Goochland  Greene County Courthouse Hanover County Courthouse Louisa County Courthouse Madison C

Courthouse Appomatox County Courthouse Caroline County Courthouse Cumberland County Courthouse Fairfax County Cour

County Courthouse Prince William County Courthouse Rockbridge County  Courthouse Albermarle Cour

rthouse Greene County Court

Virginia Criminal

Madison County Courthouse Orange

ox County Courthouse

Sentencing Commission

Courthouse Goochland Count

am County Courthouse Rockbridge County Courthouse Spotslyvania County Courthouse Albermarle County Courthouse Appom

urthouse Hanover County Courthouse Louisa County Courthouse Madison County Courthouse  Prince

oline County Courthouse Fairfax County Courthouse Goochland County Courthouse Greene County Cour

kbridge County Courthouse Spotslyvania County Courthouse Albermarle

1998 Annual Report

Virginia Criminal Sentencing Commission

Madison County

Rockbridge County

Appomatox County

Caroline County

Photographs appearing on the cover and throughout this report are circuit courthouses found in Virginia. Information found in the captions was largely drawn from Virginia's Historic Courthouses by John O. and Margaret T. Peters, Charlottesville: The University Press of Virginia, 1995. Photographs were taken by Judith Ann Sullivan.

1998 Annual Report

December 1, 1998

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

Attorney General
The Honorable Mark Earley, Richmond
(Frank S. Ferguson, Attorney General's Representative)

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

The Staff of the Commission

Richard P. Kern, Ph.D., Director

James C. Creech, Ph.D., Research Associate
Meredith Farrar-Owens, Research Associate
Kimberly D. Floyd, Research Associate
Jody T. Fridley, Research Associate
Anne A. Jones, Research Associate
Jackie Smith Mason, Research Associate
Carolyn A. Williamson, Research Assistant
Shirley F. Shepperson, Office Services Specialist

The design and layout of the 1998 Annual Report of the Virginia Criminal Sentencing Commission was created by Judith Ann Sullivan.

Commonwealth of Virginia

Hon. Ernest P. Gates
Chairman

Richard P. Kern, Ph.D.
Director

100 North Ninth Street
Richmond, Virginia 23219
Tel. (804) 225-4398
Fax (804) 786-3934

Supreme Court of Virginia
Virginia Criminal Sentencing Commission

December 1, 1998

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

§17.1-803 of the Code of Virginia requires the Virginia Criminal Sentencing Commission to report annually upon its work and recommendations. Pursuant to this statutory obligation, we respectfully submit for your review the 1998 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 lies ahead. The report provides a comprehensive examination of judicial compliance with the felony sentencing guidelines for fiscal year 1998. This report also provides a progress report on the implementation of an offender risk assessment instrument and the Commission's recommendations to the 1999 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

Table of Contents

Introduction

Guidelines Compliance

Offender Risk Assessment Study

Offender Risk Assessment Study, continued

Impact of Truth-In-Sentencing

Recommendations of the Commission

Appendices

Introduction

Built in 1799, Fairfax County's circuit courthouse is only one of three remaining courthouses built between the American Revolution and 1800. At this site in 1862, Captain John Quincy Marr of the Confederacy's Warrenton Rifles is reported to be the first officer fatally wounded in the Civil War.

Overview

This is the fourth 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 1998. 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's 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 1999.

Commission Profile

The Virginia Criminal Sentencing Commission is comprised of 17 members as authorized in Code of Virginia §17.1-802. The Chairman of the Commission, who 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, Mark Earley, designated Deputy Attorney General Frank Ferguson as his representative at Commission meetings.

The Virginia Criminal Sentencing Commission is an agency of the Supreme Court of Virginia. The Commission's offices and staff are located in 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 they 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 perform 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 Commis- sion's review process and the fact that users and preparers of the guidelines are more accustomed to the new system, very few 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 the next chapter.

Activities of the Commission

The full membership of the Commission met four times in 1998: April 6, July 31, September 28 and November 16. The following discussion provides an overview of some of the Commission's actions and initiatives during the past year.

Training and Education

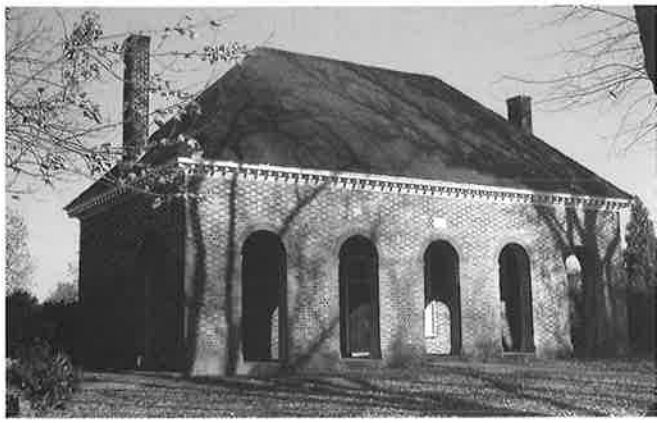
Training and education are ongoing activities of the Commission. The Commission gives high priority to instructing probation and parole officers and Commonwealth's attorneys on how to prepare complete and accurate guidelines work sheets. The Commission also realizes there is continuous need to provide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

In 1998, the Commission provided sentencing guidelines assistance in a variety of forms: training and education seminars, assistance via hot line phone system, and publications and training materials. The Commission offered 15 training seminars in nine different locations in the Commonwealth. The sites for these seminars included the Richmond Police Training Academy, the Fairfax County Government Center, the Cardinal Criminal Justice Training Academy in Salem, the Virginia Beach Fire Training Center, the Department of Corrections' Training Academy, and the Supreme Court of Virginia. By special request, seminars were also held in specific locations for probation and parole officers, Commonwealth's attorneys, and members of the defense bar. The Commission also provided training on the guidelines system to newly elected judges during their pre-bench training program. Additionally, the Commission provided an educational seminar for the general public at the Lynchburg "City Wide Convention" held in May.

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 providing 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 thousands of calls through its hot line service.

The Commission also distributes a brochure to citizens and criminal justice system professionals explaining Virginia's truth-in-sentencing system. Additionally, the Commission distributes a yearly progress report which provides a brief overview of judicial compliance with the truth-in-sentencing guidelines and average sentences served for specific offenses.

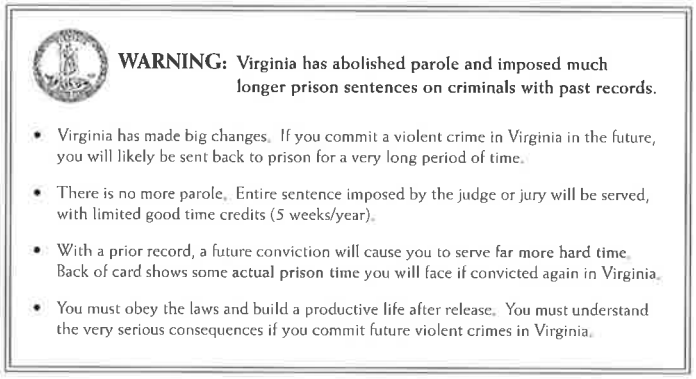


Hanover County's original courthouse was built circa 1735. Patrick Henry first developed his reputation as a lawyer here. It is not currently in use by the circuit court, but is set in Hanover County's historic area of the government complex.

Offender Notification Program

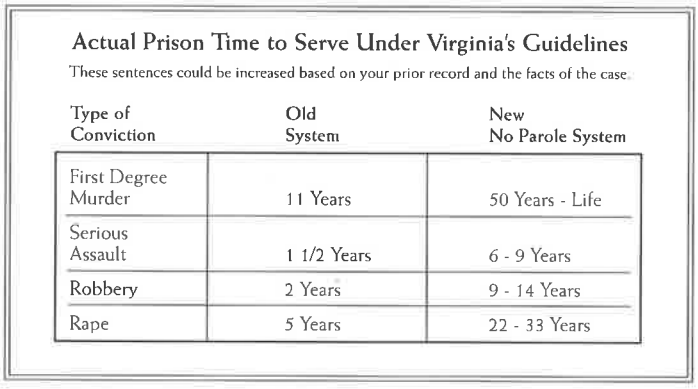
Developed and initiated in 1996, the offender notification program is a joint effort of the Commission and the Department of Corrections to provide educational information about recent significant sentencing reforms to inmates about to depart from Virginia's prison system and return to the community. 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 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 punishment 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.



WARNING: **Virginia has abolished parole and imposed much longer prison sentences on criminals with past records.**

- Virginia has made big changes. If you commit a violent crime in Virginia in the future, you will likely be sent back to prison for a very long period of time.
- There is no more parole. Entire sentence imposed by the judge or jury will be served, with limited good time credits (5 weeks/year).
- With a prior record, a future conviction will cause you to serve far more hard time. Back of card shows some actual prison time you will face if convicted again in Virginia.
- You must obey the laws and build a productive life after release. You must understand the very serious consequences if you commit future violent crimes in Virginia.



Actual Prison Time to Serve Under Virginia's Guidelines

These sentences could be increased based on your prior record and the facts of the case.

Type of Conviction	Old System	New No Parole System
First Degree Murder	11 Years	50 Years - Life
Serious Assault	1 1/2 Years	6 - 9 Years
Robbery	2 Years	9 - 14 Years
Rape	5 Years	22 - 33 Years

As part of the offender notification program, all inmates who are leaving the prison system due to a completed sentence or parole (under the 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 that 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 have been prepared for distribution – one for violent offenders and one for nonviolent offenders. The use of multiple cards conveys a message to the inmate that is somewhat tailored to his situation. The program became operational statewide in January 1997. Virginia's offender notification program is the first of its kind in the nation.

Community Corrections Revocation Data System

Under §17.1-803(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 correctional bed space needs.

With the recent sentencing reforms that abolished parole, circuit court judges now handle a variety 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' Academy for Staff Development.

The sentencing revocation data collection form was instituted for all violation hearings held on or after July 1, 1997. 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.

Albermarle County's courthouse was built in 1803 by John Jordan, who worked for Thomas Jefferson at Monticello. John Mosby (reknowned leader of the Confederate Mosby's Raiders) was convicted here in 1853 of unlawfully shooting a fellow University of Virginia student.

Virginia Criminal Sentencing Commission

Sentencing Revocation Report

First Name: **I.** **Last Name:**

Date of Birth: / / **Social Security Number** - - **SID/CCRE:**

Most Serious Original Primary Offense (VCC) - - **Date of Sentencing (Original)** / / **Original Disposition:** ○ No Incarceration ○ Jail or Prison **Court (FIPS)**

Type of Revocation: ○ Probation ○ Post Release ○ Good Behavior ○ Suspended Sentence ○ Community-Based Program

Conditions Cited In Violation Report:

(Mark all that apply)

- ○ Fail to obey all Federal, State and local laws and ordinances
- ○ Fail to report any arrests within 3 days to probation officer
- ○ Fail to maintain employment or to report changes in employment
- ○ Fail to report as instructed
- ○ Fail to allow probation officer to visit home or place of employment
- ○ Fail to follow instructions and be truthful and cooperative
- ○ Use alcoholic beverages to excess
- ○ Use, possess, distribute controlled substances or paraphernalia
- ○ Use, own, or possess firearm
- ○ Change residence or leave State of Virginia without permission
- ○ Abscond from supervision
- ○ Fail to follow special conditions (Specify) _____

→ *Complete if there are any new law or ordinance violations:*

VCCs for most serious new law violations

- -
- -

Location of Arrest:

○ In Virginia ○ Federal or Out of State

(To Be Completed by the Judge)

Decision of the Court:

- ○ Not in violation
- ○ Found in violation, continued under same conditions
- ○ Found in violation
- ○ Released from supervision/restrictions
- ○ Taken under advisement

Sanctions Imposed for Revocation: *(Mark all that apply)*

- ○ Boot Camp
- ○ Community-Based Program
- ○ Day Reporting
- ○ Detention Center Incarceration
- ○ Diversion Center Incarceration
- ○ Electronic Monitoring
- ○ Intensive Probation
- ○ Incarceration *(Enter disposition to the right)*
- ○ Other _____

Final Disposition for Revocation:

Total Incarceration Time Imposed

years months days

Total Incarceration Time to Serve (effective)

years months days

New Supervised Probation Period

years months days

☐ Indefinite Supervised Probation

Judicial Comments:

_____

_____

Date of Revocation Decision:

/ /

_____

Judge's Signature

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 involving 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 has completed a study of embezzlement cases to examine, among other things, the dollar value embezzled and its impact on sentences. 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 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 local 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 Com-

Appomatox County's original courthouse was the location of General Robert E. Lee's surrender to General Ulysses S. Grant in 1865. After fire destroyed the courthouse in 1892, Appomatox County built the pictured courthouse at a new location. The original courthouse building was restored as an historical landmark in 1964.

mission 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 have completed the 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 collected 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 act, and the status of the restitution to the victim at the time of sentencing.

The results of the special embezzlement study were presented to the Commission this past year.

Substance Abuse Screening and Assessment for Offenders

During its 1998 session, the General Assembly passed sweeping legislation that requires many offenders, both adult and juvenile, to undergo screening and assessment for substance abuse problems related to drugs or alcohol, beginning July 1, 1999. The new law targets all adult felons convicted in circuit court and adults convicted in general district court of any Class 1 misdemeanor drug crime or a second driving under the influence (DUI) offense committed within five years of the previous DUI. The law also targets all juvenile offenders adjudicated for a felony or any Class 1 or 2 misdemeanor. To provide judges with as much information as possible about the offenders they sentence, the legislation mandates the preparation of pre-sentence reports (not post-sentence reports) for adults convicted of felonies or selected misdemeanors in circuit court, and the preparation of social history reports for juvenile offenders identified for screening and assessment. To defray the cost of screening and assessment, the new law increased court fees charged to drug offenders. Effective July 1, 1998, fees assessed for drug crimes increased from $100 to $150 for felony convictions and from $50 to $75 for misdemeanor convictions. The fees are paid into the new Drug Offender Assessment Fund.

The new law created the framework for screening and assessment of offenders. For adult felons, screening and assessment will be conducted by the probation and parole office, while local offices of the Virginia Alcohol Safety Action Program will perform the screening and assessment for adult misdemeanants, pursuant to an agreement with the local community corrections program. Juvenile offenders are to be screened and assessed by the court service unit serving the Juvenile and Domestic Relations Court. A goal of the legislation is to provide a certified substance abuse counselor in each probation district of the Department of Corrections and each court service unit receiving funding from the Department of Juvenile Justice.

The legislation established a work group composed of the directors of the Department of Corrections, the Department of Criminal Justice Services, the Department of Juvenile Justice, the Sentencing Commission, the Virginia Alcohol Safety Action Program, and the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services. The work group is charged with developing a plan for implementing the legislation and is to report to the General Assembly by

January 1, 1999. Serving the work group are three staff subcommittees, which met throughout the summer and fall. The screening and assessment subcommittee has focused on selecting instruments and developing procedures for screening and assessing Virginia's offender populations. A Sentencing Commission staff member has served as the chairperson. The treatment/sanctions subcommittee has assessed the current and the optimum substance abuse treatment continuums and is developing recommendations for a system of graduated sanctioning for probation violations related to substance abuse. The outcome measures subcommittee is developing measures of substance abuse treatment outcomes and is framing a blueprint for short- and long-term evaluations of the legislation.

The work of the subcommittees has been guided by defining the roles of screening and assessment. Screening is a preliminary evaluation that attempts to measure whether key or critical features of a target problem are present in an individual. A screening instrument does not enable a clinical diagnosis to be made, but merely indicates whether there is a probability that the condition is present. A screening instrument is used to identify individuals likely to benefit from a comprehensive assessment. On the other hand, assessment is a thorough evaluation, the purpose of which is to establish definitively the presence or absence of a diagnosable disorder or disease. Results of comprehensive assessment are used for developing treatment plans and assessing needs for services. It is important that instruments are used on the population for which they were designed and on which they were tested and validated. The screening and assessment subcommittee selected different instruments for the adult and juvenile populations.

The work group, assisted by the three staff subcommittees, will develop its final recommendations and present its implementation plan to the upcoming General Assembly. The recommendations will range from specific procedures for screening and assessing the various offender populations, to a detailed plan for a graduated sanctioning system for the substance abusing offender, to proposals for improving the treatment continuum and for evaluating screening, assessment and treatment in the Commonwealth.

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 1998 legislative session, the Commission prepared over 126 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

Goochland County's historic courthouse, pictured here, was built in 1826. When selecting a site for the new courthouse, county officials discovered that no land had ever been condemned or appropriated for use by the county. Consequently, Goochland County acquired title to all the land on which public buildings had already been standing for sixty years.

specific crime; 3) legislation that would 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 proposed legislation. When requested, the Commission provided pertinent oral testimony to accompany the impact analysis.

Prison and 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, a Commission staff member served on the technical committee that provided methodological and statistical review of the forecasting work. Also, the Commission Executive Director served on the Policy Advisory Committee.

Juvenile Sentencing Study

A House Joint Resolution requests the Commission to study sentencing of juveniles. The Commission will 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 is 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 offenders processed through 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 it prudent to first put in place an information system to support this inquiry.

In deciding 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 more than 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 future policy makers 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-/post-sentence investigation information system in 1985. Since February, 1985, every pre-sentence and post-sentence investigation completed on a convicted felon has been automated by the Department of Corrections. Each one of these investigations provides a wealth of critical information on the characteristics of the crime, the court processing of the case, the offender's criminal record, and 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 allowed debate on critical justice system concerns to be informed by sound and objective data. 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. Recognizing that its members did not include individuals with 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. During the past year, a survey instrument was designed and distributed to juvenile and domestic relations district court judges, Commonwealth's attorneys, public defenders, and the court service units regional administrators and directors. The purpose of the survey was to determine judicial perception of the current sentencing system for juveniles. The survey results are currently being tabulated for presentation to the advisory committee.

Guidelines Compliance

Louisa County's courthouse was built in 1905, and is the third to be located on the same site. When it was built, a Colonial Revival design was explicitly chosen to honor the past.

