offender was categorized as violent or nonviolent based exclusively on the nature of his current offense, even if he had a prior conviction for a violent criminal act (e.g., an offender has most recently committed a larceny, but has previously been convicted of robbery). Sentencing reformers felt that these offenders should be characterized as violent and wanted to ensure that they served longer terms as well. The system of midpoint enhancements crafted during sentencing reform addresses this goal. Under the new system, offenders whose current and prior offenses are nonviolent are recommended by the sentencing guidelines to serve terms equivalent to the historical time served by these offenders. For example, for the sale of a Schedule I/II drug with no violent prior record, the guidelines rec-

Figure 47

Prison Time Served
Parole System v. Truth-in-Sentencing
(in years)

Malicious Injury

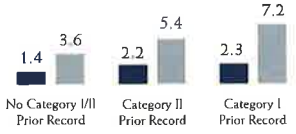
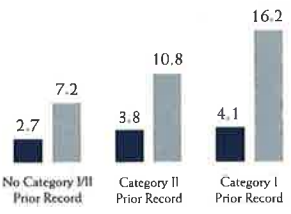


Figure 48

Prison Time Served
Parole System v. Truth-in-Sentencing
(in years)

Robbery with Firearm



Category II is defined as any prior conviction or juvenile adjudication for a violent crime with a statutory maximum penalty less than 40 years.

Category I is defined as any prior conviction or juvenile adjudication for a violent crime with a statutory maximum penalty of 40 years or more.

1988-1992 Practice
Truth-in-Sentencing

ommend a midpoint term of one year, the same as what offenders convicted of this offense served prior to the new sentencing system (Figure 49). Under the current system, these drug felons are serving just under one year. The sentencing recommendations increase dramatically, however, if the offender has a violent background. Although drug sellers with violent histories on average served only about a year and half prior to sentencing reform, the guidelines now recommend terms of three and five years for drug sellers with a less or more violent prior record, respectively. As can be seen, Virginia's judges are responding by sentencing these felons to longer terms, approximating the guidelines recommendations.

In most cases of the sale of marijuana (more than $^1/_2$ ounce and less than five pounds), the sentencing guidelines do not recommend incarceration over six months, particularly if the offender has a minimal or no prior record. Nonetheless, in those relatively few cases in which judges choose to sentence marijuana sellers having no prior violent record to a term exceeding six months, they have imposed sentences with an expected time to serve of a year and a half (Figure 50). When sellers of marijuana have the most serious violent criminal history (Category I), judges have responded by handing down sentences with a median $2^1/_2$ years to serve. While terms imposed in sale of marijuana cases appear to exceed the guidelines recommendations, the number of cases is relatively small.

Similarly, in grand larceny cases, the sentencing guidelines do not typically recommend a sanction of incarceration over six months unless the offender has a fairly lengthy criminal history. When the guidelines do recommend such a term, grand larceny offenders with no violent prior record are being sentenced to a median term of nearly one year (Figure 51). Offenders whose current offense is grand larceny but who have a prior record with a less serious violent crime are serving twice as long after sentencing reform, with terms increasing from just under a year to just under two years. Their counterparts with

Category II is defined as any prior conviction or juvenile adjudication for a violent crime with a statutory maximum penalty less than 40 years.

Category I is defined as any prior conviction or juvenile adjudication for a violent crime with a statutory maximum penalty of 40 years or more.

Figure 49

Prison Time Served
Parole System v. Truth-in-Sentencing (in years)

Sale of a Schedule I/II Drug

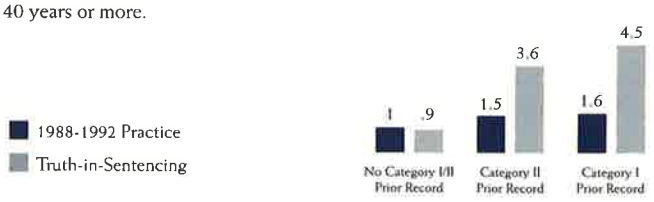
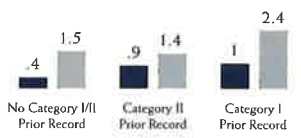


Figure 50

Prison Time Served
Parole System v. Truth-in-Sentencing (in years)

Sale of Marijuana - Less than 5 lbs.



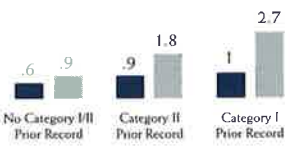
the more serious violent prior records are now serving terms of more than $2^{1}/_{2}$ years instead of the one year they have in the past.

Thus, there is unequivocal evidence that the sentences being imposed under the new system for violent offenders are producing lengths of stay dramatically longer than those historically seen. Furthermore, it was the intent of the reform that offenders with violent criminal histories serve longer than those with less serious records. It appears that median time served prior to sentencing reform for many of the offenses discussed here was not significantly related to prior record defined in terms of previous acts of violence. As the result of the design of the sentencing guidelines, sentences imposed under the new sentencing system are producing lengths of stay which increase as the seriousness of prior violence increases, creating the "stair step" effect intended by the sentencing legislation.

Figure 51

Prison Time Served
Parole System v. Truth-in-Sentencing (in years)

Grand Larceny



Impact on Projected Jail and Prison Bed Space Needs

Instituting truth-in-sentencing and achieving significantly longer incarceration terms for violent offenders were prominent goals of sentencing reform. During the development of sentencing reform legislation, much consideration was given as how best to realize those goals with Virginia's current and planned correctional resources. Reform measures were carefully crafted with an eye towards utilizing expensive correctional resources as efficiently as possible. Under the truth-in-sentencing system, the sentencing guidelines recommend prison terms for violent offenders up to six times longer than those historically served, while recommendations for nonviolent offenders are structured so that nonviolent offenders serve approximately the same terms of incarceration as they did in the past. Moreover, the sentencing guidelines are designed to preserve the proportions and types of offenders sentenced to prison incarceration.

Sentencing reforms will have an impact on the prison inmate population. Because violent offenders are serving significantly longer terms under the new system while time served by nonviolent offenders has been held relatively constant, one should expect an increase over time in the proportion of the prison population composed of violent offenders relative to the proportion of nonviolent offenders. Violent offenders will be queuing up in Virginia's prisons due to longer lengths of stay, while nonviolent offenders will continue to be released as they have in the past. The Commission anticipates that the percentage of the incarcerated population defined as violent (offenders with a current or previous conviction for a violent felony) will con-

tinue to grow over the next decade. One might also anticipate some level of increase in the prison population since violent offenders are serving longer terms than they did just prior to truth-in-sentencing reforms. Currently, one out of every five offenders qualifies for midpoint enhancements, resulting in a longer recommended term. Thus, although reform measures substantially increase lengths of stay for certain offenders, the number of offenders targeted is relatively small compared to the overall number of criminals entering Virginia's prisons. Furthermore, because sentencing reforms target violent offenders, who were already serving longer than average sentences, the impact of longer lengths of stay for these offenders won't be felt until well into the next decade and beyond.