Introduction

Since 1995, the sentencing guidelines have provided Virginia's judiciary with sentencing recommendations in felony cases subject to the Commonwealth's truth-in-sentencing laws, which dictate that convicted felons serve at least 85% of the pronounced sentence. Under truth-in-sentencing, parole has been eliminated and the guidelines recommendations for nonviolent offenders with no prior record of violence are tied to the amount of time they served during a period prior to the abolition of parole. In contrast, offenders convicted of violent crimes and those with prior convictions for violent felonies are subject to guidelines recommendations up to six times longer than the historical time served in prison by those offenders. Based on the degree of compliance with the truth-in-sentencing guidelines, there is strong evidence that judges in Virginia have made the transition from sentencing in a system with parole to a system where felons serve nearly all of an incarceration sentence behind bars.

To date, the Commission has received worksheets for over 58,000 sentencing events under the truth-in-sentencing system. Once received, sentencing guidelines worksheets are entered into an automated data base, along with case disposition information, to assist the Commission in conducting detailed analysis of compliance and departure patterns. The analysis in this report will focus on cases, defined as sentencing events, from the most recent year of available data, fiscal year 1998 (July 1, 1997, through June 30, 1998). Compliance will be examined in a variety of ways in this report, but of particular focus will be the changes to the guidelines which became effective July 1, 1997. These new features are the result of recommendations presented by the Commission in its 1996 Annual Report and adopted by the 1997 General Assembly.

Figure 1

Number and Percentage of Cases Received by Circuit - FY1998

Circuit	Number	Percent
1	640	3.1%
2	1487	7.3
3	638	3.1
4	1869	9.1
5	500	2.4
6	332	1.6
7	1063	5.2
8	521	2.5
9	391	1.9
10	467	2.3
11	483	2.4
12	608	3.0
13	1260	6.2
14	860	4.2
15	839	4.1
16	600	2.9
17	649	3.2
18	505	2.5
19	1234	6.0
20	355	1.7
21	334	1.6
22	556	2.7
23	768	3.8
24	781	3.8
25	518	2.5
26	528	2.6
27	576	2.8
28	236	1.2
29	306	1.5
30	98	0.5
31	480	2.3

Case Characteristics

For cases sentenced during fiscal year (FY) 1998, five urban circuits, following Virginia's "Golden Crescent" of the most populous areas of the state, submitted more sentencing guidelines cases to the Commission than any of the other 31 judicial circuits in the Commonwealth. Virginia Beach (Circuit 2), Norfolk (Circuit 4), Newport News (Circuit 7), the City of Richmond, (Circuit 13), and Fairfax (Circuit 19) completed at least 1,000 sentencing guidelines cases each during FY1998, and together they represent more than one-third of all cases sentenced during the year (Figure 1). Another 16 circuits sentenced between 500 and 1,000 felony offenders totaling one-half of the FY1998 cases.

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. During FY1998, there were plea agreements or guilty pleas in four out of five cases tried in Virginia's circuit courts (Figure 2). Less than 14% of the cases were adjudicated by a judge. The overall rate of jury trials has been lower under the truth-in-sentencing system than under the parole system, declining from 4% in FY1995 to 2% during FY1998. See *Juries and the Sentencing Guidelines* in this chapter for more information on jury trials.

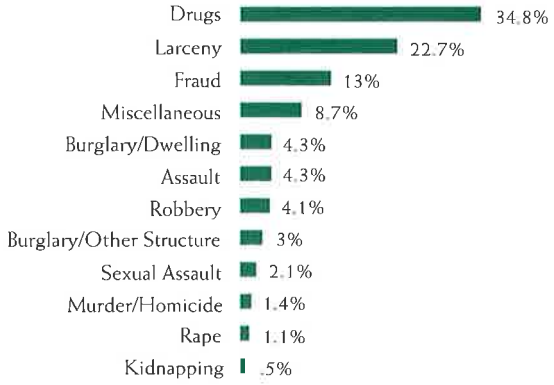
Historically, of the 12 offense groups which comprise Virginia's sentencing guidelines system (based on the primary, or most serious, offense), the Commission has received more cases for drug crimes than any of the other 11 guidelines offense groups, and FY1998 was no exception (Figure 3). Drug offenses represented, by far, the largest share (35%) of the cases sentenced in Virginia's circuit courts during the fiscal year. The vast majority of

Figure 2

Percentage of Cases Received by Method of Adjudication - FY1998

Figure 3

Percentage of Cases Received by Primary Offense Group - FY1998



the drug cases were convictions for the possession of a Schedule I/II drug, such as cocaine. In fact, for one out of every five cases received by the Commission in FY1998 this offense was the primary (most serious) offense at conviction. Larceny was the next most common offense group, representing 23% of the cases, followed by fraud offenses, which accounted for 13%. The miscellaneous offense group, comprised of mostly habitual traffic offenses and convictions for felons illegally possessing firearms, captured about 9% of the guidelines cases.

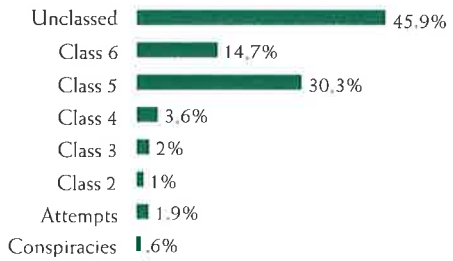
By comparison, the violent crimes of assault, robbery, homicide, rape and other sex crimes, represent a much smaller share of the FY1998 cases. Assaults and robberies were the most common of the violent offenses, and the Commission received more cases for each of these two crimes during FY1998 than for burglaries of structures other than dwellings. The murder and rape offense groups each accounted for just over 1% of the cases, while kidnappings made up only one-half of one percent of the cases sentenced during the year.

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 crimes committed. 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 special penalty which does not fall into one of the established Class 1 through Class 6 penalty ranges. In FY1998, nearly one-half of guidelines cases (46%) involved unclassed felonies, mainly due to the overwhelming number of unclassed drug offenses, particularly relating to the sale of a Schedule I/II drug, and grand larceny offenses (Figure 4). Because possession of a Schedule I/II drug was the single most frequently occurring offense, the most frequently occurring classed felony was that of Class 5 (30%). The Commission received cases for the more serious classed felonies (Classes 2, 3, and 4) much less frequently. Convictions for attempted and conspired crimes were infrequent, accounting for only about 3% of the cases.

For FY1998 cases, the correspondence between dispositions recommended by the guidelines and the actual dispositions imposed was quite high. In FY1998, the

Figure 4

Percentage of Cases Received by Felony Class of Primary Offense - FY1998



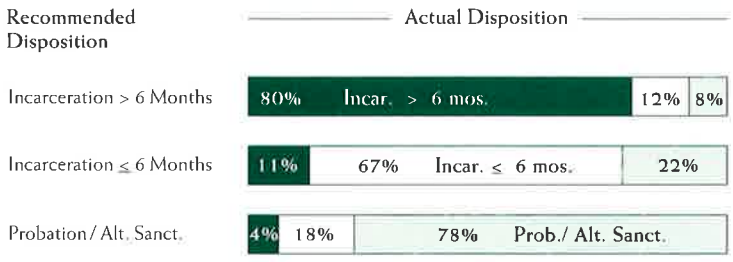
guidelines recommended nearly 9,800 cases to incarceration terms of more than six months, and judges concurred in the vast majority of cases, sentencing 80% of them to incarceration in excess of six months (Figure 5). While some offenders received a shorter than recommended term of incarceration, few offenders recommended for more than six months of incarceration went without an incarceration sanction.

Judges also typically agreed with recommendations for up to six months of incarceration. More than two-thirds of offenders received a sentence resulting in confinement of six months or less when such a penalty was recommended. Moreover, nearly eight out of ten offenders whose guidelines recommendation called for no incarceration were given probation and no post-dispositional confinement. Although some offenders with a "no incarceration" recommendation ended up with a short jail term, hardly any of them were sentenced to terms of more than six months.

It is worth noting that sentences to the state's Boot Camp Incarceration, Detention Center Incarceration and Diversion Center Incarceration programs have been defined as incarceration sanctions for the purposes of the sentencing guidelines since July 1, 1997. While they continue to be defined as "probation" programs in their enactment clauses in the Code of Virginia, the Commission felt that it was important to recognize the punitive nature of these programs by defining them as incarceration terms under the sentencing guidelines, acknowledging that they are more restrictive than probation supervision in the community.

Figure 5

Recommended Dispositions and Actual Dispositions - FY1998



Compliance Defined

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

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 is 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 arises in habitual traffic cases as the result of amendments to §46.2-357(B2 and B3) of the Code of Virginia, effective July 1, 1997. The change 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 of these offenders to be in compliance with the sentencing guidelines.

Overall Compliance with the Sentencing Guidelines

The overall compliance rate summarizes the extent to which Virginia's judges concur with the recommendations of the sentencing guidelines, both in type of disposition and in length of incarceration. For the 20,482 cases sentenced in FY1998, the overall rate of compliance with the sentencing guidelines was nearly 75% (Figure 6). The rate at which judges sentence offenders more severely than the guidelines recommend, known as the "aggravation" rate, was 12.5%. The "mitigation" rate, or the rate at which judges sentence offenders to sanc-

Figure 6

Overall Guidelines Compliance and Direction of Departures - FY1998

Overall Compliance

Direction of Departures

tions considered less severe than the guidelines recommendation, was just under 13%.

Isolating cases of departures from the guidelines does not reveal a strong bias toward sentencing above or below guidelines recommendations. Of the FY1998 departures, 49% were cases of aggravation while 51% were cases of mitigation. In its 1996 Annual Report, the Commission presented a compliance rate comparable to the FY1998 rate, but aggravation departures outnumbered mitigation departures 55% to 45%. The 1996 analysis included a period during which judges were making the transition from sentencing in a parole system to sentencing in a system in which parole had been eliminated and the guidelines for nonviolent offenders had been reduced to reflect historical time served. The gradual change in the departure pattern towards mitigation may also be the result of expansion in the number and variety of alternative sanction programs since 1996.

Compliance by Sentencing Guidelines Offense Group

Overall compliance with the sentencing guidelines among FY1998 cases is relatively high, and departures from the guidelines do not favor aggravation or mitigation. However, examining compliance by the 12 offense groups which make up the guidelines system reveals that compliance is not uniform, nor is the departure pattern consistent, across offense categories (Figure 7).

Compliance rates ranged from a high of 81% in the larceny offense group to a low of 62% among rape offenses. In general, higher rates of compliance were found for property crimes than the person offense categories. Larceny, fraud, drugs, burglary (other than dwellings), and the miscellaneous offense group all had compliance rates above 70%. The person offense groups (assault, homicide, rape, robbery, kidnapping and sexual assault) all had compliance rates below 70%. Burglary of a dwelling reflected a compliance rate comparable to the person crimes.

It is worth noting that offenses in the person offense groups, along with burglaries of dwellings and burglaries with weapons, receive statutorily mandated midpoint enhancements which increase the guidelines recommendation in such cases by a minimum of 100%-125% (§17.1-805 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 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 likely not uniform across guidelines offense groups, but the impact cannot be disentangled from the compliance rates of offenses.

Figure 7

Guidelines Compliance by Offense Group - FY1998

	Compliance	Mitigation	Aggravation	Number of Cases
Assault	66.9%	18.1%	15.0%	873
Burglary/Dwelling	64.2	21.6	14.2	882
Burg./Other Structure	74.0	16.5	9.5	618
Drug	73.8	11.9	14.3	7128
Fraud	79.0	15.8	5.2	2667
Kidnapping	67.9	17.0	15.1	106
Larceny	80.6	8.7	10.7	4643
Miscellaneous	77.9	7.3	14.8	1792
Murder/Homicide	64.5	13.0	22.5	284
Rape	62.4	27.1	10.5	218
Robbery	62.5	22.1	15.4	833
Sexual Assault	62.6	17.1	20.3	438

Departure patterns among cases sentenced in FY1998 differ significantly across the offense groups. Among the property crimes, fraud offenses and burglaries of other structures (nondwellings) exhibited a marked mitigation pattern among the departures, while drug, larceny and miscellaneous offenses reveal patterns of aggravation. Departures from the burglary of dwelling guidelines resulted in a mitigation rate much higher than the other property offenses and similar to the rates of mitigation among several of the person crime categories. The violent offenses of rape and robbery, and to a lesser extent assault and kidnapping, demonstrated strong mitigation patterns. In fact, in more than a fourth of the rape cases and over a fifth of the robberies, judges sentenced below the guidelines recommendation. Despite the midpoint enhancements for violent current offenses and violent prior records, the guidelines offense groups of homicide and sexual assault showed stronger aggravation patterns from the guidelines than that for any 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 or the offense for which the offender was originally indicted.

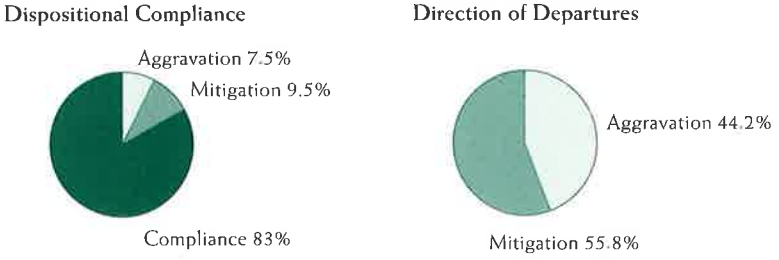
Dispositional Compliance

The Commission examines compliance with Virginia's sentencing guidelines in a variety of ways. Through this type of detailed analysis, the Commission is able to gain perspective on which elements of the guidelines that are functioning well and which have gained less acceptance among members of the judiciary in the Commonwealth. Dispositional compliance, defined as the rate at which judges sentence offenders to the same type of disposition that is recommended by the guidelines, is an important component of overall compliance with guidelines, since the recommendation as to type of disposition is the foundation of the sentencing guidelines system. Determining the type of disposition or sanction in a case is arguably one of the most important decisions a judge will make, since it involves the decision to deny someone's liberty.

In FY1998, the dispositional compliance rate was 83% (Figure 8). Such a high rate of dispositional compliance indicates that, for more than eight out of every ten cases, judges agree with the type of sanction recommended by the guidelines (probation/no incarceration, incarceration up to six months, or incarceration in excess of six months). The rate of dispositional compliance has remained largely stable since the truth-in-sentencing guidelines were implemented in 1995. Of the relatively few cases not in dispositional compliance in FY1998, mitigations occurred more often than aggravations (56% to 44%.) In 1996, the Commission reported that dispositional departures favored aggravation sentences. The gradual shift to mitigations may be due to the expansion of alternative sanction programs which offer judges additional choices for punishing offenders other than traditional terms of incarceration in prison or jail.

Figure 8

Dispositional Compliance and Direction of Departures - FY1998



Among FY1998 cases, dispositional compliance rates by primary offense group ranged from a high of 94% in homicide cases to a low of 74% for sexual assault (Figure 9). Dispositional compliance rates for all offense groups were 80% or better, with the exception of burglary of dwellings and sexual assault. Until FY1998, departures from recommended dispositions in sexual assault cases were overwhelmingly sentences to more severe sanctions than those recommended by the guidelines. In fact, the dispositional aggravation rate in the sexual assault crime category previously was more than three times the overall average. The Commission has tried to address the tendency on the part of judges to sentence sex offenders more harshly by adding a factor to the guidelines which makes it more likely that the offender will be recommended for incarceration if the victim of the sex crimes was under 13 years of age at the time of the offense. The dispositional aggravation rate dropped from 24% prior to the change to less than 15% during the most recent fiscal year, accompanied by an increase in dispositional compliance in sexual assault cases. See *Sentencing and the 1997 Guidelines Revisions* section of this chapter for more information regarding this modification.

Figure 9

Dispositional Compliance by Offense Group - FY1998

	Compliance	Mitigation	Aggravation	Number of Cases
Assault	81.5%	11.7%	6.8%	873
Burglary/Dwelling	76.4	12.6	11.0	882
Burg./Other Structure	82.2	11.5	6.3	618
Drug	80.6	9.8	9.6	7128
Fraud	82.8	14.0	3.2	2667
Kidnapping	82.1	11.3	6.6	106
Larceny	83.7	7.6	8.7	4643
Miscellaneous	90.0	6.2	3.8	1792
Murder/Homicide	94.0	3.2	2.8	284
Rape	90.8	9.2	0.0	218
Robbery	93.3	3.7	3.0	833
Sexual Assault	74.4	11.0	14.6	438

Durational Compliance

In addition to examining the degree to which judges concur with the type of disposition recommended by the guidelines, it is important to study the degree to which judges concur with the sentence length recommended when the sentencing guidelines call for an offender to serve an active term of incarceration. This is known as durational compliance, 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 for which the guidelines recommended an active term of incarceration and the offender received an incarceration sanction consisting of at least one day in jail.

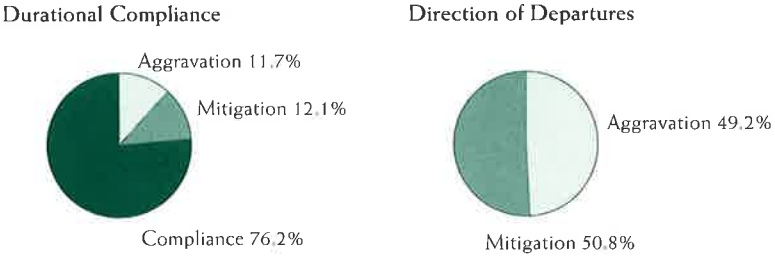
Durational compliance among FY1998 cases was 76% (Figure 10). The rate of durational compliance is significantly lower than the rate of dispositional compliance reported in the previous section. This result indicates that judges agree with the type of sentence recommended by the guidelines more often than they agree with the recommended sentence length in incarceration cases.

For FY1998 cases which were recommended for and received an incarceration term, but the sentence was not within the recommended range, those receiving more severe sanctions were nearly equal in number to those receiving sanctions less severe than the guidelines recommendation. In previous years, aggravation departures in sentence length have outnumbered mitigation departures (e.g., 56% vs. 44% in the 1996 Annual Report).

The sentencing ranges recommended by the guidelines are relatively broad, allowing judges to utilize discretion in sentencing offenders to different incarceration terms while still remaining in compliance with the guidelines. For cases recommended for incarceration of more than six months, the sentence length recommendation derived from the guidelines (known as the midpoint) is accompanied by a high-end and low-end recommendation. The Commission, therefore, is interested in the sentencing patterns exhibited by judges for cases in compliance with the guidelines.