Despite record breaking increases in the inmate population in the late 1980s and early 1990s, growth in the number of state prisoners has slowed in recent years. As such, the state's official prison forecast has been revised downward for the third consecutive year. Where the state once expected nearly 45,000 inmates in June 2002, the current projection for that date is 34,514. Prior forecasts predicted a doubling of the inmate population, but the 1997 forecast for state prisoners projects average annual growth of only 3.7% (Figure 52). Unanticipated drops in the number of admissions to prison in the last three years have caused these progressively lower forecasts. Recent declines in the number of admissions to prison are key to the slower rate of growth now projected for Virginia's prison population.

The drop in admissions to prison that Virginia is experiencing reflects the recent downturn in the amount of crime reported in the Commonwealth. The crime rate in Virginia has been declining in recent years and is welcome news. See *Impact on Crime* section in this chapter for further discussion of crime and the new sentencing system.

Figure 52

State-Responsible Inmate Population – Historical and Projected

	Date*	Inmates	Percent Change
Historical	1993	20,760	
	1994	23,648	13.9%
	1995	27,364	15.7
	1996	28,743	5.0
	1997	28,743	0
Projected	1998	30,271	5.3
	1999	31,443	3.9
	2000	32,561	3.6
	2001	33,571	3.1
	2002	34,514	2.8

* June each year

June 1996 and June 1997 actual prison population levels were identical, according to the Virginia Department of Corrections.

Impact on Expansion of Alternative Punishment Options

When the new sentencing system was created the General Assembly established the Statewide Community-Based Corrections System. The system was implemented to provide circuit court judges alternatives to traditional incarceration in prison for nonviolent felons otherwise destined for prison, enabling them to reserve costly prison beds for violent offenders.

The system included alternatives that, while they actually involve incarceration, are different from traditional incarceration in jail or prison. These alternatives include more structured programs designed to address problems associated with recidivism. Some of the programs also involve physical labor. Offenders accepted in these programs are considered probationers since their entire sentence has been suspended and the sentencing judge retains authority over the offender should he fail the conditions of the program or subsequent supervision.

Alternative Incarceration Punishment Programs

In the three years since the new sentencing system became effective, the Department of Corrections has begun to establish new types of programs. Three detention centers and two diversion centers are located in the Department's Eastern and Central Regions. In its 1997 session, the General Assembly authorized conversion of correctional field unit beds in addition to work centers in the Department of Corrections' Northern and Western administrative regions, but to date no detention or diversion Centers have opened in these regions. The number of beds total 440, of which 86 are designated to serve female probates. The majority of these beds, about 70%, are detention center beds. According to the Department of Corrections, diversion centers have been more difficult to site. The first diversion center opened in December, 1996; this Richmond facility for females has a 36 bed capacity. Six months ago, in July of 1997, the Chesterfield Diversion Center for Men began operation; its capacity is 100. The Department of Corrections continues to explore additional sites in the Northern, Central, and Western regions. Several field units have been identified as potential detention centers but have not yet been converted.

These two new types of alternative punishment incarceration programs supplement the Boot Camp Incarceration Program which has been in operation since 1991. This program for young adult offenders is a military-style program focusing on drill and ceremony, physical labor, remedial education, and a drug education program.

At the present time there are no plans to expand the boot camp incarceration program, which has 96 beds. Young male offenders are received into the program once a month in platoons averaging about 30 each. The program has recently been lengthened from three to four months making it more comparable in length to the detention and diversion center programs. The few women referred and accepted to the program are sent to a women's boot camp facility in Michigan.

Detention center, diversion center and boot camp programs are voluntary in that a defendant must motion the court for consideration. Following conviction or a probation revocation, the court may commit the defendant to the Department of Corrections for evaluation. If the Department of Corrections finds the defendant a suitable candidate, the court may impose and suspend a prison sentence and then place the offender on probation conditioned on the offender's successful completion of one of the aforementioned programs. The programs are designed for nonviolent offenders who would otherwise have been incarcerated in prison. Failure to complete the program results in the offender's return to court, at which time probation and the suspended sentence may be revoked in whole or part.

Alternative to Incarceration Punishment Programs

The Department of Corrections also operates a number of day reporting centers featuring daily offender contact and monitoring as well as program services. Day reporting centers are designed to control probates' and parolees' activities each day and operate from 6 a.m. to 10 p.m. Offenders report each morning to the center and are directed to any combination of education or treatment programs, to a community center work project, or a job. Currently there are six such non-residential centers. The Fairfax and Abingdon programs opened in 1993. The following year, programs began in Richmond and Newport News/Hampton. Norfolk and Roanoke opened in 1995. They are considered a more viable option in urban rather than rural areas since offenders must have transportation to the center. The Department has requested funding for three additional day reporting centers. Locations targeted are 1) Martinsville/Danville 2) Suffolk/Chesapeake/Portsmouth and 3) Harrisonburg/Staunton.

The three types of alternative incarceration punishment programs (detention centers, diversion centers, and boot camp) when added to existing non-incarceration punishments such as day reporting centers, home/electronic incarceration, halfway houses, intensive probation and regular probation supervision comprise the new Statewide Community-Based Corrections System for State-Responsible Offenders.

While the expansion of alternatives to traditional incarceration has up to this point kept pace with the demand for such alternatives, the implementation of risk assessment coupled with recent legislative and guidelines changes are expected to increase the demand for such alternatives.

Impact on Crime

Reported crime in Virginia is going down. Since the inception of the new sentencing system, the overall rate of so-called "index crimes" (murder/non-negligent manslaughter, forcible rape, robbery, aggravated assaults, burglary, larceny, motor vehicle theft and arson) in Virginia (per 100,000 residents) has declined from 4,108 in 1994 to 3,971 in 1996, or more than 3%. From 1994 to 1996, the rate of reported robberies has dropped by nearly 9% and aggravated assault by almost 5%. Burglary and larceny rates have fallen 10% and 1%, respectively.

The drop in the crime rate and introduction of a new felony punishment system raises the possibility that there is some cause and effect relationship. The adoption of truth-in-sentencing to ensure more certain punishments and longer prison terms for violent felons was accompanied by an expectation that it would address some aspect of the crime problem. Accordingly, it is appropriate to begin to attempt the address what, if any, impact the new sentencing system may be having on Virginia's crime rate. Accordingly, the next sections of the report address the possible relationship between the implementation of the new sentencing system and the crime rate.

Impact on Crime - Deterrence Effects

In crafting the new system, the designers of sentencing reform dramatically altered the way felons are sentenced and serve time in Virginia. Virginia has embarked on the era of truth-in-sentencing. The new sanction system abolished parole and restricted time that an inmate can work off his sentence, with the goal of making punishment certain and predictable. As stated earlier, a major objective of this reform was to ensure that violent criminals, especially repeat violent offenders, were punished more severely than in the past. Thus, the guidelines were designed to recommend sentences for violent offenders that were up to six times longer than terms historically served. The new sentencing legislation mandated that alternative sanction programs for nonviolent offenders be developed and expanded throughout the Commonwealth to hold down the cost of incarcerating violent criminals longer. While these sentencing reforms appear to be fulfilling many of the intended goals, at this time the impact of these changes on crime in Virginia is much more difficult to ascertain.