Figure 10

Durational Compliance and Direction of Departures - FY1998*



*Cases recommended for and receiving more than 6 months incarceration

Figure 11

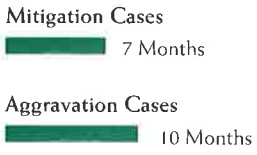
Distribution of Sentences within Guidelines Range - FY1998

Analysis of cases receiving incarceration in excess of six months that are in durational compliance reveals that under one-fifth were sentenced to prison terms equivalent to the midpoint recommendation (Figure 11). Altogether, almost 77% of the cases in durational compliance were sentenced at or below the sentencing guidelines midpoint recommendation. Only 24% of the cases receiving incarceration over six months were sentenced above the midpoint, in the upper portion of the recommended range. It is interesting to note that this pattern of durational compliance in prison cases has been consistent since the sentencing guidelines took effect, indicating that judges have favored the lower portion of the recommended range.

As reported above, when incarceration was recommended by the guidelines in FY1998, judges chose an incarceration term outside of the guidelines range in one out of four cases. Offenders receiving more than six months of incarceration, but less than the recommended time, were given "effective" sentences (sentences less any suspended time) short of the guidelines range by a median value of seven months (Figure 12).

Figure 12

Median Length of Durational Departures - FY1998



For offenders receiving longer than recommended incarceration sentences, the effective sentence exceeded the guidelines range by a median value of ten 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. Moreover, the median length of departures has dropped slightly since the 1997 Annual Report, when the Commission reported median departures of eight and 12 months, respectively.

Reasons for Departure from the Guidelines

Compliance with the truth-in-sentencing guidelines system, as with its predecessor (the sentencing guidelines in place under the parole system) is voluntary. Beginning in 1995, however, judges were required by §19.2-298.01(B) of the Code of Virginia to articulate and submit reasons for sentencing outside the guidelines recommended range. The Commission remains very interested in the departure reasons cited by the judiciary. The explanations that judges provide indicate to the Commission where judges disagree with the sentencing guidelines and where the guidelines may need adjustment or amendment. As the Commission deliberates upon recommendations for revisions to the guidelines, submitted to the General Assembly each December 1 in the Commission's annual report, the opinions of the judiciary, reflected in departure reasons, are an important part of the Commission's discussions. For instance, in 1996, based on departure reasons cited by judges in drug cases, together with input from other criminal justice professionals, the Commission recommended modifications, later approved by the General Assembly, to the drug sentencing guidelines, to account for the amount of drug involved in cases of offenders convicted of selling large amounts of cocaine. See the *Sentencing and 1997 Guidelines Revisions* section of this chapter for more information on this modification.

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. In FY1998, 2,626, or 13%, of the 20,482 cases concluded during the fiscal year received sentences which fell below the guidelines recommendation in the case. These are defined as "mitigation" sentences.

Isolating the FY1998 mitigation cases reveals that, most often, judges emphasized the offender's potential for rehabilitation in

explaining their departures (Figure 13). Factors related to rehabilitation were cited in one out of every five 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 restitution made by the offender. An offender's potential for rehabilitation is often cited in conjunction with the use of an alternative sanction.

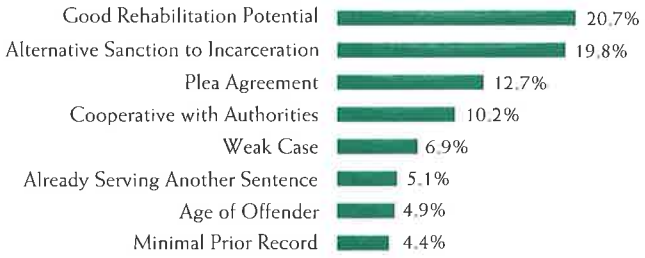
Other than rehabilitation potential, the most popular reason for departure reported by judges was the decision to utilize an alternative sanction or community treatment program to punish the offender. Detention Center Incarceration, Diversion Center Incarceration, Boot Camp Incarceration, intensive supervised probation, day reporting and the drug court programs are examples of alternative sanctions available to judges in Virginia. The types and availability of programs, however, varies considerably from locality to locality. These mitigation cases represent diversions from a recommended incarceration term in those cases in which the judge felt the offender was amenable to the program.

While rehabilitation potential and alternative sanctions were the most frequently cited reasons for mitigation in FY1998, other reasons were also conveyed to the Commission. Judges, in 13% of the low departures, indicated only that they sentenced in accordance with a plea agreement. In 10% of the mitigation cases, judges referred to the offender's cooperation with authorities, such as aiding in the apprehension or prosecution of others. Less often, 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 in some cases indicated that the offender had already been sentenced to incarceration by another jurisdiction or in a previous proceeding (5%). Just as often, judges considered the offender's age. In 4% of the mitigations, 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.

Figure 13

Most Frequently Cited Reasons for Mitigation - FY1998



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

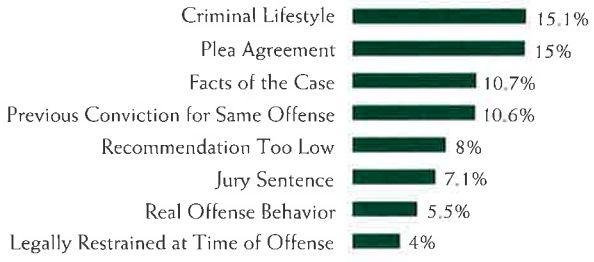
In FY1998, judges sentenced 2,553 of the 20,482 cases to terms more severe than the sentencing guidelines recommendation, resulting in "aggravation" sentences in 12% of the convictions during the year. Examining only the aggravation cases for FY1998, the Commission found that the most common reason for sentencing above the guidelines recommendation, cited in over 15% of the aggravations, was the offender's criminal lifestyle including a history of criminality beyond the contents of his formal criminal record of convictions or juvenile adjudications of delinquency (Figure 14). In almost as many cases, judges recorded "plea agreement" as the only departure reason.

Other aggravation reasons were prevalent as well. Judges, for more than one out of ten aggravation sentences in FY1998, indicated that the facts of the case, or extreme aggravating circumstances, existed such that the offender deserved a higher than recommended sentence. Just as often, however, judges reported the offender's prior convictions for the same or a very similar offense as the current case. Judges stated in 8% of the upward departures that they felt the guidelines recommendation was too low. Almost as many aggravation sentences (7%) were imposed by a jury. In nearly 6% of the aggravations, judges conveyed that the offender's true behavior or the actual offense was more serious than the offenses for which the offender was ultimately convicted. Finally, judges wrote that they sentenced more harshly in 4% of the cases because the offender was under some form of legal restraint, such as probation, when the latest offense was committed.

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

Figure 14

Most Frequently Cited Reasons for Aggravation - FY1998



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

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 for which judges disagree with the sentencing guidelines most often. For convenience, the guidelines are assembled into 12 offense groups, but crimes which exhibit very high compliance and those with 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, encompassing about 95% of all felony sentencing events in Virginia's circuit courts. Figure 15 presents compliance results for those offenses which served as the primary offense in at least 100 cases. These 36 crimes account for nearly all (90%) of the FY1998 guidelines cases.

The compliance rates for the crimes listed in Figure 15 range from a high of 93% for felony shoplifting (goods valued more than $200) to a low of 60% for

Figure 15

Compliance for Specific Felony Crimes - FY1998

	Compliance	Mitigation	Aggravation	Number of Cases
Person				
Malicious Injury	63.5%	22.5%	14.0%	342
Unlawful Injury	69.5	15.6	14.9	410
1st Degree Murder	80.4	16.8	2.8	107
Aggravated Sexual Battery, Victim Less than 13 years old	62.6	23.7	13.7	131
Robbery of Business with Gun or Simulated Gun	59.7	23.6	16.7	216
Robbery in Street with Gun or Simulated Gun	66.7	22.9	10.4	144
Robbery of Business, No Gun or Simulated Gun	67.3	14.0	18.7	107
Robbery in Street,No Gun or Simulated Gun	61.2	23.7	15.1	219
Grand Larceny from a Person	74.0	6.7	19.3	300
Property				
Burglary of Dwelling with Intent to Commmit Larceny, No Deadly Weapon	65.3	21.7	13.0	753
Burglary of Other Structure with Intent to Commmit Larceny, No Deadly Weapon	72.9	17.0	10.1	535
Credit Card Theft	80.2	15.4	4.4	318
Forgery of Public Record	79.1	17.3	3.6	474
Forgery	77.4	17.4	5.2	751
Uttering	76.5	16.3	7.2	276
Bad Check, Valued $200 or More	84.3	12.3	3.4	178
Welfare Fraud, Valued $200 or More	90.0	5.5	4.5	110
Bad Checks- 2 or More over 90 Days, Combined Value $200 or More	82.1	12.3	5.6	106
Obtain Money by False Pretenses, Valued $200 or More	74.6	18.4	7.0	244
Shoplifting Goods Valued Less than $200 (3rd conviction)	86.5	8.7	4.8	229
Shoplifting Goods Valued $200 or More	93.0	2.3	4.7	128
Grand Larceny, Not from Person	80.8	9.2	10.0	1872
Petit Larceny (3rd conviction)	79.6	10.5	9.9	734
Grand Larceny Auto	71.8	11.7	16.5	291
Unauthorized Use of Vehicle Valued $200 or More	80.9	10.8	8.3	278
Embezzlement of $200 or More	84.5	2.5	13.0	440
Receive Stolen Goods Valued $200 or More	83.5	7.4	9.1	242
Drug				
Obtain Drugs by Fraud	83.2	3.7	13.1	244
Possession of Schedule I/II Drug	77.6	5.8	16.6	4125
Sale of .5 oz - 5 lb of Marijuana	74.2	9.0	16.8	465
Sale of Schedule I/II Drug for Accommodation	75.8	15.5	8.7	161
Sale, etc. of Schedule I/II Drug	65.3	25.8	8.9	1874
Other				
Hit and Run with Victim Injury	77.5	14.2	8.3	120
Habitual Traffic Offense with Endangerment to Others	81.7	1.1	17.2	354
Habitual Traffic Offense - 2nd Offense, No Endangerment to Others	81.5	1.3	17.2	605
Possession of Firearm or Concealed Weapon by Convicted Felon	76.2	16.7	7.1	424

offenders convicted of robbery of a business with a gun. For offenders convicted of this type of robbery, nearly one in four received a sentence below the guidelines. The single most common offense, simple possession of a Schedule I/II drug, comprised one out of every five guidelines cases and registered a compliance rate of 78%. While compliance in Schedule I/II drug possession cases was high, the rate of aggravation departures was three times higher than mitigation departures. This is most likely due to the fact that the guidelines typically recommend probation/no incarceration for possession of a Schedule I/II drug, particularly if the offender has little or no prior record. If the recommendation is for no incarceration, the only way to depart from the guidelines is to sentence above them.

Eight crimes against the person surpassed the 100 case mark. Two assaults, malicious injury (a Class 3 felony) and unlawful injury (a Class 6 felony) appear on the crime list. While the compliance in unlawful injury cases was about 70%, malicious injury cases are characterized by a lower compliance (64%) and a markedly higher mitigation rate (23% vs. 16%). Although compliance in person crimes is typically lower than compliance in property and drug crimes, judges concurred with the guidelines for first degree murder in more than 80% of the cases. Fewer than two-thirds of aggravated sexual battery (victim less than 13 years old) cases were sentenced within the guidelines, while one in four was sentenced below them. All of the robberies on the list yielded below average compliance. Departures in robbery cases typically favored mitigation.

Half of the offenses listed in Figure 15 are property crimes, including two burglaries. Burglary of an other structure (non-dwelling) with intent to commit larceny (no weapon) demonstrated a higher compliance rate than the same burglary committed in a dwelling (73% vs. 65%). Every fraud and larceny offense listed in the table had 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), bears a compliance rate of 81%.

For most of the five drug offenses in Figure 15, compliance was 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 Schedule I/II drug offenses, however, were characterized by substantially lower compliance rates. Sentences for the sale, distribution, or possession of a Schedule I/II drug with intent to distribute comply with guidelines only 65% of the time, with more than a quarter of offenders receiving a sentence below the guidelines recommendation. In many of the mitigation cases, 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 terms.

Four offenses which fall in the guidelines miscellaneous offense group appear in Figure 15: hit and run, both types of felony habitual traffic offender violations and possession of a gun by a convicted felon. All of these had higher than average compliance rates.

Compliance by Circuit

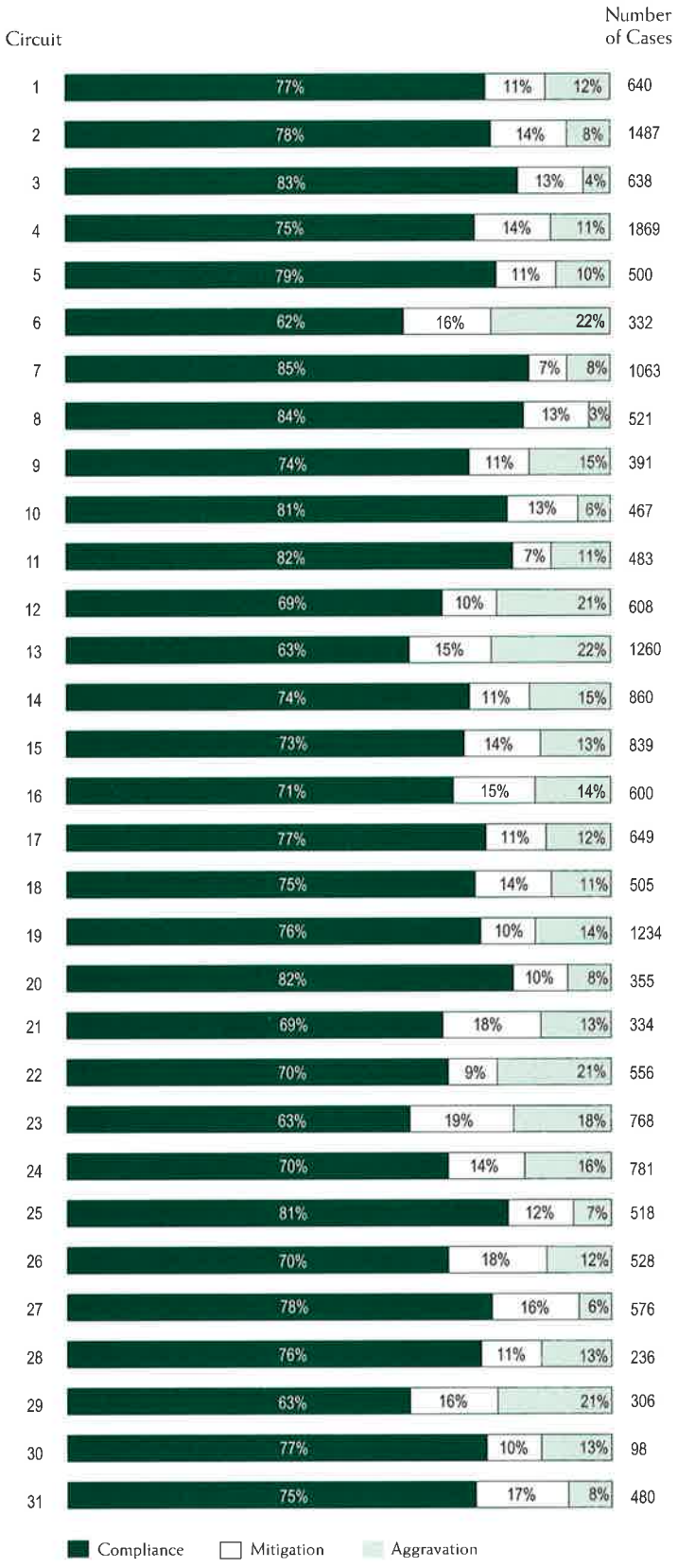
Compliance rates and departure patterns vary significantly across Virginia's 31 circuits (Figure 16). The map and accompanying table on the following pages detail the specific location of Virginia judicial circuits.

Overall, 18 of the state's 31 circuits have compliance rates in the 70% to 79% range, with an additional seven circuits reporting compliance rates higher than 80%. Only six circuits had compliance rates below 70%. There are likely many reasons for the variations in compliance across circuits. Certain jurisdictions may see atypical cases not reflected in statewide averages. In addition, the availability of alternative or community-based programs currently differs from locality to locality.

The degree to which judges follow guidelines recommendations does not seem to be primarily related to geography. Both high and low compliance circuits were found in close geographic proximity, with no geographic pattern discernible. However, the circuits in the Hampton Roads area of Virginia typically have maintained compliance rates above the statewide average. Chesapeake (Circuit 1), Virginia Beach (Circuit 2), Portsmouth (Circuit 3), Norfolk (Circuit 4), the Suffolk area (Circuit 5), and Newport News (Circuit 7) reported compliance rates ranging from 75% to 85%.