If, indeed, sentence reform has had an effect on crime, then it may be that through the knowledge of the tough penalties of the new system, some persons who would otherwise have broken the law have been deterred from committing crime, or at least certain types of crime. Deterrence is one of the commonly acknowledged goals of our criminal justice system. The criminological literature refers to both general deterrence and specific deterrence. Specific deterrence pertains to an individual and the hope that the threat or actual application of a punishment

will deter him from engaging in crime. A number of criminological studies of the deterrent value of punishment initiatives have produced mixed results, with some researchers concluding that many offenders were unaware of the new sanctions that were enacted in hopes of deterring their criminal behavior. Theoretically, the deterrent value of a specific punishment is enhanced when the targeted person or population is adequately informed of the sanction. If the likely punishment for future misconduct is specifically detailed and communicated to the intended audience, the deterrent value of the sanction should be increased.

Ceremonial laying of the cornerstone for the Federal Reserve Bank of Richmond, April 13, 1920. This became the foundation for the present day Supreme Court Building.

Through the offender notification program now underway in Virginia, inmates are informed of the state's new tougher sentencing laws by correctional staff at the time of their release processing. Unlike other punishment initiatives, the offender notification program involves communicating specific information about the sanctions the offender is likely to incur should he reoffend. Offenders being released from prison have not only experienced punishment for committing their original crimes, but they are instructed on the harsher sanctions which likely await them should they be convicted of a new crime. Thus, the program should increase the potential deterrent effect of Virginia's sentencing reforms among this offender population. Virginia's offender notification program is the first of its kind in the nation. The evaluation of its impact on recidivism rates, being conducted by the Commission over the next two years, will be of interest to a wide audience of legislators, executive branch agencies, and others around the nation interested in sentencing reform. See *Offender Notification Program* in the first chapter for more information about the evaluation of this program.

The other aspect of deterrence is known as general deterrence. General deterrence is aimed at the general citizenry and the hope that knowledge of criminal penalties among the population will deter criminal conduct. General deterrence effects are much more difficult to assess since it is very hard to measure the depth of knowledge among the population about criminal punishments and what, if any, effect this knowledge has in preventing them from committing crime. At this time, the Commission is not undertaking any efforts to study the general deterrent effect of the new sentencing system.

Impact on Crime - Incapacitation Effects

The impact of sentencing reforms on crime in Virginia may extend beyond the concepts of specific and general deterrence. Criminological research suggests that a relatively large share of crime is committed by a small portion of known offenders. The designers of sentencing reform targeted violent offenders, particularly repeat violent offenders, for significantly longer terms in prison than those historically served. The new system keeps violent offenders incarcerated for longer terms than in the past, incapacitating them longer, and thereby preventing any new crimes they might commit if they were released into the community earlier.

At this time, the incapacitation effect of the new punishment system on crime cannot be measured definitively. The new system became effective for anyone convicted of a felony crime occurring on or after January 1, 1995. Since the new sentencing system has been in effect for less than three years, most of the violent offenders, based on historical average time served, would still be in prison even if the old parole and inmate good time laws were still in existence. An incapacitation effect of the new longer sentences can only begin to be measured when a period of time has elapsed that exceeds the historical length of time served in prison for violent offenders. Further complicating a study of incapacitation effects is the fact that for inmates still serving out sentences under the parole system, parole grant rates, averaging approximately 42%, dropped dramatically during the last three years to an average of just 15%. The drop in parole grant rates has resulted in significantly longer prison stays for felons being punished under the old sentencing system. Thus, it could be possible that the drop in parole grant rates is achieving some of the incapacitation effects that sentence reform is designed to produce.

Impact on Crime - Summary

The crime rate in Virginia has been declining in recent years and is welcome news. Crime has also been declining nationally, with many states witnessing downward trends in crime rates similar to those Virginia has experienced. Some of these states have abolished parole and toughened their punishments for violent offenders, while others have adopted other crime fighting strategies. The issue of whether the drop in crime rates seen in the Commonwealth is largely attributable to the sentencing reforms or some other combination of initiatives, such as reductions in parole grant rates, is complex and requires rigorous research with longitudinal data. While the relationship between the sentencing reforms and crime rates cannot be discerned definitively at this point in time, it is important to continue to pursue this research to ensure that policy makers understand the impact of their initiatives.

Recommendations of the Commission

Recommendation 1

Amend §17-234 of the Code of Virginia to require one-time appointments to the Sentencing Commission for staggered terms and to remove the current restriction on two appointment terms for current members in order to ensure some degree of membership continuity.

❖ Issue

Membership of the Sentencing Commission.

❖ Problem

Under §17-234, members of the Sentencing Commission are appointed to three year terms and are not eligible to serve more than two consecutive terms except the Attorney General who serves by virtue of his office. Because of this statutory language, there exists the real possibility of almost complete turnover in Commission membership all at one time. For example, 14 of the 17 current Commission members will, under current law, be prohibited from serving beyond October, 2000. The simultaneous loss of 82% of the Commission members would hinder progress on ongoing projects and eliminate a great deal of institutional knowledge. To avoid situations like this, legislation usually provides for staggered appointment terms so that turnover on a commission is gradual and continuity is provided.

❖ Proposal

The Commission requests a modification to §17-234, providing that all appointments to the Commission in the year 2000 be for varied terms. Thereafter, appointments will be for four years. Also, to prevent an exceedingly large amount of membership turnover in three years, the legislative proposal includes a clause that would allow members initially appointed prior to January 1, 1998, to be eligible for re-appointment. Under the legislative proposal, only members initially appointed on and after January 1, 1998, shall not be eligible to serve more than two consecutive terms. This proposal also includes a provision that would provide statutory language addressing the appointment of a Commission Vice-Chairman.

Recommendation 2

Amend §17-237 of the Code of Virginia to eliminate the clause which restricts the period of time that is considered when scoring prior criminal record for certain convicted felons.

❖ Issue

Scoring of prior criminal record with the so-called "16 year rule."

❖ Problem

Under §17-237, when evaluating prior criminal record for purposes of applying guidelines midpoint enhancement for past violent crimes, "previous convictions shall include prior adult convictions and adjudications of delinquency based on an offense which would have been at the time of conviction a felony if committed by an adult under the laws of any state, the District of Columbia, the United States and its territories." However, if the offender is convicted of a crime not specified in §17-237 (1,2,3), there is statutory language that limits the review of past record. The intended purpose of the clause in §17-237(B) was to ensure that someone convicted of certain non-violent crimes who has been crime free for an extended time would not receive a large midpoint enhancement on the guidelines for a prior conviction that occurred a long time ago. Specifically, §17-237(B) states "However, for purposes of subdivision A4 of this section, only convictions or adjudications (i) occurring within sixteen years prior to the date of the offense upon which the current conviction or adjudication is based or (ii) resulting in an incarceration from which the offender was released within sixteen years prior to the date of the offense upon which the current conviction or adjudication is based shall be deemed to be previous convictions."

In reality, the provisions of this "16 year rule" are rarely applicable to most offenders. More importantly, it is almost impossible to apply this rule in a fair and consistent manner. The source material for applying this rule is the criminal history "rap" sheet. To correctly determine if the provisions of this section apply to a case, the worksheet preparer must be able to identify the date of the prior convictions or release from incarcerations. These dates are almost never found on criminal history records, especially for crimes that have occurred in the distant past.