Figure 16

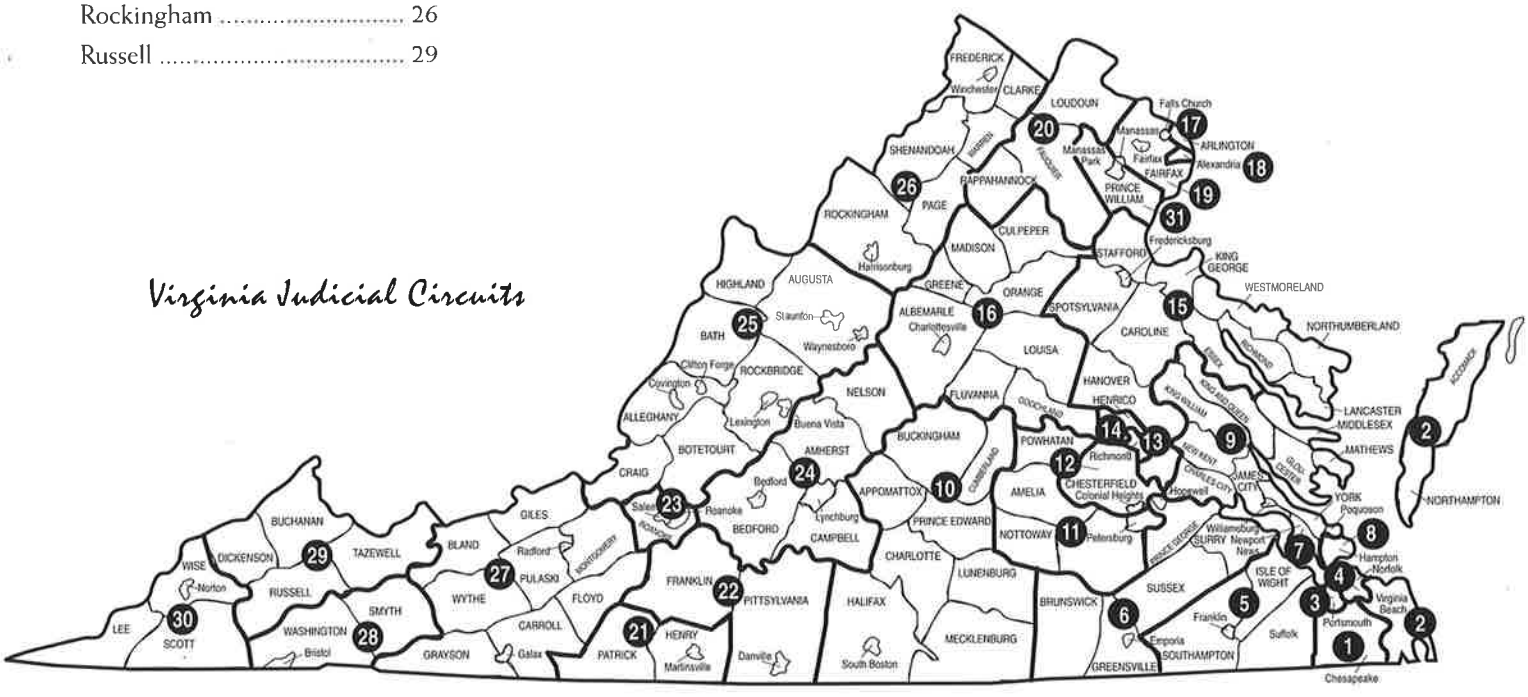
Compliance by Circuit - FY1998



Virginia Localities and 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

Virginia Judicial Circuits



In FY1998, the highest compliance rate with the sentencing guidelines, 85%, was found in Newport News (Circuit 7). Newport News is one of the five jurisdictions which submitted more than 1,000 truth-in-sentencing guidelines cases to the Commission in FY1998. The others, Virginia Beach (Circuit 2), Norfolk (Circuit 4), the City of Richmond (Circuit 13) and Fairfax (Circuit 19), returned compliance rates between 75% and 78%, except for the City of Richmond, which had a compliance rate of only 63%.

The lowest compliance rates under the truth-in-sentencing guidelines in FY1998 were found in Circuit 6 in Sussex, Surry, Brunswick and Greensville counties (62%), Circuit 29 in Southwest Virginia (63%), the City of Richmond (63%) and Circuit 23 in Roanoke.

Of all Virginia's circuits, Roanoke yielded the highest rate of mitigation, 19%. Roanoke was the first circuit in the state to develop a drug court program, and handling some cases through the drug court may explain at least some of the mitigations. Of the five circuits with 1,000 or more cases, Virginia Beach (Circuit 2) and Richmond City (Circuit 13) had the highest rate of mitigation, 14% and 15%, respectively.

With regard to high mitigation rates, it would be too simplistic to assume that this reflects an area with lenient sentencing habits. 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 the City of Richmond (Circuit 13) had the highest rate of aggravation of all circuits in FY1998. Among the five circuits with 1,000 or more cases, Richmond's aggravation rate far exceeded the aggravation rates in other circuits.

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

Compliance and Midpoint Enhancements: Longer Sentence Recommendations for Violent Offenders

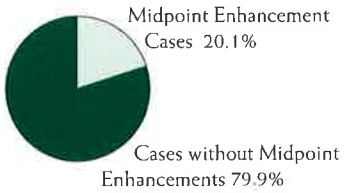
The truth-in-sentencing guidelines are designed specifically to provide sentence recommendations for certain categories of offenses that are significantly greater than historical time served for these crimes. Offenders who are convicted of a violent crime or who have been previously convicted of a violent crime are recommended for incarceration terms up to six times longer than offenders fitting similar profiles served under the parole system during the period prior to its abolition. Section 17.1-805, formerly, §17-237, of the Code of Virginia describes the framework for what are known as "midpoint enhancements," which raise the score on the sentencing guidelines worksheets in cases involving violent offenders and, therefore, increase the guidelines sentencing recommendation. Midpoint enhancements are triggered for homicide, rape, or robbery offenses, most assaults and sexual assaults, and certain burglaries, when any one of these offenses is the most serious offense, also called the "instant offense." Offenders with a prior record containing at least one

conviction for a violent crime are subject to degrees of midpoint enhancements based on the nature and seriousness of the offender's criminal history. The most serious prior record receives the most extreme enhancement. A prior record labeled "Category II" contains at least one 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.

Because midpoint enhancements are designed to target only violent offenders for longer sentences, enhancements do not affect the sentence recommendation for the majority of guidelines cases. Among the FY1998 cases, 80% of the cases did not involve midpoint enhancements of any kind (Figure 17). Only 20% of the cases qualified for a midpoint enhancement because of the current or prior conviction for a felony defined as violent.

Figure 17

Application of Midpoint Enhancements - FY1998

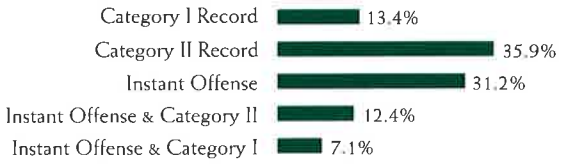


Of the 4,122 cases in FY1998 in which midpoint enhancements applied, nearly one-third (31%) received these upward adjustments due to the violent nature of the current, or instant, offense (Figure 18). More than one-third (36%) were given an enhancement, despite a nonviolent current offense, because the offender's criminal history was defined as a Category II prior record. The most substantial midpoint enhancements for prior record, relating to Category I, applied in only 13% of the enhancement cases. Over 12%, however, qualified for enhancements for both a current violent offense and a Category II prior record. Only a 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.

Since the inception of the truth-in-sentencing guidelines, judges have departed from the sentencing guidelines more often in midpoint enhancement cases than in cases without enhancements. In FY1998, compliance was only 66% when enhancements applied, significantly lower than compliance in all other cases (77%). Low compliance in midpoint enhancement cases is suppressing the overall compliance rate. When departing from enhanced guidelines recommendations, judges are choosing to mitigate in three out of every four departures. The sentencing recommendations

Figure 18

Type of Midpoint Enhancement Received - FY1998



produced by the guidelines are in the form of ranges which allow judges to exercise certain discretion in sentencing and still be in compliance with guidelines. Despite this, when sentencing in midpoint enhancement cases in FY1998, judges departed from the low end of the guidelines range by an average of more than two years (27 months), with the median mitigation departure at 16 months (Figure 19). The relatively low compliance rate and overwhelming mitigation pattern are evidence that judges feel the midpoint enhancements are too extreme in certain cases.

Compliance, while generally lower in midpoint enhancement cases than in other cases, varies across the different types and combinations of midpoint enhancements (Figure 20). In FY1998, enhancements for a Category II prior record generated the highest rate of compliance of all the midpoint enhancements (72%), and the lowest mitigation rate (22%). Compliance in cases receiving enhancements for a Category I prior record was several percentage points lower (66%). The most severe midpoint enhancements, that for a combination of a current violent offense and a Category I or Category II prior record, yielded even lower rates of compliance (64%). In FY1998, enhancements for a current violent offense exhibited the lowest compliance rate of all the enhancement types (60%). In each category of midpoint enhancements, the ratio of mitigation to aggravation departures was more than three to one, except for instant offense enhancements, which maintained a ratio of two to one.

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, there-

Figure 19

Length of Mitigation Departures in Midpoint Enhancement Cases - FY1998

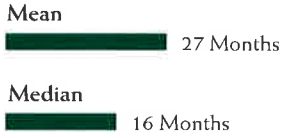


Figure 20

Compliance by Type of Midpoint Enhancement - FY1998*

	Compliance	Mitigation	Aggravation	Number of Cases
None	76.9%	9.7%	13.4%	16,360
Category II Record	72.0	22.0	6.0	1,480
Category I Record	66.3	28.3	5.4	554
Instant Offense	59.8	25.6	14.6	1,286
Instant Offense & Category II	64.0	28.2	7.8	511
Instant Offense & Category I	64.3	29.5	6.2	291

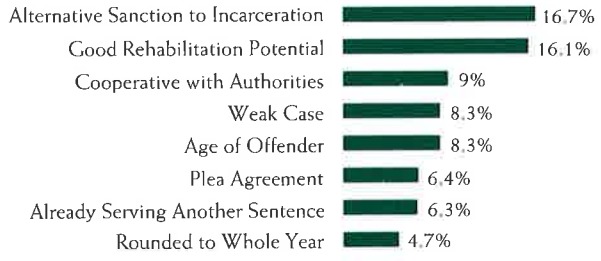
* Midpoint enhancements prescribe prison sentence recommendations for violent offenders which are significantly greater than historical time served under the parole system during the period 1988 to 1992.

fore, is focused on downward departures from the guidelines (Figure 21). Such analysis reveals that in FY1998 the most frequent reason for mitigation in these cases was based on the judge's decision to use alternative sanctions to traditional incarceration (17%). In over 16% 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 cited the defendant's cooperation with authorities in the current or other prosecutions. In about 8% of these cases, judges imposed a shorter than recommended sentence because of the offender's age. Just as often, judges indicated that the evidence against the defendant was weak or that a key witness refused to testify. In 72% of cases where weak evidence was cited, a plea agreement was accepted by the judge.

In about 6% of FY1998 enhancement cases sentenced below the guidelines, judges reported only that they had accepted a plea agreement. The fact that the offender already had sentences to serve in other jurisdictions or from previous proceedings was suggested by judges in another 6% of the mitigation sentences. In a small percent of cases (5%), it is apparent that the judge rounded the low end of the recommended range down to the nearest whole year, so that the final sentence fell just short of compliance with guidelines.

Figure 21

Most Frequently Cited Reasons for Mitigation in Midpoint Enhancement Cases - FY1998



Sentencing and the 1997 Guidelines Revisions

In its 1996 Annual Report, the Commission presented several specific recommendations regarding revisions to the sentencing guidelines. Under §17.1-803, formerly §17-238, of the Code of Virginia, any such recommendations adopted by the Commission become effective the following July 1, unless otherwise acted upon by the General Assembly. Since the General Assembly did not revise any of the Commission's recommendations during its 1997 session, the changes were incorporated into the guidelines July 1, 1997. This section will address the impact of some of these changes on sentencing and compliance.

Cocaine Sales Offenses

In 1996, 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. 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 drug cases was the quantity of the drug sold. Responding to input of guidelines users, the Commission examined drug quantity and its impact on sentencing.

Results of the study indicated that the majority of drug sale cases prosecuted in Virginia's circuit courts involved small amounts of powdered or crack cocaine and that the severity of the sentence imposed was not significantly different for sales characterized by larger amounts of cocaine than those involving smaller amounts. It is important to remember that cases involving the very largest drug amounts are prosecuted through federal, and not state, courts. While not purely grounded in analysis of historical data, it was the consensus of the Commission that Virginia's guidelines should recommend longer terms for offenders selling, distributing, manufacturing or possessing with intent to sell 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 related offenses.

Under the new work sheets, effective since July 1, 1997, 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 in which 226.8 grams (1/2 pound) or more were seized. 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 incarceration term for these offenders, but the sentence recommendation has been expanded to include the option of sentencing these first-time felons to the Detention Center Incarceration program in lieu of traditional incarceration. Detention Center Incarceration involves confinement in a secure facility from four to six months and requires participation in a substance abuse treatment program.

Since the modifications to the drug guidelines took effect, the Commission has received 107 cases which qualified for the three or five year increase in recommendation for the sale of large quantities of cocaine. So far, judges have elected to sentence just over half (55%) of these offenders within the new range recommended by the guidelines, and have departed below the guidelines in nearly all remaining cases. When sentencing below the new drug guidelines, judges indicated in more than one out of four cases that the offender cooperated with authorities and/or aided in the prosecution of others, and in one out of every five, that the offender was sentenced to an alternative sanction program.

While compliance with the new drug guidelines is relatively low and mitigation is high, the addition of drug quantity to the guidelines has had an effect on sentencing in these cases. The proportion of offenders selling larger quantities of cocaine who receive an

Cumberland County courthouse was built between 1818 and 1821. It is currently listed as a significant local landmark by the Virginia Landmarks Register.

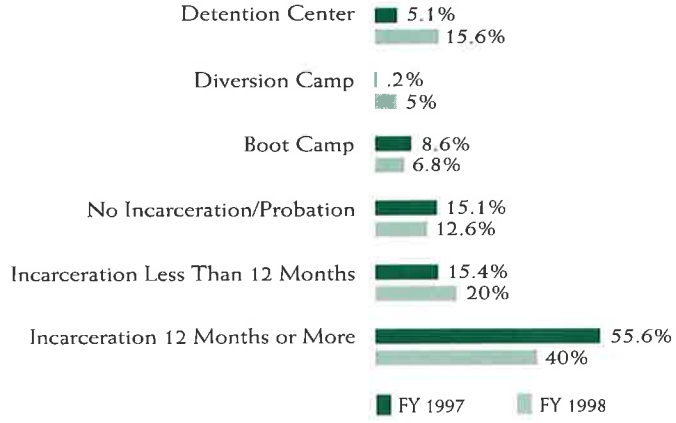
effective sentence (imposed less any suspended time) in excess of four years has nearly tripled, from 16% in FY1997 to 42% in FY1998 (Figure 22). The proportion of these offenders sentenced to a short prison term (12 to 24 months) dropped by more than half (33% to 14%) and the proportion of offenders given an alternative sanction program or no incarceration at all has declined from 27% to 15% during the same period. Although compliance with the drug guidelines has been lower for cases receiving the increased recommendations for large quantity than for other drug sale cases, the modification has had an impact on sentencing, resulting in harsher sanctions for some offenders.

The other modification to the drug guidelines, focusing on first-time felons convicted of selling a gram or less of cocaine, has also had an impact on sentencing outcomes. In these cases, the guidelines provide a dual option recommendation: either a traditional prison term (seven to 16 months) or Detention Center Incarceration. In FY1998, the Commission received 340 drug cases in which the dual option recommendation was applicable. Compared to the previous fiscal year, judges utilized the Detention Center Incarceration program more frequently in FY1998, 5% vs. 16% (Figure 23).

Moreover, use of the Diversion Center program has increased (0% to 5%) as beds have become available. The Diversion Center program, like Detention Center, is a four to six month program with a drug treatment component. Diversion Center operates similar to a work release program, allowing inmates to leave the center for jobs during the day. Clearly, the proportion of offenders receiving an incarceration term of 12 months or more has declined from FY1997 to FY1998 from 56% to 40%. The intent of this modification was to afford judges the opportunity to sentence first-time felons convicted of selling a gram or less of cocaine to an alternative sanction program, such as the Detention Center, and still be in compliance with guidelines. It appears that, in many cases, judges have taken advantage of this new option.

Figure 23

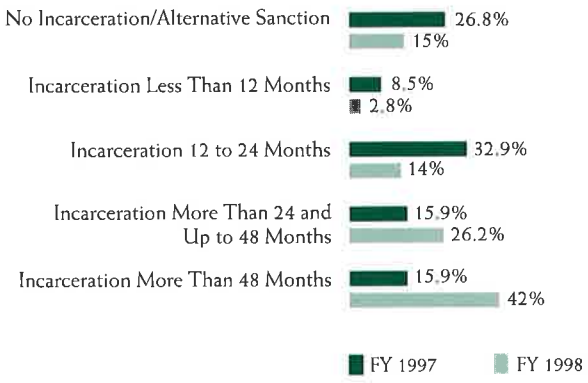
Sentences for First-time Felons Selling 1 Gram or Less of Cocaine* FY1997 and FY1998



*Cases Recommended for Prison or Detention Center Incarceration

Figure 22

Sentences for Felons Selling 28.35 Grams or More of Cocaine - FY1997 and FY1998



Sex Offenses Against Children

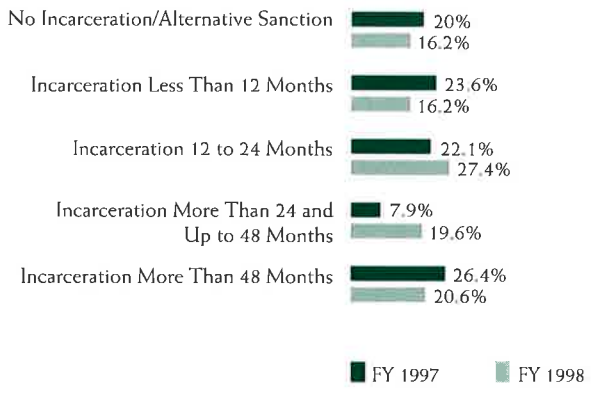
Since the truth-in-sentencing guidelines became effective in 1995, sentences for sexual assault crimes have resulted in consistently low compliance rates. From January 1, 1995, through October 22, 1996, judges elected to impose a sentence more severe than that recommended by the guidelines in nearly a third of sexual assault cases. At that time, the sentencing guidelines did not consider victim age in the guidelines computations. In 1996, the Commission conducted a detailed analysis of sexual assault cases which revealed that two-thirds were crimes committed against victims who were under the age of 13 at the time of the offense, and that, when the sex crime victimized such a young person, judges sentenced the offender to prison more frequently than recommended by guidelines. The Commission responded by modifying the sexual assault guidelines to include victim age.

With the modification to the guidelines, sexual assault crimes committed against victims under the age of 13 receive additional points on the guidelines worksheets such that it is much more likely that the offender will be recommended for incarceration, particularly a prison term. The Commission received 179 sexual assault cases sentenced in FY1998 involving victims less than 13 and, in 63% of the them, judges complied with the new penalties recommended by guidelines. More than one-fourth (27%) of the offenders affected by the modification were given sentences below the guidelines recommendation in the case. It may be that many judges who sentenced in compliance with the previous sexual assault guidelines when the victim was under 13 have maintained their sentencing patterns after the addition of the victim age factor, but now their sentences fall below the new guidelines recommendation.

Notwithstanding the emerging mitigation pattern in sexual assault cases with young victims, the addition of the victim age factor to the sexual assault guidelines in FY1998 has had an impact on sentencing outcomes. The proportion of offenders receiving a sanction other than prison or jail dropped from 20% in FY1997 to 16% in FY1998, while those receiving a short term of incarceration (less than 12 months) declined from 24% to 16% (Figure 24). Conversely, the proportion of offenders receiving 12 to 24 months of incarceration rose (from 22% to 27%), as did sentences of more than 24 months up to 48 months (from 8% to 20%). The intent of this modification was to recommend more offenders convicted of sexual assault crimes against young victims for terms of incarceration, particularly prison terms. It appears, given sentencing outcomes in FY1998, that the change has resulted in some shift in sentencing patterns for these offenses.

Figure 24

Sentences for Sexual Assaults Against Victims under Age 13 FY1997 and FY1998



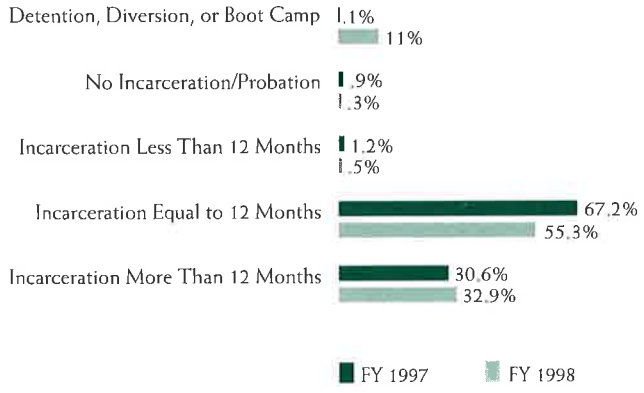
Habitual Traffic Offenders

Changes in the sentencing of habitual traffic offenders are not the result of any direct changes to the sentencing guidelines but, instead, have resulted from amendments to the Code of Virginia passed 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 a Detention Center, Diversion Center or Boot Camp Incarceration program.

The change in the Code gives judges the opportunity to suspend the mandatory minimum penalty for those offenders they consider amenable to one of the alternative sanction programs. Of the 951 habitual traffic cases sentenced in FY1998, more than one out of every ten (11%) were sentenced to one of the alternative sanction programs allowed in the Code (Figure 25). Since the modification, a smaller proportion of offenders received a sentence equivalent to the 12 month mandatory minimum penalty (67% down to 55%). The results indicate that judges are being selective in utilizing the new sentencing options for habitual traffic offenders, sentencing whom they believe are the most appropriate candidates to those programs.

Figure 25

Sentences in Habitual Traffic Cases - FY1997 and FY1998



Juries and the Sentencing Guidelines

Today, Virginia is one of only six states that allows juries to determine sentence length for non-capital offenses. Virginia's juries have typically handed down sentences more severe than the recommendations of the sentencing guidelines. In fact, in FY1998, a jury sentence was more likely to exceed the guidelines than fall within the guidelines range. Some have speculated that many citizens may be unaware of the abolition of parole and Virginia's conversion to truth-in-sentencing, with its 85% minimum time to serve requirement. As the result, jurors may be inflating sentences, under the assumption that only a portion of the term will be served because of parole release. Moreover, juries are not allowed, by law, to receive any information regarding the sentencing guidelines to assist them in their sentencing decisions.

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 adjudi-

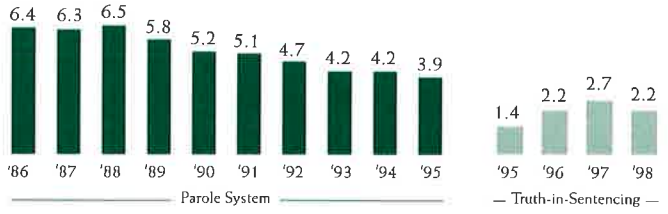
cated by a jury has been declining (Figure 26). Between FY1986 and FY1988, the overall rate of jury trials was above 6%. Starting in 1989, however, the rate began a small but gradual decline. According to available data, the rate of jury trials was just over 4% in FY1994.

Some criminal justice professionals have offered a possible explanation for the downward trend in the rate of jury trials between FY1989 and FY1994. 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 longer sentences imposed in cases adjudicated by juries throughout the Commonwealth, than in similar cases sentenced by circuit court judges. In addition, the Judicial Sentencing Guidelines Committee of the Judicial Conference of Virginia utilized the new data system to develop Virginia's first voluntary sentencing guidelines, implemented statewide in 1991. These events of the late 1980s and early 1990s may have influenced the rate of trials by jury in the succeeding years.

Subsequent events have also likely influenced the rate of jury trials in Virginia. In 1994, the General Assembly enacted provisions for a system of bifurcated jury trials. In bifurcated trials, the jury determines the guilt or innocence of the defendant in the first phase of the trial, and then, in a second phase, the jury makes its sentencing decision. When the bifurcated trials became effective on July 1, 1994 (FY1995), jurors in Virginia, for the first time, were presented with information on the offender's prior criminal record to assist them in making a sentencing decision. During the first year of the bifurcated trial process, the overall rate of jury trials dropped slightly to just under 4%, the lowest rate since the data series began.

Figure 26

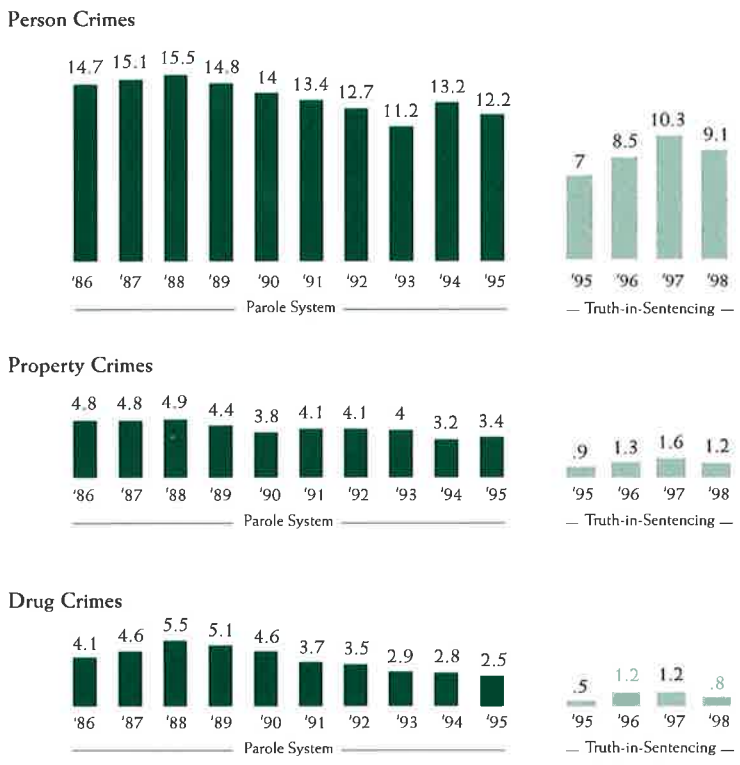
Percentage of Jury Trials FY1986 - FY1998
Parole System v. Truth-in-Sentencing (No Parole) System



Most recently, parole was abolished and truth-in-sentencing was instituted for felony offenses committed on or after January 1, 1995. Among the early cases subject to truth-in-sentencing provisions (FY1995), the overall rate of jury trials sank to just over 1%. Truth-in-sentencing laws, however, were only in effect during the last six months of FY1995, limiting the time for conclusion of jury trials during that fiscal year. During the first complete fiscal year of truth-in-sentencing (FY1996), just over 2% of the cases were resolved by jury trials, half the rate of the last year before the abolition of parole. Thus, while the shift to bifurcated trials may have been associated with a small decrease in the rate of jury trials in FY1995, the introduction of truth-in-sentencing resulted in a dramatic reduction in jury trials. The rate of jury trials rose in FY1997 to nearly 3%, but in FY1998, the most recent year of available data, the rate receded to 2% of all felony cases resulting in convictions in Virginia's circuit courts.

Figure 27

Percentage of Jury Trials by Offense Type FY1986 - FY1998
Parole System v. Truth-in-Sentencing (No Parole) System



Inspecting jury trial rates by offense type reveals very divergent trends for person, property and drug crimes. From FY1986 through FY1995 parole system cases, the jury trial rate for crimes against the person (homicide, robbery, assault, kidnapping, rape and sexual assault) was typically three to four times the rates for property and drug crimes, which were roughly equivalent to one another (Figure 27). However, Virginia 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 all crime types dropped dramatically, particularly for property and drug crimes. Since the FY1995 truth-in-sentencing cases, the jury trial rate for crimes against the person has rebounded somewhat from 7%, to 10% in FY1997 and 9% in FY1998. Rates for property and drug crimes, on the contrary, have not shown that kind of rebound. The jury trial rate for property crimes in FY1998 was still only 1%. For FY1998 cases, less than 1% of drug crimes in Virginia were adjudicated by juries.

Of the 20,482 FY1998 cases analyzed for this report, the Commission received 418 cases tried by juries. While the compliance rate for cases adjudicated by a judge or resolved by a guilty plea exceeded 75% during the fiscal year, 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 were more likely to fall above the guidelines (44%) than within the guidelines.

Additionally, the rate of aggravation, or sentencing above the guidelines recommendation, was nearly four times that of non-jury cases.

Judges, although permitted by law to lower a jury sentence they feel is inappropriate, typically do not amend sanctions imposed by juries. Judges modified jury sentences in 27% of the FY1998 cases in which juries found the defendant guilty. Of the cases in which the judge modified the jury sentence, nearly half (47%) were cases in which the final sentence was still higher than the guidelines recommendation for the case. Judges brought a high jury sentence into compliance with the guidelines recommendation in only four out of ten modifications.

For those jury cases in which the final sentence fell short of the guidelines, it did so by a median value of nearly 19 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 recommendation by a median value of more than four years. In many cases, juries sentenced offenders to terms which far exceeded the guidelines recommendation.

Figure 28

Sentencing Guidelines Compliance in Jury Cases and Non-Jury Cases - FY1998

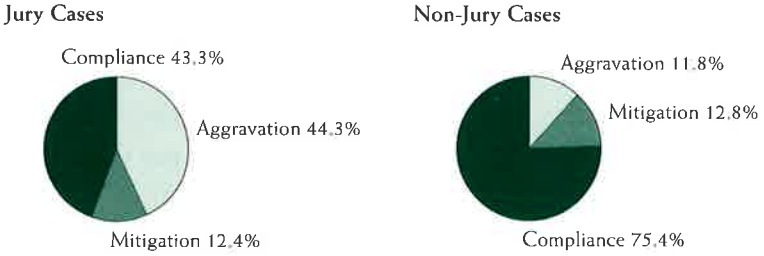
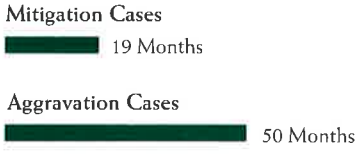


Figure 29

Median Length of Durational Departures in Jury Cases - FY1998



Offender Risk Assessment Study

Built in 1897, Rockbridge County courthouse's design was selected in a competition. The winning plan was submitted by William McDowell, a graduate of the local Washington College (now Washington and Lee University). At the dedication, county supervisor J.M. Johnson announced that the $16,900 courthouse was "the cheapest good building and the best cheap building ever erected in Rockbridge County." A colleague, J.R. McCormick, suggested to those present that "the safest thing for them and their pocketbooks was to keep as far away from (the courthouse) as possible."

Introduction

In 1994, the Virginia General Assembly required the Commission (§17.1-803) to study the feasibility of placing at least 25% of incarceration bound drug and property offenders in alternative sanctions based on a risk assessment instrument that identifies those offenders who pose a relatively low risk to public safety. The instrument has been developed and is currently being pilot tested in several judicial circuits.

This chapter is divided into several sections. First, the research methodology used to develop the risk assessment instrument is briefly reviewed. Next, the process of integrating the risk assessment component into the existing sentencing guidelines system in four pilot judicial circuits is discussed. The chapter then provides an analysis of data collected during the first year of implementation. The evaluation plan for an independent review of the risk assessment instrument is then described. The chapter concludes with a discussion of the Commission's decision to expand use of the risk assessment component into additional judicial circuits.

Development of Risk Assessment Instrument

Development of the risk assessment instrument began by using automated pre-/post-sentence investigation (PSI) report data to study recidivism among nonviolent drug and property offenders. A random sample of about 2,000 offenders who had been released from incarceration between July 1, 1991, and December 31, 1992, was drawn. A stratified sampling technique was used to increase the chance of including offenders with juvenile criminal records, as juvenile experiences and especially delinquent behavior have been shown to be a precursor to adult crime. Recidivism was defined as reconviction for a felony during a three year follow-up period. Sample cases were matched to PSI data to determine which offenders were subsequently re-convicted for a felony by December 31, 1995.

An empirical approach was used to construct the risk instrument, adopting factors and their relative weights (degree of importance) as determined by statistical analysis. The only exception to this approach was the race of the offender, a factor that was statistically significant in predicting

recidivism. The Commission chose to remove this factor in a statistically controlled manner, viewing race of the offender as a proxy for social and economic disadvantage. The remaining significant indicators were incorporated into a worksheet, in a manner consistent with the guidelines format, based on their relative degree of importance.

The Commission adopted a score threshold (nine points) on the risk assessment scale which was expected to yield recommendations for an alternative punishment for 25% of the non-violent felons who would otherwise be incarcerated. In the research used to construct the risk scale, offenders who scored at or below the risk threshold of nine points had one chance in eight (12%) of being re-convicted of a felony within three years.

Certain types of offenders and offenses are excluded from risk assessment consideration. By statute (§17.1-803), offenders who committed a violent felony among either their current offenses or prior convictions are excluded. The Commission also decided to exclude from risk consideration those offenders who sold one ounce or more of cocaine.

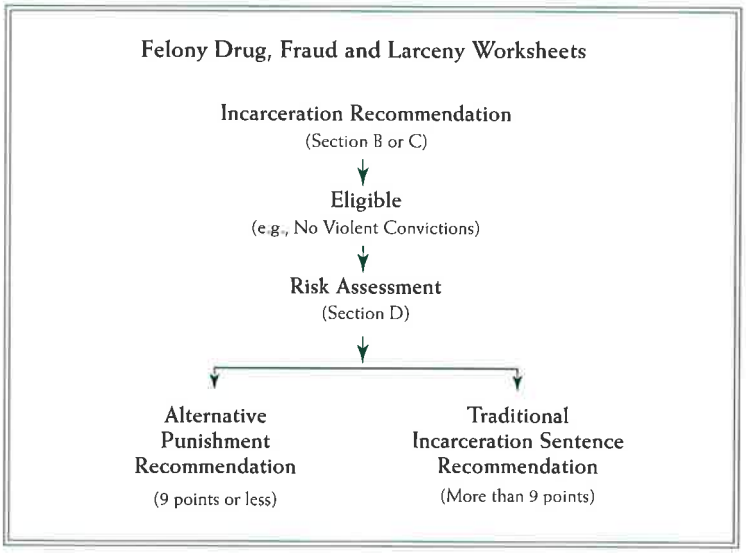
Implementation of Risk Assessment Instrument

The risk assessment instrument was incorporated into the current guidelines system as an additional worksheet, Section D, as shown on the adjacent page, to be completed when the primary offense is drug, fraud, or larceny and the recommended sentence includes incarceration. If the sentencing guidelines recommendation does not include incarceration, Section D is not completed. Additionally, Section D is not scored if the offender is ineligible as described in the previous paragraph (Figure 30).

In the autumn of 1997, three judicial circuits 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). Staff conducted training at the pilot sites in October and November of 1997. A manual explaining how to score the risk assessment form was also developed and distributed. New risk assessment work sheets (Section A - Section D), distinguishable from regular sentencing guidelines forms, were printed and distributed to the pilot circuits.

Figure 30

Sentencing Guidelines System/Risk Assessment



Drug — Section D

Form #

Recommended for Probation or Ineligible

A. Was the offender recommended for No incarceration on Section B? ___ Yes ___ No

B. Do any of the offenses at sentencing involve the sale, distribution, or possession with intent, etc. of cocaine of a combined quantity of 28.35 grams (1 ounce) or more? ___ Yes ___ No

C. Are any prior record offenses violent (Category I/II listed in Tables I or II of the Guidelines Manual)? ___ Yes ___ No

D. Are any offenses at sentencing violent (Category I/II listed in Tables I or II of the Guidelines Manual)? ___ Yes ___ No

If answered YES to ANY, go to "Alternative Punishment Recommendations" on cover sheet and check Recommended for Probation or Ineligible. If answered NO to ALL, complete remainder of Section D worksheet.

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 →

Go to **Cover Sheet** and fill out **Alternative Punishment Recommendations** section.
If total is 9 or less, check Recommended for Alternative Punishment.
If total is 10 or more, check Do NOT Recommend for Alternative Punishment.

December 1, 1997, marked the initial use of the risk assessment instrument by judges in the pilot sites. Three months later, Circuit 22 (city of Danville and counties of Franklin and Pittsylvania) became the fourth pilot site to use the risk assessment component. During the pilot phase, application of the instrument as a new component in the guidelines system has been closely monitored. Experience gained 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.

The Commission recognizes that not all offenders who receive a recommendation for alternative punishment will be sentenced accordingly. Judges retain the discretion to sentence as deemed appropriate; risk assessment is seen as additional information for judges to consider in sentencing. Judges are considered in compliance with the guidelines whether they sentence within the recommended incarceration range or if they follow the recommendation for alternative punishment.

Risk Assessment Cases Completed

Between December 1, 1997 and September 21, 1998, the Commission received 1,247 risk assessment work sheets from the four pilot circuits. Nearly half (46%) of these work sheets came from Circuit 19. Another 25% came from Circuit 14. These two circuits comprise three quarters of the cases received to date. About 16% of the cases have come from Circuit 5, and 13% from Circuit 22. Figure 31 illustrates the breakdown of risk assessment cases by circuit.

Figure 31

Number and Percentage of Cases Received by Circuit

Circuit	Cases	Percent
5	206	16%
14	308	25%
19	575	46%
22	158	13%

Of the three offense groups considered for risk assessment, drug and larceny offenses have comprised nearly 80% of the cases received. The other 19% were fraud cases. Figure 32 represents the risk assessment offense breakdown.