❖ Proposal

The Commission proposes elimination of the "16 year rule." The scoring of the guidelines forms should be accomplished in a fair and accurate fashion. The fact that the criminal history record keeping system does not typically contain the information required to apply the 16 year rule creates a situation where a worksheet scoring rule cannot be reliably and consistently applied. In cases involving an offender who has been crime free for an extended period of time, it should be left up to the judge's discretion to decide the merit of a guideline midpoint enhancement for violent crime in the distant past. The Commission is very confident that judges are already doing this as witnessed by the lower compliance rate in cases already receiving midpoint enhancements. As documented in the Guidelines Compliance chapter, in cases involving applied midpoint enhancements, judges are mitigating at a rate higher than the overall compliance pattern.

Recommendation 3

Amend §16.1-305 of the Code of Virginia to permit probation officers and Commonwealth's attorneys to photocopy or receive photocopies of petitions and disposition information on juvenile criminal records in order to accurately and expeditiously prepare sentencing guidelines worksheets.

❖ Issue

Juvenile record access to complete guidelines worksheets

❖ Problem

In 1995, the Commission requested that §16.1-306 be modified to allow that juvenile records be maintained to support the complete scoring of sentencing guidelines worksheets, as stipulated in §17-237(B). This amendment was approved by the General Assembly and went into effect July 1, 1996. Nonetheless, probation officers and Commonwealth's attorneys continue to encounter difficulties in obtaining juvenile record information in a timely fashion.

Subsections A and C of §16.1-305 of the Code of Virginia give both probation officers and Commonwealth's attorneys access to all juvenile records including social, medical and psychological records, petitions, motions, transcripts of testimony, findings, verdicts and orders. However, probation officers and prosecutors are required to hand write all the information they need to accurately prepare the guidelines worksheets. The written transcription of the juvenile record information is extremely time consuming and can be unreliable when notes are illegible or important details are missed.

❖ Proposal

The Commission proposes a modification of §16.1-305 to permit probation officers and prosecutors to photocopy petitions and disposition information as required for sentencing guidelines worksheet computations. Suggested language would state: "Upon request, a copy of the court order of disposition in a delinquency case shall be provided to the probation officer or the attorney for the Commonwealth for the purposes of calculating sentencing guidelines and for the preparation of a background report for the court or the Department of Corrections. This information shall be kept confidential by each recipient, and reports utilizing this information shall be distributed as specified in §19.2-299 and §19.2-298.01."

This modification to the Code would ensure that probation officers and prosecutors have timely access to juvenile records and enhance the accuracy of the information used in preparing guidelines worksheets.

Recommendation 4

Amend §19.2-298.01 of the Code of Virginia to make it clear that sentencing guidelines forms are open records and should not be sealed upon entry of the sentencing order.

❖ Issue

Sealing of sentencing guidelines forms in court records

❖ Problem

Section 19.2-298.01 provides that completed guidelines worksheets are to be made part of the official record of the case. It has been the position of the Commission that the guidelines forms are open records and available for review by the public. There is no specific language in the Code that requires a court clerk to seal guidelines worksheets.

Section 19.2-298.01 also contains language which addresses the process for distributing guidelines forms. This language states that guidelines forms "shall be subject to the same distribution as presentence investigation reports prepared pursuant to subsection A of §19.2-299." This language is present to ensure that the guidelines forms are distributed prior to sentencing to all the court officials who receive presentence reports. However, because §19.2-299 contains language which requires that presentence reports be sealed, some circuit court clerks are concerned that this also applies to the guidelines worksheets.

Lobby of the Federal Reserve Bank of Richmond circa 1921, currently the Virginia Supreme Courtroom.

❖ Proposal

The Commission proposes a modification of §19.2-298.01 to clearly state that the sentencing guidelines forms are open records and shall not be sealed upon entry of the sentencing order.

Recommendation 5

Amend §19.2-298.01(C) of the Code of Virginia to ensure that sentencing guidelines forms are always presented to the judge in cases tried upon a plea of guilty, including cases which are the subject of a plea agreement.

❖ Issue

Preparation of guidelines worksheets in plea agreements

❖ Problem

Section 19.2-298.01(C) states that in felony cases "tried by a jury and in felony cases tried by the court without a jury upon a plea of not guilty, the court shall direct a probation officer of such court to prepare the discretionary sentencing guidelinesworksheets. In felony cases tried upon a plea of guilty, including cases which are the subject of a plea agreement, the court may direct a probation officer of such court to prepare the discretionary sentencing guidelines worksheets, or, with the concurrence of the accused, the court and the attorney for the Commonwealth, the worksheets may be prepared by the attorney for the Commonwealth."

This statutory clause, when taken by itself, is being mistakenly interpreted by some to mean that guidelines worksheets are not required in plea agreement cases. This interpretation derives from the use of the word "may" with reference to both the probation officer and Commonwealth's attorney options for worksheet preparation in cases not involving a jury or bench trial. In trial cases, the statutory language uses the term "shall" with reference to worksheet preparation.

Despite the fact that §19.2-298.01(A) states that "In all felony cases, other than Class 1 felonies, the court shall have presented to it the appropriate discretionary sentencing guidelines worksheets," there appears to be some confusion if guidelines are to be completed in plea situations.

❖ Proposal

The Commission proposes amending §19.2-298.01(C) by adding language that makes it clear that if there is not concurrence of the accused, the court and the attorney for the Commonwealth with regard to the prosecutor preparing the worksheet, that the court *shall* instruct the probation officer to prepare the forms.

Future Plans

Reanalysis of Felony Sentencing Data under Truth-in-Sentencing

The initiation of truth-in-sentencing in Virginia has changed the meaning and interpretation of court-imposed sentences. No longer are felony offenders released after serving only a small portion, sometimes as little as one-fourth or one-fifth, of the court-imposed sentence. Under truth-in-sentencing, the sentence pronounced in the court room reflects very closely the amount of time the offenders will serve behind bars. The beginning of truth-in-sentencing marked the embarkation into a new era of criminal sentencing in Virginia.

The Commission developed the truth-in-sentencing guidelines after analyzing 105,624 cases sentenced between 1988 and 1992, and prison time served data for over 28,000 felons released from prison during this period. The Commission has performed detailed studies of compliance under 38,969 truth-in-sentencing guidelines cases received through September 30, 1997. The Commission feels that over the next year there may be enough experiential data for nonviolent offenses, and many violent offenses, to begin a full scale reanalysis for the purposes of making recommendations for revisions to the guidelines.

In 1998, the Commission will assess the number of truth-in-sentencing cases for each offense group to determine which groups can be reanalyzed to yield reliable results using standard statistical procedures. The Commission will be designing a plan for the analysis over the coming months, and will likely begin analysis mid-year.

Implementation and Integration of Risk Assessment

As discussed in the Risk Assessment chapter, the Commission has developed an offender risk assessment instrument as required under §17-235 of the Code of Virginia. The instrument is designed to identify offenders, recommended by the sentencing guidelines for an incarceration term, who represent a relatively low risk to public safety. These offenders are then recommended for an alternative punishment program in lieu of traditional incarceration. With the data collection, analysis, and design phases of the project complete, the Commission initiated pilot testing of the risk assessment instrument in selected circuits on December 1, 1997. Because the Commission believes it is very important to closely monitor the application of the risk assessment instrument as it is introduced, the pilot test phase of the project will be conducted for approximately one year. Gradual expansion in the number of circuits utilizing the risk assessment instrument should begin in 1999 and proceed until the instrument is implemented statewide.