Figure 32

Number and Percentage of Cases Received by Primary Offense

Offense	Cases	Percent
Drug	535	43%
Larceny	470	38%
Fraud	242	19%

Risk Assessment Eligible Offenders

Only certain drug and property felons are considered for risk assessment. Offenders who are recommended for a traditional incarceration term who have no violent prior convictions, no violent additional offenses at sentencing, and who are not being sentenced for drug sale offenses involving a cocaine amount of one ounce or more are eligible for risk consideration. The exclusion criteria greatly reduces the possible number of offenders who are assessed for a risk of recidivism. Among those not considered for risk assessment, most (65%) were offenders recommended for probation. The remaining 35% were those with either violent prior records, violent additional offenses, or offenders who sold large amounts of cocaine. Some of the cases deemed ineligible for risk consideration were labeled as such due to problems in completing the risk assessment work sheet. After eliminating the cases ineligible for risk assessment scoring, the Commission has received 545 cases where the risk assessment instrument has been completed. The forthcoming analysis summarizes the results of a study of these 545 cases.

Analysis of Offenders Screened with Risk Assessment

The risk assessment instrument consists of eleven factors on which all eligible offenders are scored (see page 49). The higher the final score on this worksheet, the higher the likelihood of recidivism. Among the 545 eligible offenders scored on the risk assessment instrument the scores have ranged from a low of 1 to a high of 26 points. Offenders scoring nine points or less are recommended for an alternative punishment to traditional incarceration. Figure 33 provides an illustration of the score distribution on the risk assessment instrument. Among the offenders screened for risk to date, 25% have scored nine or less and thus have been recommended for alternative punishments. The average risk score is 12 points.

The risk assessment cases have been categorized into four groups based upon whether an offender was recommended for an alternative and whether he received an alternative punishment (Figure 34).

Figure 33

Distribution of Scores on Risk Assessment Instrument

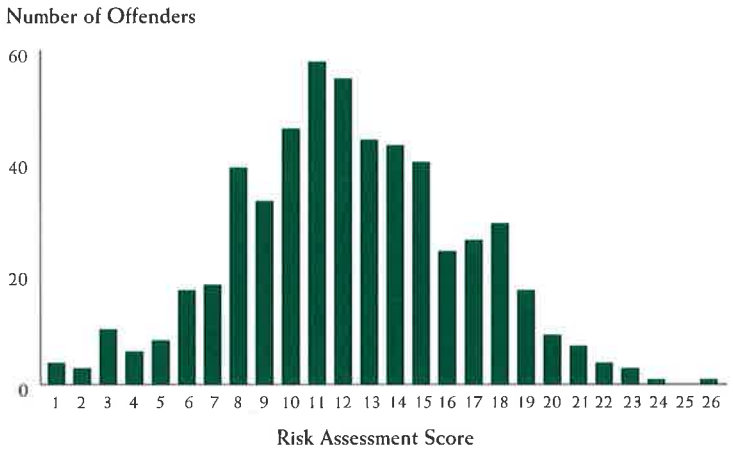
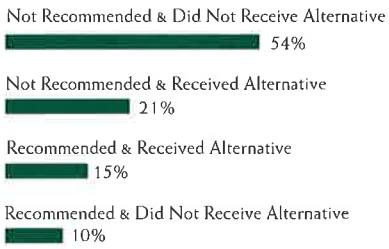


Figure 34

Categories of Offenders Based on Risk Recommendation and Sentence Received



Of the 545 eligible offenders, 15% were recommended for and sentenced to an alternative punishment while another 10% recommended for an alternative were sentenced to traditional incarceration. In 21% of the cases, the offender was not recommended for an alternative punishment but was sentenced to one. Over half of the screened offenders (54%) were not recommended for an alternative and did not receive an alternative sentence.

Compliance Rates for Risk Assessment Cases

Since Virginia's sentencing guidelines are discretionary, judges may depart from the guidelines recommendation. In cases where an offender is recommended for an alternative sanction, judges can follow the traditional sentencing guidelines incarceration recommendation or the recommendation for an alternative punishment. If the judge sentences in accordance with either of these recommendations, he or she is in compliance with the sentencing guidelines.

Of the eligible offenders, 138 were recommended for an alternative punishment. About 58% of these recommended offenders (80) were sentenced to an alternative punishment. Another 42% were sentenced to a traditional incarceration term (Figure 35).

When offenders are recommended for an alternative but not sentenced to one, judges are asked to give reasons for not choosing an alternative punishment. Approximately 40% of the time judges do not cite a reason for choosing traditional incarceration instead of an alternative sanction. Another 41% of the time reasons cited are similar to typical guidelines departure reasons as discussed in the compliance chapter. In 19% of the cases, reasons for not choosing an alternative pertain to medical or psychological suitability or offenders declining to participate in alternative punishment programs; Virginia law permits offenders to refuse some alternative punishment programs.

The Commission is particularly interested in cases where an offender was recommended for an alternative but was not sentenced accordingly. With the help of the judiciary in the pilot sites, the Commission hopes to increase the number of cases where written explanations for these decisions are provided.

There were 407 offenders not recommended for an alternative sanction. Seventy-two percent (72%) received traditional incarceration sentences (Figure 35). The other 28% were sentenced to an alternative sanction. Many of these offenders scored just above the threshold value of nine points which would have qualified them for alternative sanction recommendations (Figure 36).

The most frequent departure reason cited for cases sentenced above the guidelines recommendation was the offender's criminal lifestyle. For sentences below the guidelines recommendation, the most frequently cited reason for departure was the offender's good potential for rehabilitation.

Figure 35

Judicial Compliance with Risk Assessment Recommendation

Risk Recommendation	Distribution	
	Sentenced to Alternative	Not Sentenced to Alternative
Recommended for Alternative	58%	42%
Not Recommended for Alternative	28%	72%

Figure 36

Risk Assessment Scores for Non-Recommended Offenders Who Received Alternative Punishments

Types of Alternative Punishment Sentences

Among the 80 offenders recommended for an alternative punishment and sanctioned accordingly, 61% (49 offenders) were sentenced to probation. At this writing, 19 of these offenders have been sentenced to the Department of Corrections probation programs such as the detention center incarceration program and the diversion center incarceration program. No offenders recommended for an alternative punishment have been sentenced to the boot camp incarceration program. Another 14% of these offenders were recommended for an incarceration period of more than six months but were sentenced to six months or less. The remaining 25% of the offenders recommended for and sentenced to an alternative sanction were punished with other less restrictive incarceration programs such as work release, electronic monitoring, weekend sentences, or sentences to be served on a jail farm (Figure 37).

Figure 37

Disposition Outcome for Offenders Recommended for and Sentenced to Alternative Punishment

Offender Profile – Risk Assessment Eligible Cases

The risk assessment worksheet (see page 49) is comprised of eleven different factors that cover offender and offense characteristics as well as prior criminal record. The following data describe the profile of the offenders screened to date with the risk assessment instrument. Most of the offenders were males (71%). The age of the offenders ranged from 16 to 68, about half between 20 and 33 years old. Only 10% were younger than age 20. The majority of the offenders had never been married (61%) and two-thirds were unemployed at the time of the current offense. Approximately two-thirds of the offenders committed crimes without an accomplice. More than 90% of the screened felons had a criminal record; more than half had at least one prior felony conviction. Almost one third of the offenders had a prior drug conviction. The prior adult incarceration rate is particularly high for these offenders; 80% had at least one prior adult incarceration. About 10% of these felons had been committed to a juvenile corrections facility.

Issues Related to Risk Assessment Implementation

One of the objectives of a pilot project is to uncover and resolve issues that develop over the course of a training and implementation phase. An issue that has surfaced during the past year appears to stem from the expectation that pre-sentence investigation reports be completed by probation officers for potential risk assessment cases. During the initial training at each circuit, it was requested that judges order a pre-sentence report in drug, fraud and larceny cases during the pilot test period. The rationale for requiring pre-sentence reports is grounded in the belief that in order to apply the instrument in an equitable manner, comprehensive and accurate information must be available regarding the offender's current status and criminal record. The pre-sentence report contains the most detailed, comprehensive and reliable information on an offender's background and all of this information is subject to verification in court. When a pre-sentence report is not available at sentencing, there is a much greater likelihood that important information may be missed or incorrectly scored on the risk assessment instrument. Thus, the judicial circuits selected as pilot sites were among those which already had high rates of pre-sentence reports completed.

Several months into the pilot phase it was discovered that a large number of sentencing guidelines forms had been received for which there was no risk assessment (Section D) completed. As mentioned above, new work sheets had been distributed which were easily distinguishable from regular guidelines worksheets; risk assessment guidelines forms are printed on yellow instead of white paper. Further investigation revealed that most of these forms were prepared by Commonwealth's Attorneys. Upon reading the court orders, it was also evident that these were primarily cases in which no presentence report had been prepared. This situation was brought to the attention of each circuit through a letter sent to each affected Commonwealth's Attorneys' office and Probation office, with copies to the chief circuit judge. The Commission decided that, for the present, it would be preferable to have the risk assessment instrument completed even if it were not accompanied by a presentence report. This problem will continue to be closely monitored.

It should also be noted that the Commission's concern pertaining to complete and accurate data seems to be well-founded. The number of cases in which no presentence report was prepared correlates well with risk assessment forms received that are missing pertinent information.

An Independent Evaluation Study

The National Institute of Justice, an agency of the United States Justice Department, has recently awarded the National Center for State Courts in Williamsburg, Virginia, a grant to evaluate the development and impact of the risk assessment instrument. The twenty-four month project will be the first comprehensive evaluation that examines how risk assessment and alternative sanctions are integrated into a sentencing guidelines structure, and the effect this has on the criminal justice system. The evaluation results should have considerable policy and practitioner implications since no other structured sentencing system in the nation utilizes an empirically-based risk assessment instrument that relates directly to incarceration populations and explicit alternative punishment thresholds. The evaluation study has three 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.

Expansion of Pilot Project

While an independent evaluation of the risk assessment program awaits, the Commission is pleased with the progress made to date in the four pilot sites which actively use the risk assessment component of the guidelines. Given that no significant problems have occurred and the fact that the judges have found the instrument to provide useful information, the Commission has decided to expand the use of the risk assessment component into a few additional judicial circuits. Potential sites for expansion have been identified and it is hoped that a few additional circuits will be using the risk assessment instrument by early 1999. The increased numbers of cases will facilitate a more thorough assessment of the impact of the use of the risk assessment instrument and the use of alternative punishment on recidivism rates.

Impact of Truth-in-Sentencing

Prince William County's courthouse opened on January 1, 1894, following the move of its county seat from Brentsville to Manassas. In 1911, President William Howard Taft helped celebrate the fiftieth anniversary of the first battle of Manassas here. Today, Prince William county courts are newly located in an adjacent judicial complex.

Introduction

Truth-in-sentencing is approaching its fourth anniversary in Virginia. Legislation passed by the General Assembly in 1994 radically altered the way felons are sentenced and serve incarceration time in the Commonwealth. Since January 1, 1995, for felony offenses committed on or after that date, most offenders have been serving at least 85% of their incarceration sentences in prison or jail.

In the last four years, over 58,000 offenders have been sentenced under truth-in-sentencing provisions in Virginia's circuit courts. The evidence is continuing to mount that the system is achieving much of what its designers intended. This chapter will examine the impact of truth-in-sentencing on several aspects of the criminal justice system in Virginia.

Impact on Percentage of Sentence Served by State Responsible Felons

The reform legislation passed in 1994 was designed to accomplish several goals. One of the goals of the reform was to drastically reduce the gap between the sentence pronounced in the court room and the time actually served by a convicted felon in prison. Prior to 1995, extensive good conduct credits combined with the granting of parole resulted in many inmates serving at little as one-fourth of the sentence imposed by a judge or a jury. Today, under the truth-in-sentencing system, parole release has been eliminated and each inmate is required to serve at least 85% of his sentence. The system of earned sentence credits in place since 1995 limits the amount of time a felon can work off his sentence to 15%. The intent of the reform was to establish a system by which offenders must participate in work, education, or treatment programs while incarcerated in order to earn time off their sentences.

The Department of Corrections (DOC) has developed policies for the application of earned sentence credits. There are four different rates at which inmates can earn credits: 4½ days for every 30 served (Level 1), three days for every 30 served (Level 2), 1½ days for every 30 served (Level 3) and zero days (Level 4). An inmate who served at Level 1, the highest level, for his entire sentence would end up serving 85% of the time imposed, while an inmate at Level 4 for his whole term would serve 100%. Most inmates are automatically placed in Level 2 upon admission into DOC, and an annual review is performed to determine if the level of earning should be adjusted based on the inmate's conduct and program participation in the preceding 12 months. 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 they are not recommended for a program by corrections staff (e.g., a disabled inmate may not be able to participate in a work program, or certain programming may not be 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 December 31, 1997, reveals that more than half (55%) are earning at Level 2, or three days for every 30 served (Figure 38). Nearly one in three (30%) is earning at the highest level, Level 1, gaining 4½ days for every 30 served. Almost 7% of inmates are earning at Level 3 (1½ days for 30 served), while 9% 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 just under 90% of the sentences imposed in Virginia's courtrooms.

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 91% of their sentences. Inmates incarcerated for drug crimes are serving 89%. As of December 31, 1997, first degree murderers are serving the highest portion of their sentences, on average, than any other offense category (93%), largely because offenders sentenced to life in prison, which includes a disproportionate number of murderers, are not eligible to earn sentence credits.

Figure 38

Levels of Earned Sentence Credits among Prison Inmates
(December 31, 1997)

Level	Days Earned	Percent
Level 1	4.5 days per 30 served	30.0%
Level 2	3.0 days per 30 served	54.9
Level 3	1.5 days per 30 served	6.5
Level 4	0 days	8.6

Impact on Incarceration Periods Served by 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. Ensuring that violent felons were targeted for longer prison terms than they had served in the past was also a priority of the system's designers. The truth-in-sentencing guidelines were designed specifically to yield longer sentence recommendations for offenders with current or prior convictions for violent crimes. This is accomplished through a system of enhancements which increases the guidelines recommendations for violent offenders. The guidelines recommendations for those convicted of nonviolent crimes with no history of violence do not receive any enhancements and are based on incarceration time served during a period governed by parole laws prior to the implementation of truth-in-sentencing. In cases of offenders with current or prior convictions for violent felonies, enhancements serve to substantially increase the recommended sentence whenever the guidelines call for an incarceration term exceeding six months. As the result, the truth-in-sentencing guidelines recommend sentences for violent felons that are significantly longer than the time they typically served in prison in the past.

The truth-in-sentencing guidelines were crafted specifically to maintain the historical rate of prison incarceration, which, when truth-in-sentencing provisions were implemented, was defined as any sentence exceeding six months. The intent was to lengthen the prison terms served by violent offenders without increasing the proportion of convicted offenders sentenced to the state's prison system. Since the inception of truth-in-sentencing, offenders have been sentenced to incarceration in excess of six months slightly less often than recommended by the guidelines (Figure 39). For crimes against the person, the guidelines have recommended that 78% of the offenders serve more than six months, while 76% received such a sanction. The difference between recommended and actual rates of incarceration over six months is larger in property and drug cases than for person crimes. The guidelines have recommended 42% of property offenders for terms over six months and 36% of them were sentenced accordingly. For drug crimes, offenders were recommended for and sentenced to terms exceeding six months in 36% and 31% of the cases, respectively. Many property and drug offenders recommended by the guidelines to more than six months of incarceration in a traditional correctional setting have been placed in state and local alternative sanction programs instead. See *Expansion of Alternative Sanction Options* in this chapter for information regarding the development of alternative punishment programs under truth-in-sentencing.

Overall, there is considerable evidence that sentences imposed for violent offenders under the truth-in-sentencing system are resulting in dramatically longer lengths of stay than those seen 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

Figure 39

Recommended and Actual Incarceration Rates for Terms Exceeding 6 Months by Offense Type

Type of Offense	Recommended	Received
Person	78.2%	75.8%
Property	41.7	35.5
Drug	35.5	31.0
Other	74.5	67.5

laws. In fact, a large number of violent offenders will be serving two, three or four times longer under truth-in-sentencing than criminals who committed similar offenses did just a few years ago under the parole system.

The crime of first degree murder serves as an excellent example of the impact of truth-in-sentencing on the incarceration terms for violent offenders. Under the parole system, offenders convicted of first degree murder who had no prior convictions for violent crimes typically served 12½ years in prison, based on the time served median (the middle value, where half of the time served values are higher and half are lower). In contrast, under truth-in-sentencing, first-degree murderers having no prior convictions for violent crimes have been receiving sentences with a median time to serve of 37 years, three times what they served under the parole system (Figure 40).

First-degree murderers previously convicted of violent crimes can expect to serve even longer terms under truth-in-sentencing. Offenders with prior convictions for violent felonies receive guidelines recommendations substantially longer than those without a violent prior record, and the size of the increased penalty recommendation is linked to the seriousness of the prior crimes, measured by statutory maximum penalty. The truth-in-sentencing guidelines specify two degrees of violent criminal records. A previous conviction for a violent felony with a maximum penalty of less than 40 years is a Category II prior record, while a past conviction for a violent felony carrying a maximum penalty of 40 years or more is a Category I record. First degree murderers with a less serious violent record (Category II), who served a median of 14 years when parole was in effect, have been receiving terms under truth-in-sentencing with a median time to serve of 51 years. Offenders convicted of first degree murder who had a previous conviction for a serious violent felony (Category I record) will serve a median of nearly 96 years under truth-in-sentencing, compared to the 15 years typically served during the parole era.

The crime of second degree murder also illustrates the impact of truth-in-sentencing in lengthening prison stays. Second-degree murderers with no violent prior convictions historically served less than five years under the parole system, and only six and one-half years to seven years in cases involving violent prior records (Figure 41). Since the implementation of truth-in-sentencing, offenders convicted of second degree murder who have

These charts report values of actual incarceration time served under parole laws (1988-1992) and expected time to be served under truth-in-sentencing provisions for cases sentenced in FY1998. Time served values are represented by the median (the middle value, where half of the time served values are higher and half are lower). FY1998 data includes cases recommended for, and sentenced to, more than six months of incarceration.

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

Figure 40

First Degree Murder

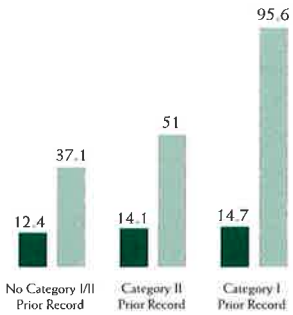
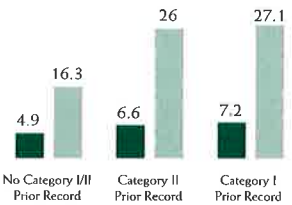


Figure 41

Second Degree Murder



1988-1992 Practice

Truth-in-Sentencing

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.

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

no record of violence have received sentences which will lead to a median time served of over 16 years. For second-degree murderers who are repeat violent offenders, the impact of truth-in-sentencing is even more pronounced. Truth-in-sentencing data reveal that these offenders will serve a median between 26 and 27 years, instead of the six to seven years served prior to sentencing reform.

Offenders convicted of voluntary manslaughter, likewise, are serving more time incarcerated than in the past (Figure 42). For voluntary manslaughter, offenders sentenced to prison typically served two to three years under the parole system, regardless of the nature of their prior record. With no violent prior record, persons convicted of voluntary manslaughter under truth-in-sentencing will serve a median term of nearly five years. For those who do have previous convictions for violent crimes, median expected lengths of stay have risen to six and nine years under truth-in-sentencing, depending on the seriousness of the offender's prior record. Repeat violent offenders convicted of voluntary manslaughter will serve two to three times longer than they did when parole was in effect.

Rapists and other sex offenders are also serving longer terms as the result of sentencing reform and truth-in-sentencing provisions (Figure 43). Offenders convicted of forcible rape (no violent prior record) under the parole system were released after serving, typically, 5½ years in prison. Having a prior record of violence, however, made little difference in the median time served. 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 twice the historical time served. In contrast to the parole system, offenders with a violent prior record will serve significantly longer terms than those without violent priors. Based on the median, rapists with a less serious violent record (Category II) are now serving twice as long as the seven years they served prior to sentencing reform. For those with a more serious violent prior record (Category I), such as a prior rape, the sentences imposed under truth-in-sentencing are equivalent to time to be served of nearly 32 years.

Results are similar for another violent sexual crime. Historically, under the parole system, offenders convicted of forcible sodomy served a median of four and a half to five and a half years in prison, even if they had a prior conviction for a serious violent felony (Figure 44). Recommendations of the

Figure 42

Voluntary Manslaughter

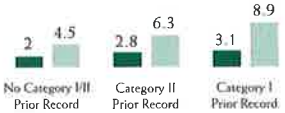


Figure 43

Forcible Rape

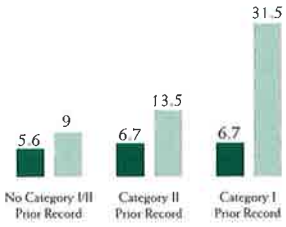
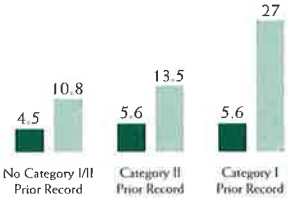


Figure 44

Forcible Sodomy



truth-in-sentencing guidelines have led to increases in time to serve for many of these offenders. Once convicted of forcible sodomy, offenders can expect to serve terms typically ranging from 11 years, if they have no violent prior convictions, up to a median of 27 years if they have a Category I violent prior record.

Lengths of stay for aggravated sexual battery have also increased (Figure 45). Sentences handed down under truth-in-sentencing are producing a median time to serve ranging from three years for offenders never convicted of a violent crime, to over five years for batterers who have committed serious violent felonies in the past. For each type of prior record, truth-in-sentencing terms are surpassing prison terms served under the parole system. In fact, sentencing reform has effectively doubled the median time to be served for most offenders convicted of this crime.

The truth-in-sentencing guidelines have achieved longer incarceration terms for offenders convicted of aggravated malicious injury, a crime which results in the permanent injury or impairment of the victim. Prior to reform, sentences for aggravated malicious injury yielded prison stays of less than four years if the offender had no record of violent criminality. Under truth-in-sentencing, however, the median time to serve has more than doubled (Figure 46). Likewise, the median length of stay for a conviction of aggravated malicious injury when an offender has the less serious of the violent prior record types (Category II) has increased from 4½ years to 10 years, and from 4½ years to 24 years when an offender has a more serious violent prior record (Category I). 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 to serve for those with the most serious violent record (Figure 47).

The tougher penalties specified by the truth-in-sentencing guidelines for robbery with a firearm have resulted in substantially longer prison terms for this crime. Robbers who committed their crimes with firearms, but who had no previous 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 served a little more than four years in prison, based on the median, prior to the no-parole legislation. Since sentencing reform, offenders

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

Figure 45

Aggravated Sexual Battery

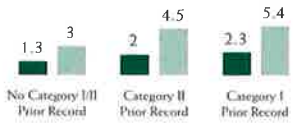


Figure 46

Aggravated Malicious Injury

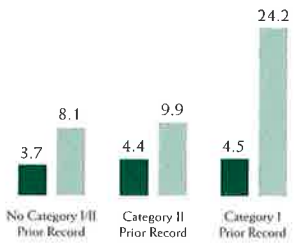


Figure 47

Malicious Injury

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 parole system. For robbers with the more serious violent prior record (Category I), such as a prior conviction for robbery, the expected time served in prison is now 16 years, or four times the historical time served for offenders fitting this profile.

The truth-in-sentencing guidelines were formulated to target offenders convicted of violent crimes for longer incarceration terms. The designers of sentencing reform felt that any offender with a previous conviction for a violent crime also should be characterized as a violent offender, subject to enhanced penalty recommendations, even if his current offense is considered nonviolent. The system of midpoint enhancements crafted during sentencing reform addresses this view. For instance, an offender who has most recently committed a larceny, but who previously has been convicted of a robbery, is classified as a violent offender by the truth-in-sentencing guidelines and will receive a longer sentence recommendation than someone convicted of larceny who has no prior conviction for a violent crime.

The truth-in-sentencing system has been largely successful in increasing incarceration terms for offenders whose current offense is nonviolent but who have a prior record of violence. For example, for the sale of a Schedule I/II drug, such as cocaine, the guidelines recommend a midpoint term of one year in the absence of a violent record, the same as offenders convicted of this offense served prior to sentencing reform. In the truth-in-sentencing period, these drug offenders are serving a median of just over one year (Figure 49). The sentencing recommendations increase dramatically, however, if the offender has a violent background. Although drug sellers with violent criminal histories typically served only about a year and a half under the parole system, the truth-in-sentencing guidelines recommend sentences which will result in incarceration stays of 3½ to 4½ years, depending on the seriousness of prior record. Virginia's judges are responding by sentencing these drug felons to longer terms, approximating the guidelines recommendations.

Figure 48

Robbery with Firearm

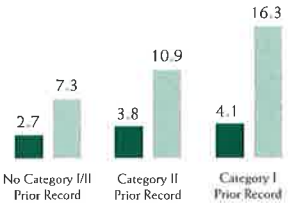
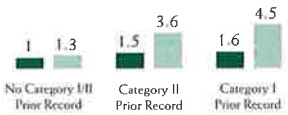


Figure 49

Sale of a Schedule I/II Drug



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

In most cases of the sale of marijuana (more than ½ ounce and less than five pounds), the sentencing guidelines do not recommend incarceration over six months, particularly if the offender has a minimal 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 a median expected time to serve of approximately one year (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 2½ years to serve.

Similarly, in grand larceny cases, the sentencing guidelines do not 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 just over one year (Figure 51). Offenders whose current offense is grand larceny but who have a prior record with a less serious violent crime (Category II) are serving twice as long after sentencing reform, with terms increasing from just under a year to just under two years. Their counterparts with the more serious violent prior records (Category I) are now serving terms of more than 2½ years instead of the one year they had in the past.

The impact of Virginia's truth-in-sentencing system on the incarceration periods of violent offenders has been significant. The truth-in-sentencing data presented in this section provide 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 system's designers 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 the previous acts of violence. As the result of the design of the sentencing guidelines, sentences imposed under truth-in-sentencing are producing terms of incarceration which increase as the seriousness of prior violence increases, creating the "stair step" effect intended by the 1994 sentencing legislation.

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

Figure 50

Sale of Marijuana (More than ½ oz and less than 5 lbs)

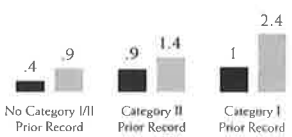
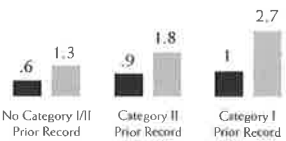


Figure 51

Grand Larceny



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

Impact on Projected Prison Bed Space Needs

During the development of sentencing reform legislation, much consideration was given as to how best to balance the goals of truth-in-sentencing and longer incarceration terms for violent offenders with demand for expensive correctional resources. Reform measures were carefully crafted with an eye towards Virginia's current and planned prison capacity.

Truth-in-sentencing is expected to have an impact on the prison (i.e., state responsible) inmate population. Because violent offenders are serving significantly longer terms under truth-in-sentencing provisions than under the parole system and time served by nonviolent offenders has been held relatively constant, the proportion of the prison population composed of violent offenders relative to the proportion of nonviolent offenders should increase over time. Violent offenders will be queuing up in Virginia's prisons due to longer lengths of stay, while nonviolent offenders will continue to be released after serving approximately the same terms of incarceration as they did 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 continue to grow over the next decade.

Some increase in the prison population might also be anticipated since violent offenders are serving longer terms than they did just prior to truth-in-sentencing reforms. The truth-in-sentencing guidelines specify midpoint enhancements which increase sentence recommendations for offenders having current or prior convictions for violent felonies. Currently, one out of every five offenders qualifies for these enhancements. 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 will not be felt until several years from now.

Despite record breaking increases in the inmate population in the late 1980's and early 1990's, growth in the number of state prisoners has slowed in recent years. Virginia's official state responsible (i.e., prison) forecast has been revised downward in each of the last four years. Where the state once expected nearly 45,000 inmates in June 2002, the current projection for that date is 32,862. Prior forecasts predicted a rate of growth which would have doubled the inmate population within a decade, but the forecast for state prisoners developed in 1998 projects average annual growth of only 2.5% from 1999-2003 (Figure 52). Unanticipated drops in the number of admissions to prison within the last four years have caused these progressively lower forecasts. Fewer than anticipated 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. See *Impact on Crime* section in this chapter for further discussion of crime and the new sentencing system.

Figure 52

Historical and Projected State Responsible (Prison) Population, 1993-2003

	Date*	Inmates	Percent Change
Historical	1993	20760	
	1994	23648	13.9%
	1995	27364	15.7
	1996	28743	5.0
	1997	28743	0.0
	1998	29442	2.4
Projected	1999	31194	6.0
	2000	31950	2.4
	2001	32484	1.7
	2002	32862	1.2
	2003	33289	1.3

* June data are used for each year.

Impact on Expansion of Alternative Punishment Options

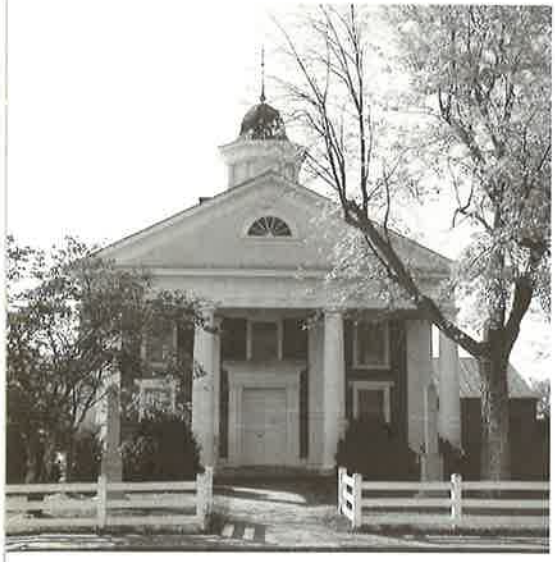
When the new sentencing system was created the General Assembly established a two level community-based corrections system; one level pertains to state-responsible offenders while the other applies to local-responsible offenders. This system was implemented to provide judges alternatives to traditional incarceration for nonviolent offenders, enabling them to reserve costly correctional institution beds for violent offenders. Although the Commonwealth already operated some community corrections programs, a more comprehensive system was enabled through this legislation.

As part of the system, two new cornerstone programs, the diversion center incarceration program and the detention center incarceration program, were authorized. The new programs, while they involve incarceration, differ from traditional incarceration in jail or prison since they include more structured services designed to address problems associated with recidivism. Offenders accepted in these programs are considered probationers since their entire sentence is suspended and the sentencing judge retains authority over the offender should he fail the conditions of the program or subsequent community supervision requirements. This section focuses on one level of the system, the Statewide Community-Based Corrections System.

Alternative Incarceration Punishment Programs

In the four years since the new sentencing system became effective, the Department of Corrections has gradually established detention and diversion centers around the state as part of the community-based corrections system for state-responsible offenders. These centers involve highly structured, short-term incarceration for felons deemed appropriate by the courts and the Department of Corrections.

The detention center program features military-style management and supervision, physical labor in organized public works projects and such services as remedial education and substance abuse services. The diversion center program emphasizes assistance to the offender in securing and maintaining employment while also providing education and substance



In 1838, Greene County was formed from the western portion of Orange County. A reason cited was that the high waters of two rivers and poor road conditions made it expensive and inconvenient to attend court. The courthouse, also completed in 1838, was built on land donated by the founder of Standardsville, Captain William Standard.

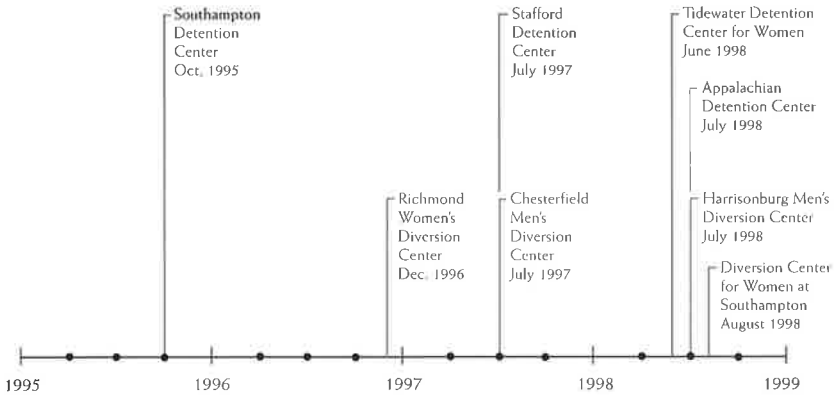
abuse services. The Department of Corrections now operates four detention centers and four diversion centers throughout the state. Figure 53 depicts opening dates for the various detention and diversion centers.

These two new types of alternative punishment incarceration programs supplement the boot camp 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. 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.

On July 1, 1998, approximately 500 probationers were in the detention, diversion, and boot camp programs while more than 700 offenders were on facility waiting lists. The diversion center program has been operating at full capacity while the detention center program is functioning at near full capacity. According to the Department of Corrections' June, 1997 population report, there were about 300 probationers in these programs at that time. This represents a 67% increase from June 30, 1997, to June 30, 1998.

Figure 53

Opening Dates for Currently Operating Detention Centers and Diversion Centers



Alternative to Incarceration Punishment Programs

In addition to the alternative incarceration programs described above, the Department of Corrections operates a host of other non-incarceration programs as part of its community-based corrections system. Programs such as regular and intensive probation supervision, home electronic monitoring, day reporting centers, and adult residential centers are an integral part of the system.

Regular probation services have been available since the 1940's; intensive supervision, characterized by smaller caseloads, was pilot tested in the mid 1980's. Intensive supervision is now an alternative in most of the state's 41 probation districts.

The Department now operates six day reporting centers. These centers feature daily offender contact and monitoring as well as program services. 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. The centers are considered a more viable option in urban rather than rural areas since offenders must have transportation to the center. Four more day reporting centers are in the planning stage.

Guidelines Revisions and Legislative Amendments

Modifications to the sentencing guidelines regarding first-time felons convicted of selling a gram or less of cocaine and amendments to the habitual traffic offender statute have resulted in increased judicial use of alternative punishment programs, especially the detention center, diversion center and boot camp programs. These changes are described in the guidelines compliance chapter. Based on sentencing data maintained by the Commission, approximately 200 offenders were sentenced to these programs between July 1, 1997, to June 30, 1998, accompanying these changes.

Although the risk assessment component of the guidelines system is currently being pilot tested and is not operational statewide, it is expected that full implementation should result in increased numbers of sentences to these alternative incarceration programs as well as to other alternative punishment programs referred to in this chapter.

Impact on Crime

While the sentencing reforms passed in 1994 appear to be fulfilling many of the intended goals (truth-in-sentencing, longer incarceration terms for violent offenders and expansion of alternative sanctions), the impact of the reforms on crime in Virginia is difficult to ascertain. Between 1993 and 1997, reported crime in Virginia declined. The overall rate of "index crimes" (murder/non-negligent manslaughter, forcible rape, robbery, aggravated assaults, burglary, larceny, motor vehicle theft and arson) in Virginia (per 100,000 population) dropped from 4,210 in 1993 to 3,870 in 1997, more than 8% (Figure 54). While four of the index crimes rose slightly from 1996 and 1997, the rates of all eight index crimes yielded a net decline for the five year period (Figure 55). Implementation of a new felony punishment system and a drop in the crime rate raises the possibility that there is some cause and effect relationship. The following sections of the report discuss the possible relationship between the implementation of truth-in-sentencing and the crime rate in Virginia.

Figure 54

Index Crimes in Virginia 1993-1997

	Rate per 100,000 Population	Percent Change
1993	4210	
1994	4108	-2.4%
1995	4063	-1.1
1996	3971	-2.3
1997	3870	-2.5

Figure 55

Index Crime in Virginia by Crime Type, 1993-1997

	Rate per 100,000 Population					Percent Change '93-'97
	1993	1994	1995	1996	1997	
Murder/Non-Negligent Manslaughter	8.4	8.8	7.7	7.4	7.2	-14.7%
Forcible Rape	32.6	28.7	27.4	26.4	26.3	-19.2
Robbery	144.1	133.7	133.1	122.0	123.8	-14.1
Aggravated Assault	192.7	192.0	197.2	183.2	185.0	-4.0
Burglary	677.7	645.0	601.8	582.1	562.4	-17.0
Larceny	2832.1	2785.4	2767.3	2744.1	2656.6	-6.2
Motor Vehicle Theft	289.8	280.5	295.6	276.4	277.2	-4.4
Arson	32.8	34.4	33.1	29.3	31.2	-4.8

Impact on Crime - Deterrence Effects

One way for truth-in-sentencing to have an impact on crime in Virginia is by having a deterrence effect. If sentencing reform has had an effect on crime, some persons who would otherwise have broken the law may be deterred from committing crime, or at least certain types of crime, because of the knowledge of the tough penalties associated with the truth-in-sentencing system. Deterrence is one of the commonly acknowledged goals of criminal justice. The criminological literature refers to both general deterrence and specific deterrence. Specific deterrence pertains to an individual who has committed a crime and the degree to which the threat or actual application of punishment will deter him from engaging in crime again. Theoretically, the deterrent value of a specific punishment is optimized when the targeted person or population is adequately informed of the sanction. 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 sanctions that were enacted in hopes of deterring their criminal behavior.