The Commission will monitor the performance of the risk assessment instrument closely. Not only will data be collected on the success of the instrument in predicting recidivism, but information will also be gathered on offenders' experiences in alternative punishment programs. For instance, the Commission would like to obtain data regarding offenders who receive

substance abuse treatment, vocational training, education training and other services. It is possible that some types of offenders will respond more successfully to specific interventions offered by the programs, and in some cases, this may have a significant impact on reducing the likelihood of recidivism. Examining the relative effectiveness of these alternative punishments in protecting public safety will require a detailed follow-up analysis of the participants and subsequent identification of those factors which correlate with the probability of success. Evaluation findings can serve as a means to revise the risk assessment instrument and, in turn, result in more targeted and reliable diversion recommendations.

Federal Reserve Bank of Richmond, Annex, Eighth and Franklin Streets, circa 1921; today is part of the Virginia Supreme Court Building.

Efficiency Measures in Worksheet Automation

During 1998, the Commission will implement new procedures for the automation of sentencing guidelines information which will modernize and improve the efficiency of this process. Currently, the Commission employs data entry personnel to manually key the sentencing guidelines information into a computer data base. The Commission has purchased sophisticated scanning equipment. Under the new automation process, the guidelines documents will be sent through a scanner and a visual image of the forms will be stored in an archive. In addition, special computer software will enable Commission staff to review the scanned forms for accuracy before saving the information directly to the sentencing guidelines data base. Overall, automation through scanning will require far less time than current manual entry procedures and will allow for more timely analysis of sentencing information.

In 1997, the Commission designed scannable versions of the sentencing guidelines forms, which were distributed to probation officers and Commonwealth's attorneys statewide by July 1. In early 1998, the Commission plans to begin pilot testing scanning procedures. By 1999, the Commission hopes to utilize scanning for automating sentencing guidelines information submitted from circuit courts throughout the Commonwealth.

Juvenile Sentencing Data Base System

House Joint Resolution 131 requests the Commission to perform an extensive study of the sentencing of juveniles both in Virginia's juvenile courts and in our circuit courts. Given the lack of a reliable and comprehensive data system in the juvenile justice system, as well as recent dramatic changes to laws relating to juvenile justice, the Commission has endorsed the creation of an information system to support this important research. In recognition that its members did not include individuals with much expertise in the juvenile justice system, the Commission voted to establish a Juvenile Sentencing Study Advisory Committee to oversee the creation of the new data system and the subsequent analysis.

Over the course of the next year, the advisory committee must make vital decisions regarding the design of this juvenile sentencing information system and the operational procedures to support it. For instance, the committee must decide which juveniles to target for data collection (i.e., those charged with serious felonies, violent felonies, etc.), who will gather the information, and what specific information elements to collect.

In early 1997, the advisory committee endorsed the Commission's proposal to prepare and submit a grant request for federal funds to the Department of Criminal Justice Services. The grant has since been approved, and the monies will support all aspects of designing, implementing and maintaining the new data system. The Commission is now moving forward with these funds and has hired a project coordinator to work closely with the advisory committee and the Commission on this project.

Once the data system is in place, an analysis of the collected information will proceed as soon as a sufficient number of cases have entered the data system.

Web Site/Home Page on the Internet

The Commission intends to explore the possibility of going on-line with its own Internet site. In the future, the Commission's Internet site may be used to display guidelines update notices, post training schedules and special reports, and provide instruction for ordering manuals and other materials. Additionally, the Commission hopes to use the site as a medium to receive comments and user input about the guidelines.

APPENDICES

Appendix 1 Judicial Reasons for Departure from Sentencing Guidelines

Property, Drug and Miscellaneous Offenses

Reasons for MITIGATION	Burglary of Dwelling	Burglary of Other Structure	Drugs	Fraud	Larceny	Misc
No reason given	4.4%	4.7%	5.3%	4.1%	8.9%	8.6%
Minimal property or monetary loss	0.3	2.6	0.1	2.1	6.3	0
Minimal circumstances/facts of the case	2.2	3.1	1.8	3.9	2.8	19.3
Offender was not the leader or active participant in offense	0.8	1.0	2.2	1.1	0.5	0.4
Small amount of drugs involved in the case	0	0	3.3	0.1	0	2.1
Offender and victims are friends	4.1	0.5	0	2.4	0.8	0.4
Little or no injury/offender did not intend to harm; victim requested lenient sentence	3.6	1.6	0	2.9	1.0	1.2
Offender has no prior recor	0.8	2.6	2.1	1.4	0	0
Offender has minimal prior record	1.9	3.1	3.6	2.8	1.8	9.1
Offender's criminal record overstates his degree of criminal orientation	0.8	0.5	1.1	1.1	1.2	2.5
Offender cooperated with authorities	9.8	14.5	12.4	9.7	7.9	10.3
Offender is mentally or physically impaired	2.7	5.7	2.9	4.2	3.9	2.5
Offender has emotional or psychiatric problems	1.1	1.6	0.3	1.8	1.5	1.6
Offender has drug or alcohol problems	3.8	2.6	1.5	2.2	2.0	2.1
Offender has good potential for rehabilitation	13.7	16.6	14.0	28.8	19.7	9.9
Offender needs court order treatment or drug counseling	1.1	3.1	0.7	0.4	0.5	0.8
Age of offender	7.9	7.8	4.3	2.0	4.4	3.3
Multiple charges are being treated as one criminal event	0.8	0	0.1	2.2	0.2	0
Sentence recommend by Commonwealth Attorney or probation officer	2.2	3.1	1.7	3.4	2.0	1.2
Weak evidence or weak case	6.6	4.7	3.4	5.8	10.5	7.8
Plea agreement	8.5	5.7	9.9	9.3	12.5	10.3
Sentencing consistency with codefendant or with similar cases in the jurisdiction	1.9	3.1	1.0	1.5	2.1	0.8
Offender already sentenced by another court or in previous proceeding for other offenses	6.8	2.6	2.7	8.6	6.1	4.9
Offender will likely have his probation revoked	1.6	2.1	1.5	3.2	2.1	2.1
Offender is sentenced to an alternative punishment to incarceration	27.9	21.8	38	13.2	15.6	4.1
Guidelines recommendation is too harsh	0.3	2.1	0.8	2.4	0.8	0.8
Judge rounded guidelines minimum to nearest whole year	1.4	1.0	0.8	1.4	0.8	0.4
Other mitigating factors	5.2	3.6	3.6	4.6	8.4	9.0

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

Appendix 1 Judicial Reasons for Departure from Sentencing Guidelines

Property, Drug and Miscellaneous Offenses

Reasons for AGGRAVATION	Burglary of Dwelling	Burglary of Other Structure	Drugs	Fraud	Larceny	Misc
No reason given	1.2%	4.5%	3.8%	3.4%	5.7%	4.8%
Extreme property or monetary loss	4.0	5.1	0	4.5	7.9	0
The offense involved a high degree of planning	1.2	2.3	0.2	3.4	3.6	0
Aggravating circumstances/flagrancy of offense	27.6	21.0	4.2	8.2	12.1	13.0
Offender used a weapon in commission of the offense	0.4	0.6	1.1	0	0.8	1.9
The offender was the leader in the offense	1.6	0.6	0.0	0.7	0.6	0
Offender's true offense behavior was more serious than offenses at conviction	6.4	4.0	5.1	8.9	5.0	5.0
Extraordinary amount of drugs or purity of drugs involved in the case	0	0	11.7	0.3	0	0
Aggravating circumstances relating to sale of drugs	0	0	1.2	0	0	0
Offender immersed in drug culture	0	0	3.8	0.3	0	0
Victim injury	4.0	1.7	0.2	0	1.5	3.4
Previous punishment of offender has been ineffective	2.8	2.8	3.1	2.1	2.5	1.0
Offender was under some form of legal restraint at time of offense	4.4	6.8	5.8	1.0	4.5	2.9
Offender's criminal record understates the degree of his criminal orientation	12.4	13.6	13.1	18.5	16.5	16.8
Offender has previous conviction(s) or other charges for the same offense	4.4	6.3	16.0	5.5	10.4	26.1
Offender failed to cooperate with authorities	1.6	3.4	3.3	3.4	5.7	6.9
Offender has drug or alcohol problems	0.4	1.7	2.5	1.0	1.5	2.1
Offender has poor rehabilitation potential	4.4	2.8	2.6	4.1	2.9	5.3
Offender shows no remorse	3.6	1.7	0.9	3.1	2.2	0.8
Jury sentence	8.8	8.5	4.1	5.8	4.4	6.5
Plea agreement	14.0	15.3	13.3	19.2	12.2	7.0
Community sentiment	1.6	0.6	2.3	0	0.9	0.8
Sentencing consistency with codefendant or with other similar cases in the jurisdiction	6.0	4.5	8.2	2.7	2.6	1.0
Judge wanted to teach offender a lesson	1.6	1.1	0.6	0.3	1.1	0.4
Guidelines recommendation is too low	8.8	10.2	6.7	5.5	6.8	8.0
Mandatory minimum penalty is required in the case	0	0	0.9	1.0	0.2	5.5
Other reason for aggravation	10.0	6.4	10.9	10.6	9.6	8.9

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

Appendix 2 Judicial Reasons for Departure from Sentencing Guidelines

Offenses Against the Person

Reasons for MITIGATION	Assault	Kidnapping	Homicide	Robbery	Rape	Sexual Assault
No reason given	3.6%	0%	1.6%	5.4%	6.5%	5.1%
Minimal circumstances/facts of the case	10.2	6.3	11.5	6.3	4.6	7.7
Offender was not the leader or active participant in offense	1.8	0	4.9	7.6	0.9	0
Offender and victim are related or friends	8.4	12.5	4.9	1.5	11.1	5.1
Little or no victim injury/offender did not intend to harm; victim requested lenient sentence	14.6	15.6	3.3	3.0	13.0	14.1
Victim was a willing participant or provoked the offense	4.0	0	1.6	0	8.3	5.1
Offender has no prior record	4.7	0	3.3	2.7	3.7	2.6
Offender has minimal prior criminal record	3.6	0	3.3	3.0	4.6	2.6
Offender's criminal record overstates his degree of criminal orientation	1.1	6.3	0	1.2	0.9	0
Offender cooperated with authorities or aided law enforcement	2.6	9.4	4.9	16.3	4.6	2.6
Offender has emotional or psychiatric problems	2.6	3.1	1.6	2.1	1.9	0
Offender is mentally or physically impaired	5.8	6.3	0	3.6	3.7	5.1
Offender has drug or alcohol problems	2.6	0	4.9	2.7	3.7	3.8
Offender has good potential for rehabilitation	14.2	9.4	8.2	8.2	10.2	11.5
Offender shows remorse	4.4	6.3	6.6	3.3	4.6	0
Age of offender	8.0	6.3	11.5	16.9	4.6	6.4
Offender plead guilty rather than go to trial	0.4	0	0	0.6	0.9	0
Jury sentence	1.5	3.1	26.2	2.1	8.3	0
Sentence was recommended by Commonwealth's attorney or probation officer	3.3	3.1	1.6	2.4	2.8	2.6
Weak evidence or weak case against the offender	17.5	9.4	8.2	7.6	25.9	20.5
Plea agreement	4.7	15.6	8.2	5.7	6.5	19.2
Sentencing consistency with codefendant or with other similar cases in the jurisdiction	2.2	0	0	0.9	2.8	0
Offender already sentenced by another court or in previous proceeding for other offenses	1.1	3.1	4.9	6.0	3.7	3.8
Offender is sentenced to an alternative punishment to incarceration	7.3	3.1	9.8	12.1	1.9	1.3
Guidelines recommendation is too harsh	0	0	0	0.3	0.9	2.6
Judge rounded guidelines minimum to nearest whole year	1.5	6.3	0	0.9	0	1.3
Other reasons for mitigation	2.2	9.3	0	6.9	2.8	2.6

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

Appendix 2 Judicial Reasons for Departure from Sentencing Guidelines

Offenses Against the Person

Reasons for AGGRAVATION	Assault	Kidnapping	Homicide	Robbery	Rape	Sexual Assault
No reason given	2.7%	2.9%	0%	4.5%	0%	1.4%
The offense involved a high degree of planning	0.9	0	0	0.9	3.0	1.0
Aggravating circumstances/flagrancy of offense	22.1	26.0	29.0	24.0	36.4	24.3
Offender used a weapon in commission of the offense	2.2	0	0	4.1	0	0
Offender's true offense behavior was more serious than offenses at conviction	9.7	4.8	6.5	3.2	3.0	7.1
Offender is related to or is the caretaker of the victim	0	0	0	0	0	5.2
Offense was an unprovoked attack	1.3	0	0	0.9	0	0.5
Offender knew of victim's vulnerability	3.5	1.9	6.5	5.9	18.2	19.0
Victim injury	1.8	1.0	0	8.6	6.1	8.1
Extreme violence or severe victim injury	29.2	8.7	6.5	12.2	3.0	1.0
Previous punishment of offender has been ineffective	0.4	0	3.2	0	0	1.9
Offender was under some form of legal restraint at time of offense	1.3	0	0	2.7	0	0
Offender has a serious juvenile record	0.9	0	0	0	0	0
Offender's record understates the degree of his criminal orientation	7.1	10.6	19.4	5.0	6.1	2.9
Offender has previous conviction(s) or other charges for the same offense	3.5	0	0	0.9	6.1	4.8
Offender failed to cooperate with authorities	3.1	1.0	3.2	0.5	3.0	2.4
Offender has drug or alcohol problems	0	4.8	3.2	0.5	0	1.9
Offender has poor rehabilitation potential	5.8	3.8	25.8	7.2	3.0	5.7
Offender shows no remorse	5.3	9.6	6.5	4.1	15.2	7.1
Jury sentence	15.9	45.2	29.0	19.9	30.3	6.7
Plea agreement	4.0	1.9	3.2	4.1	0	7.6
Sentencing consistency with codefendant or with other similar cases in the jurisdiction	0.9	1.9	0	0.9	0	2.4
Guidelines recommendation is too low	7.5	3.8	0	14.0	12.1	13.3
Mandatory minimum penalty is required in the case	2.2	0	0	6.8	0	0
Other reasons for aggravation	4.6	4.9	6.4	8.3	6.1	9.2

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

Appendix 3 Sentencing Guidelines Compliance by Judicial Circuit for Property,

◆ Burglary of Dwelling

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	56.9%	15.7%	27.4%	51
2	72.2	19.2	8.6	198
3	71.4	22.9	5.7	70
4	68.5	18.1	13.4	127
5	76.6	8.5	14.9	47
6	71.4	10.7	17.9	28
7	74	16	10	50
8	76.3	18.4	5.3	38
9	53.1	18.8	28.1	32
10	66.7	23.5	9.8	51
11	81.6	13.1	5.3	38
12	55.6	22.2	22.2	54
13	57.5	15	27.5	80
14	74.6	16.9	8.5	59
15	59.9	19.6	20.5	112
16	62	25.3	12.7	79
17	57.6	18.2	24.2	33
18	48.4	38.7	12.9	31
19	66.4	18.1	15.5	110
20	83.9	9.7	6.4	31
21	77.4	19.4	3.2	31
22	61.4	14	24.6	57
23	68.1	26.1	5.8	69
24	56	27.3	16.7	66
25	81.6	10.5	7.9	76
26	67.7	29.2	3.1	65
27	77.1	19.3	3.6	83
28	60	16.7	23.3	30
29	45.8	25	29.2	24
30	58.4	8.3	33.3	12
31	71.2	26.9	1.9	52
Total	67.3%	19.4%	13.3%	1884

◆ Burglary of Other Structure

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	75%	18.8%	6.2%	16
2	80.7	6.8	12.5	88
3	71	19.3	9.7	31
4	70.3	17.6	12.1	74
5	58.3	25	16.7	24
6	73.1	15.4	11.5	26
7	77.8	11.1	11.1	36
8	87.5	12.5	0	16
9	78.6	7.1	14.3	28
10	79.2	12.5	8.3	24
11	80.8	7.7	11.5	26
12	58.4	19.4	22.2	36
13	61.3	14.8	23.9	88
14	84.4	6.7	8.9	45
15	66	13.2	20.8	53
16	77.4	16.9	5.7	53
17	76.3	7.9	15.8	38
18	55.2	20.7	24.1	29
19	69.8	15.9	14.3	63
20	82	15.4	2.6	39
21	88.6	2.9	8.5	35
22	66	10.6	23.4	47
23	74.4	12.8	12.8	47
24	67.6	16.2	16.2	68
25	85.2	9.8	5	61
26	65.7	22.4	11.9	67
27	48.7	43.6	7.7	39
28	69.2	15.4	15.4	26
29	64.3	16.7	19	42
30	46.2	30.8	23	13
31	80	10	10	20
Total	72.9%	13.7%	13.4%	694

◆ Drugs

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	73.6%	6.1%	20.3%	424
2	78.8	11	10.2	915
3	88.4	8.3	3.3	760
4	74.6	10.2	15.2	1300
5	78.9	7.5	13.6	360
6	63.8	14.2	22	218
7	89.4	3.8	6.8	1222
8	84.9	9.7	5.4	259
9	62.2	8.5	29.3	246
10	76.4	16.8	6.8	351
11	83.4	8.5	8.1	446
12	67.4	7.9	24.7	328
13	63.8	10.4	25.8	1316
14	77.4	5.7	16.9	526
15	59.5	11.8	28.7	557
16	75.2	10.2	14.6	294
17	77.5	7.1	15.4	395
18	68.1	19.3	12.6	420
19	78.9	10.8	10.3	758
20	83.8	6.3	9.9	142
21	82.9	9.8	7.3	164
22	61.2	3.6	35.2	392
23	61.6	19.2	19.2	453
24	63.4	8.7	27.9	527
25	76.5	14.6	8.9	247
26	65.9	19.5	14.6	287
27	82	8	10	201
28	74.5	13.4	12.1	157
29	66.3	8.1	25.6	86
30	77.8	2.8	19.4	36
31	85	10.1	4.9	406
Total	73.8%	9.8%	16.4%	7299

Drug, and Miscellaneous Offenses

◆ Fraud

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	75.7%	13.1%	11.2%	107
2	80.5	13.9	5.6	266
3	86.4	12.1	1.5	66
4	85.2	12	2.8	425
5	83	13.6	3.4	88
6	70.2	21	8.8	57
7	89.1	7.8	3.1	129
8	86	14	0	86
9	73.5	10.3	16.2	68
10	86.2	10.6	3.2	94
11	82	11.1	6.9	72
12	79.9	9.1	11	164
13	71.6	16.3	12.1	257
14	80.2	11.1	8.7	242
15	76	13.6	10.4	192
16	75.1	20	4.9	185
17	82.2	11.7	6.1	197
18	61.6	23.3	15.1	86
19	84.1	10.5	5.4	428
20	86.4	12.8	.8	133
21	76.7	22.2	1.1	90
22	77.6	13.1	9.3	107
23	66.2	27.9	5.9	222
24	63.4	31.7	4.9	205
25	88	10.1	1.8	217
26	69.6	21.7	8.7	161
27	80	17.1	2.9	140
28	75.7	15.7	8.6	70
29	76.4	11.8	11.8	34
30	78.3	17.4	4.3	23
31	78.9	15.8	5.3	114
Total	78.8%	15%	6.2%	4725

◆ Larceny

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	81.7%	5.3%	13%	338
2	87	5.4	7.6	740
3	85.4	9.9	4.7	212
4	85.5	8.3	6.2	943
5	89.5	5.7	4.8	228
6	74.6	1.7	23.7	114
7	93.8	2.7	3.5	226
8	92.3	5.3	2.4	209
9	82.5	4.4	13.1	137
10	92.6	2.5	4.9	122
11	81.3	4.7	14	64
12	76.3	4.2	19.5	308
13	76.8	6.3	16.9	396
14	79.1	4.9	16	526
15	79.1	9.9	11	326
16	86.2	6.3	7.5	174
17	84.1	4.7	11.2	473
18	77.4	9.7	12.9	319
19	82.5	5.2	12.3	592
20	86.7	5	8.3	181
21	86	10.9	3.1	193
22	70.5	2.7	26.8	220
23	73.2	14.8	12	343
24	81.3	12.7	6	331
25	87.6	6.4	6	282
26	79.8	12.1	8.1	247
27	91.1	8.2	.7	146
28	86.4	4.5	9.1	88
29	68.3	2.4	29.3	82
30	73.5	10.2	16.3	49
31	88	8.2	3.8	208
Total	82.8%	6.9%	10.3%	8817

◆ Miscellaneous

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	93.6%	3.2%	3.2%	62
2	78.9	9.3	11.8	237
3	91.5	2.1	6.4	47
4	79	8	13	138
5	72.8	7.3	19.9	136
6	78.8	7.7	13.5	52
7	84.4	5	10.6	141
8	91.2	5.3	3.5	57
9	75.9	1.9	22.2	54
10	70.2	18.3	11.5	104
11	70.3	9.4	20.3	64
12	64.9	5.3	29.8	57
13	73.3	9.1	17.6	131
14	69.5	11	19.5	82
15	77.4	7.1	15.5	155
16	74.6	5.7	19.7	122
17	57.9	0	42.1	38
18	80	5	15	20
19	77.6	3	19.4	165
20	73.2	13.4	13.4	67
21	80.7	7.5	11.8	93
22	78.1	4.7	17.2	128
23	62.6	13.9	23.5	187
24	75.4	6.9	17.7	175
25	86.1	5.3	8.6	151
26	70.1	5.7	24.2	157
27	75.4	9.4	15.2	138
28	79	6.5	14.5	62
29	63.5	2.4	34.1	41
30	71.1	10.5	18.4	38
31	72.2	12.7	15.1	79
Total	75.8%	7.6%	16.5%	3178

Appendix 4 Sentencing Guidelines Compliance by Judicial Circuit for Offenses

◆ Assault

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	56.7%	30%	13.3%	30
2	72.2	8.2	19.6	97
3	74.1	15.6	10.3	58
4	59.6	22.3	18.1	94
5	76.4	11.8	11.8	76
6	80.4	9.8	9.8	61
7	82.4	10.8	6.8	74
8	75	19.4	5.6	36
9	71.1	15.7	13.2	38
10	73.4	23.3	3.3	60
11	83	9.4	7.6	53
12	75	8.3	16.7	12
13	67	15.7	17.3	127
14	70.9	16.4	12.7	55
15	77.8	14.8	7.4	54
16	71.7	8.7	19.6	46
17	76	16	8	25
18	42.4	30.3	27.3	33
19	54.4	7	38.6	57
20	57.1	28.6	14.3	35
21	65.9	22.7	11.4	44
22	64.6	12.5	22.9	48
23	54.5	33.8	11.7	77
24	65	18.3	16.7	60
25	76.9	15.4	7.7	39
26	68.9	17.8	13.3	45
27	63.2	31.5	5.3	38
28	66.7	14.3	19	21
29	55.2	20.7	24.1	29
30	85.8	7.1	7.1	14
31	67.7	21	11.3	62
Total	68.8%	17.1%	14.1%	1598

◆ Kidnapping

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	100%	0%	0%	2
2	45.5	18.1	36.4	11
3	60	40	0	5
4	70	10	20	10
5	50	0	50	6
6	80	0	20	5
7	71.4	14.3	14.3	7
8	62.5	37.5	0	8
9	50	50	0	6
10	75	0	25	4
11	80	0	20	5
12	100	0	0	1
13	33.4	33.3	33.3	6
14	80	20	0	5
15	50	12.5	37.5	8
16	100	0	0	1
17	66.7	0	33.3	3
18	0	100	0	1
19	72.7	18.2	9.1	11
20	40	40	20	5
21	100	0	0	2
22	50	0	50	2
23	20	40	40	10
24	50	0	50	6
25	66.7	33.3	0	3
26	50	50	0	2
27	100	0	0	4
28	50	0	50	2
29	50	50	0	6
30	0	0	0	0
31	62.5	25.0	12.5	8
Total	59.4%	20.6%	20%	155

◆ Homicide

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	66.7%	33.3%	0%	3
2	66.7	18.5	14.8	27
3	73.7	10.5	15.8	19
4	59.4	10.9	29.7	64
5	60	10	30	10
6	87.5	12.5	0	8
7	61.9	4.8	33.3	21
8	100	0	0	5
9	25	25	50	4
10	63.6	9.1	27.3	22
11	75	16.7	8.3	12
12	70	10	20	10
13	63.3	10.2	26.5	49
14	76.2	19	4.8	21
15	42.9	21.4	35.7	14
16	72.7	9.1	18.2	11
17	70	10	20	10
18	33.4	33.3	33.3	3
19	66.7	14.3	19	21
20	50	0	50	4
21	60	20	20	10
22	46.2	15.4	38.4	13
23	59.1	22.7	18.2	22
24	56.3	18.7	25	16
25	77.8	11.1	11.1	9
26	61.1	5.6	33.3	18
27	78.9	15.8	5.3	19
28	57.1	0	42.9	7
29	100	0	0	3
30	100	0	0	10
31	75	16.7	8.3	12
Total	65.4%	12.8%	21.8%	477

Against the Person

◆ Robbery

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	69.7%	18.2%	12.1%	33
2	66.5	18.7	14.8	176
3	67.8	25.4	6.8	59
4	56.3	25.3	18.4	158
5	80.0	13.3	6.7	30
6	56.6	21.7	21.7	23
7	74.2	15	10.8	120
8	74	19.2	6.8	73
9	66.7	29.6	3.7	27
10	52	20	28	25
11	85.7	8.6	5.7	35
12	68.6	8.5	22.9	35
13	59.6	19.1	21.3	136
14	70	26	4	50
15	58	30	12	50
16	50	26.5	23.5	34
17	59.7	17.5	22.8	57
18	49	40.8	10.2	49
19	71.6	19.8	8.6	81
20	66.7	16.7	16.6	12
21	68.2	31.8	0	22
22	60.5	15.8	23.7	38
23	71.7	20.8	7.5	53
24	47.8	29.5	22.7	44
25	63	25.9	11.1	27
26	69.6	13	17.4	23
27	88.9	11.1	0	9
28	55.6	22.2	22.2	9
29	0	0	100	2
30	40	0	60	5
31	42.1	42.1	15.8	38
Total	64%	21.6%	14.4%	1533

◆ Rape

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	57.1%	42.9%	0%	7
2	78.4	18.9	2.7	37
3	80	20	0	5
4	66.7	23	10.3	39
5	63.6	36.4	0	11
6	80	20	0	5
7	63	25.9	11.1	27
8	66.7	33.3	0	15
9	50	25	25	8
10	54.5	36.4	9.1	11
11	66.7	22.2	11.1	9
12	66.7	33.3	0	9
13	54.5	18.2	27.3	22
14	33.4	44.4	22.2	9
15	56.3	37.5	6.2	16
16	45.5	36.4	18.1	11
17	50	25	25	12
18	22.2	66.7	11.1	9
19	77.8	22.2	0	18
20	62.5	37.5	0	8
21	66.7	11.1	22.2	9
22	88.9	11.1	0	9
23	0	90	10	10
24	66.7	33.3	0	6
25	54.5	36.4	9.1	11
26	72.2	22.2	5.6	18
27	80	20	0	5
28	100	0	0	1
29	50	25	25	4
30	0	0	0	0
31	62.5	37.5	0	8
Total	61.8%	29.3%	8.9%	369

◆ Sexual Assault

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	65.3%	4.3%	30.4%	23
2	61.3	8.1	30.6	62
3	71.5	7.1	21.4	14
4	71.1	13.3	15.6	45
5	61.9	9.5	28.6	21
6	61.1	5.6	33.3	18
7	69	6.9	24.1	29
8	73.3	20	6.7	15
9	81.3	0	18.7	16
10	68.8	6.2	25	16
11	75	18.8	6.2	16
12	44.5	11.1	44.4	18
13	55.6	14.8	29.6	27
14	58.1	12.9	29	31
15	67.5	11.6	20.9	43
16	66.7	8.3	25	24
17	38.9	11.1	50	18
18	43.8	12.4	43.8	16
19	45.2	0	54.8	42
20	62.5	12.5	25.0	16
21	57.1	0	42.9	7
22	22.2	0	77.8	9
23	40.9	27.3	31.8	22
24	51.5	17.1	31.4	35
25	73.9	10.9	15.2	46
26	52.8	2.8	44.4	36
27	71.4	22.9	5.7	35
28	60	20.0	20	10
29	75	25	0	8
30	57.1	0	42.9	7
31	70.6	0	29.4	17
Total	61.2%	10.5%	28.3%	742

Sentencing Guidelines Hotline

For Information Call
804-225-4398