Since December 1995, Virginia's offender notification program has informed prison inmates about to be released from incarceration about the state's new tougher sentencing laws. Under the program, correctional staff tell the inmate about the truth-in-sentencing system and describe to the offender the harsher sanctions he is likely to incur should he be convicted of a new crime. Thus, the program should increase the potential deterrent effect of Virginia's sentencing reforms among offenders being released from prison. Virginia's offender notification program is the first of its kind in the nation. An evaluation of its impact on recidivism rates is being conducted jointly by the Commission and the National Center for State Courts in Williamsburg, Virginia. Upon its release in 1999, the evaluation will find an audience among legislators, criminal justice agencies, and others around the nation interested in sentencing reform.

Another aspect of deterrence is known as general deterrence. General deterrence is the degree to which knowledge of criminal penalties deters members of the general population, not just those convicted of crimes, from engaging in criminal behavior. General deterrence effects are much more difficult to assess since it is very hard to measure the depth of knowledge people have of criminal punishments, and what, if any, impact this knowledge has in preventing them from committing crime. At this time, the Commission is not undertaking any study of the general deterrence effect of the truth-in-sentencing system.

The Orange County courthouse, built in 1859, was the first designed in Virginia under the influence of the picturesque movement. Competition was fierce among localities to secure train stops. To project a progressive image for the railroads, Orange County built a courthouse that resembled both Washington's B&O Station and an Italian villa.

Impact on Crime - Incapacitation Effects

Another way for truth-in-sentencing to have an impact on crime in Virginia is through incapacitation effects. 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 typically served under the parole system. By incarcerating violent offenders longer than in the past, any new crimes they might have committed, had they been released into the community earlier, are averted. This is known as incapacitation of offenders since people who are incarcerated are prevented from committing crimes against the general public.

Unfortunately, at this time, the incapacitation effect of the new punishment system on crime is difficult to measure. The truth-in-sentencing system applies to anyone convicted of a felony crime committed on or after January 1, 1995. Since the new sentencing system has been in effect for less than four years, many of the violent offenders would still be in prison even if the offender were serving his sentence under parole laws and the old system of good conduct credits. An incapacitation effect of 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 by violent offenders. Further complicating a study of incapacitation effects is the fact that parole grant rates have declined dramatically for inmates incarcerated prior to sentencing reform who are still serving out sentences under the parole system. The drop from an average 42% parole grant rate in the early 1990s to an overall rate of 15% in 1997 has resulted in significantly longer prison stays for felons completing punishment under the parole system. The incapacitation effect of just truth-in-sentencing provisions is difficult to assess in this context. Clearly, however, the substantial decrease in the parole grant rate for violent offenders that commenced in 1994 achieved to a certain extent the incapacitation effect desired by the designers of the new felony sentencing system.

Impact on Crime - Summary

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 is complex and requires more rigorous research with considerable longitudinal data that is simply unavailable at this time. Nationally, however, prison populations are at an all-time high which, some argue, indicates that the incapacitation effect is playing a significant role in the continuing drop in crime rates. Anecdotal information from criminal justice officials in the field suggests that many violent offenders who likely would have been back on the streets under Virginia's old sentencing system have remained in prison and, thus, are unable to commit new crimes.

Recommendations of the Commission

Replacing a log courthouse at a place once called "Finnell's Old Field," Madison County's courthouse was built in 1830. This courthouse is featured on the cover of this report.

Introduction

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

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

This year, utilizing a wealth of information available from a variety of sources, the Commission has adopted 24 recommendations for modifications to the guidelines system. The first five recommendations require legislative changes to enact them. The remaining 19 recommendations affect guidelines worksheets or preparation procedures, and do not require legislative action.

Recommendation 1

Amend §17.1-805(C) of the Code of Virginia to add twelve offenses to those defined as violent crimes for the purposes of the sentencing guidelines

Issue

Offenders with prior convictions for violent felonies receive guidelines recommendations substantially longer than those without a violent prior record, and the size of the increased penalty recommendation is linked to the seriousness of the prior crimes, measured by statutory maximum penalty. Section 17.1-805(C) of the Code specifies those offenses which are to be scored as violent crimes under the truth-in-sentencing guidelines. There have been new statutes added or modified since 1995 that created violent offenses that are not currently included in the list of crimes defined as violent. Other offenses existed in 1995, but were omitted when the initial set of truth-in-sentencing guidelines was set out in the Code. The Commission now recommends their inclusion as designated violent crimes.

Analysis

Several new crimes added to the Code since January 1, 1995, should be considered for addition to the list of violent felony offenses which trigger increased sentence recommendations on the guidelines.

- **Assault**

Biological Substances
Damage facility involved with infectious biological substances §18.2-52.1(B)

Possession with intent to injure with infectious biological substances §18.2-52.1(A)

Drive While Intoxicated
Victim permanently impaired, DWI with reckless disregard §18.2-51.4

Law Enforcement or Fire/Rescue Personnel
Simple assault on law enforcement, fire or rescue personnel §18.2-57(C)

Simple Assault
Hate crime - assault and battery (felony) §18.2-57(B)

- **Murder**

Non-Capital
Pregnant victim, without premeditation §18.2-32.1

In addition, a number of other felony crimes in the 1995 Code were not included in the list of crimes that trigger increased sentence recommendations. These are offenses the Commission believes should be considered for addition to the list of violent crimes.

- **Assault**

Unlawful Wounding
Throw object from roof top etc. with intent to cause injury §18.2-51.3

- **Murder**

Manslaughter
Aggravated vehicular involuntary manslaughter §18.2-36.1(B)

- **Sexual Assault**

Third Conviction Sexual Abuse
Third conviction attempted sexual battery §18.2-67.5:1

Third Conviction Sexual Battery §18.2-67.5:1

- **Vandalism, Damage Property**

Vehicle
Shoot or throw missile at train, car, vessel without malice §18.2-154

Vehicle - Law Enforcemt./Emerg.
Shoot or throw missile at law enforcement or emergency vehicle without malice §18.2-154

These offenses occur with low frequency and the impact of adding these offenses to §17.1-805(C) is expected to be minimal.

Proposal

Code of Virginia §17.1-805 (C) should be amended to include the following violent offenses: §§ 18.2-52.1(A), 18.2-52.1(B), 18.2-51.4, 18.2-57(B), 18.2-57(C), 18.2-32.1, 18.2-51.3, 18.2-36.1(B), and 18.2-67.5:1. The reference to §18.2-154 should be expanded to include both Class 4 and Class 6 felonies as violent offenses.

Recommendation 2

Amend §19.2-298.01(C) of the Code of Virginia to require probation officers to prepare sentencing guidelines worksheets for all felony cases in which guidelines are applicable

Issue

Currently, in felony cases tried upon a plea of guilty, the court may direct the probation officer to prepare the guidelines 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." In 1998, the Commission conducted a scoring reliability study to determine the accuracy rate of worksheet preparers in scoring violent criminal history information that is detailed in the pre-/post-sentence investigation (PSI) report, and to determine if scoring accuracy differs between probation officers and Commonwealth's attorneys. Results of the study indicate that worksheets prepared by a Commonwealth's attorney are more likely to contain significant errors than worksheets prepared by probation officers.

Analysis

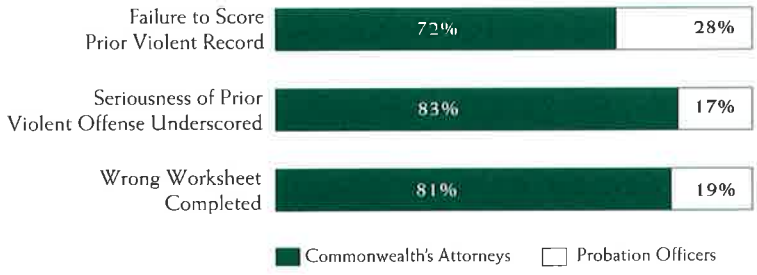
The objective of the scoring reliability study was to determine the accuracy rate of guideline preparers in scoring violent criminal history. The study was based on a random sample of 2,400 sentencing guidelines cases matched to a PSI report. The sample was designed to provide an equal number of cases with pre-sentence and post-sentence reports from each of the six judicial regions in the state. In almost all cases in which a post-sentence report was prepared, a Commonwealth's attorney prepared the sentencing guidelines forms.

The results of the study indicate that guidelines worksheets prepared by Commonwealth's attorneys had an error rate of 36.5% while the error rate for probation officers was 16.6%. In 72% of the cases when a preparer failed to score a violent prior conviction on the worksheet, the worksheet was prepared by a Commonwealth's attorney (Figure 56). In contrast, probation officers were responsible for this error 28% of the time. The impact of this error is significant, since the majority of points assigned on the worksheet depend upon whether or not the offender is scored as having a prior violent criminal history.

Another common error found in the Commission's study was the improper classification of an offender's prior record. Offenders with prior convictions for violent felonies receive guidelines recommendations substantially longer than those without a violent prior record, and the size of the increased penalty recommendation is linked to the seriousness of the prior crimes, measured by statutory maximum penalty. A category I record is defined as any

Figure 56

Percentage of Scoring Errors Committed by Commonwealth's Attorneys and Probation Officers



prior conviction or juvenile adjudication for a violent crime which carries a statutory maximum penalty of 40 years or more, while a category II record is any prior conviction or juvenile adjudication for a violent crime with a maximum penalty of less than 40 years. Incorrectly classifying an offender's category I record as a category II yields a guidelines recommendation substantially shorter than what he would have received, had his prior record been properly classified. In the Commission's study, 83% of these errors were committed by Commonwealth's attorneys while probation officers were responsible for only 17% (Figure 56).

Failing to score an offender's complete criminal history can also result in a guidelines recommendation for probation or a short incarceration term when the offender should have received a recommendation for a significant period of incarceration in prison. When this occurs, the preparer completes the wrong guidelines worksheet. In 81% of these errors identified in the study, the Commonwealth's attorneys failed to score a violent prior conviction which resulted in the prison worksheet not being completed (Figure 56).

One of the cornerstones of Virginia's no-parole sentencing system is the tough sentencing guidelines for violent felons. Importantly, "violent" felons are defined as those whose current crime is violent and those who have a violent crime in their past. Unfortunately, the Commission's study reveals that there are many instances when violent felons are not being appropriately identified to the judge. These errors of omission are predominantly found on sentencing guidelines forms completed by the Commonwealth's Attorney's office.

The Commission wishes to make it clear that these audit findings should not be used to impugn the professionalism of our Commonwealth's attorneys in executing their duties. In their prior record research, the prosecutor's office must rely almost exclusively on the "rap sheets" maintained on the central criminal records exchange system. These criminal histories rarely detail any juvenile convictions and the adult arrests often are missing final dispositions. In contrast, probation officers use these same "rap sheets" as the starting point in their criminal record research and use many additional sources including interviews with the defendant to compile a complete and accurate accounting of an offender's criminal past.

The Commission believes that complete and accurate scoring of prior record is crucial to the integrity of the sentencing guidelines system, and therefore, recommends that probation officers complete the guidelines worksheets in all felony cases in which guidelines apply. In some circuits, probation officers may experience a workload impact due to the shift in responsibility of preparing the guidelines forms. It is impossible to predict if complete and accurate scoring of the guidelines by probation officers might affect the practices of prosecutors in plea negotiations.

Proposal

The Commission recommends that language in §19.2-298.01(C) of the Code which allows Commonwealth's attorneys to prepare the guidelines be stricken.

Recommendation 3

Modify §53.1-129 of the Code of Virginia such that sentence credits earned by felons who perform work on state, city or county property are eliminated

Issue

There is an apparent contradiction in the Code of Virginia concerning the amount of time felons must serve. The provisions of §53.1-202.3 that accompanied the abolition of parole limit earned sentence credit to a maximum of 4½ days per thirty days served for any felony committed on or after January 1, 1995. However, §53.1-129 of the Code of Virginia allows a judge to award sentence credit to felons who work on state, city or county property, and there is no limit to the amount of sentence credit that the judge may award for the work performed.

Analysis

That some felons are being awarded sentence credits under §53.1-129 in excess of the maximum specified by truth-in-sentencing provisions undermines the intent of the truth-in-sentencing reform. Some felons are serving a much smaller share of their sentences than others, and many are serving significantly less than the minimum 85% set when parole was abolished. At least one jail in the state is awarding credits under §53.1-129 such that offenders are receiving one day's credit for each day worked. This is in addition to any other sentence credits earned under truth-in-sentencing laws. Moreover, this statute is not uniformly applied to all felons in the Commonwealth, as some regions use this statute more than others. Consequently, the incarceration time that will be served for a sentence imposed by a judge or jury in Virginia is unpredictable for some number of felons. The intent of truth-in-sentencing reform was to eliminate unpredictability in punishment.

There may be some impact on local responsible (i.e., jail) bed space needs in those jurisdictions that use this statute frequently.

Proposal

Amend §53.1-129 to eliminate any additional sentence credits earned by felons who work on state, city or county property. Sentence credits should be determined by the provisions of §53.1-202.3. Consequently, with these changes in effect all felons would be required to serve a minimum of 85% of their sentences.

Recommendation 4

Modify §§53.1-20, 53.1-20.1 and 53.1-21 of the Code of Virginia to eliminate any distinction between a felony sentence of one year and a felony sentence of 12 months, and to make offenders with sentences of 12 months or more the responsibility of the state and the Department of Corrections

Issue

One of the goals of truth-in-sentencing reform was to ensure that felons serve time under the same system, regardless of whether they are a state responsible (i.e., prison) inmate or a local responsible (i.e., jail) prisoner. When the General Assembly abolished parole and restructured good time, it defined a state responsible inmate as any felon with an effective sentence (imposed sentence less any suspended time) of greater than six months. Under those provisions, no distinction was made between a sentence of one year, 12 months, or 365 days. In 1997, the General Assembly redefined state and local responsibility of offenders, making "persons convicted of felonies committed on or after January 1, 1995, and sentenced to the Department (of Corrections) or sentenced to confinement in jail for a year or more" the responsibility of the state. Language remaining in the Code after this change has created differing opinions about the meaning of a one year sentence versus a 12 month sentence.

Based on a consultation with the Attorney General's office, as of September 1, 1998, the Department of Corrections (DOC) adopted a new policy of treating offenders with 12 month sentences as local prisoners. Persons with one year sentences are considered state inmates. In a more recent informal Attorney General's opinion, the distinction between state and local inmates was made even less clear. According to the informal opinion, individual sentences need to be considered separately when the aggregate sentence is between 12 months and two years. If none of the individual crimes result in a sentence of one year or more, then the offender is a state responsible inmate only at the discretion of the Director of DOC.

The sentencing guidelines provide no distinction between a 12 month sentence and a one year sentence. The Commission believes that this latest interpretation of the law provides a distinction where none was intended when parole was abolished and truth-in-sentencing laws were passed. Truth-in-sentencing aimed to simplify the sentencing system and eliminate distinctions such as this one.

Impact

This move to clarify the Code of Virginia would have no impact on the correctional bed space needs of the Commonwealth. Without the Commission's proposal, there would be an increase in the local responsible (jail) population ranging from 200 to 600 beds, with an offsetting decrease in the state responsible population.

Proposal

Amend §53.1-20(B) to read: Persons convicted of felonies on or after January 1, 1995, and sentenced to *incarceration of 12 months or more* shall be placed in the custody of the Department. Code of Virginia §53.1-20.1 should be modified so that compensation is paid to the local jail for any person convicted of a felony committed on or after January 1, 1995, and who is required to serve *incarceration of 12 months or more.* Finally, subsection 4 of §53.1-21(B) should be updated to reflect that no person convicted of a felony on or after January 1, 1995, should be transferred to the Department of Corrections when the combined length of all sentences to be served *totals less than 12 months.*

Recommendation 5

Amend §§ 19.2-298.01, 19.2-368.2, and 30-19.1:5 of the Code of Virginia which refer to matters pertaining to the Virginia Criminal Sentencing Commission, substituting the Code sections which became effective October 1, 1998, for repealed Code sections

Issue

Effective October 1, 1998, Title 17 (Courts of Record) and Title 14.1 (Costs, Fees, Salaries and Allowances) of the Code of Virginia have been repealed and replaced by Title 17.1. Chapter 11 of Title 17 pertained to the Virginia Criminal Sentencing Commission. The same provisions are now contained in Chapter 8 of Title 17.1. However, three Code sections citing the Commission in other Titles were not amended when Title 17 was re-codified.

Proposal

The Commission requests amendments to the following three Code sections in Title 19.2 and Title 30 to substitute appropriate references to the Commission:

- Amend §19.2-298.01, substituting *Chapter 8 (§17.1-800 et seq.) of Title 17.1* for *Chapter 11 (§17-232 et seq.) of Title 17*
- Amend §19.2-368.2, substituting *§17.1-805* for *§17-237*
- Amend §30-19.1:5, substituting *§17.1-803* for *§17-235*

Recommendation 6

Modify the sentencing guidelines to increase the primary (i.e., most serious) offense scores by one point on every worksheet with an offense that currently receives a score of zero, simultaneously increasing by one point the accompanying scoring thresholds and recommendation tables

Issue

There are numerous offenses which receive a zero when they are scored as the primary offense. A worksheet score of zero has been interpreted by some to mean an offense has no value under the guidelines.

Analysis

There are several worksheets (Sections A and B) which include a primary offense that receives a score of zero. The specific offenses and worksheets are listed below.

Offenses Receiving a Primary Offense Score of Zero

Assault - Section A
Attempted or conspired unlawful injury

Any other unlawful injury

Burglary/Dwelling - Section A
Occupied dwelling with intent to commit a misdemeanor without deadly weapon

Burglary/Dwelling - Section B
Dwelling with intent to commit larceny, etc. without deadly weapon

Dwelling at night with intent to commit larceny, etc. without deadly weapon

Burglary/Other - Section A
Possession of burglary tools

Burglary/Other - Section B
Other structure with intent to commit larceny

Drug - Section A
Prescription fraud

Drug paraphernalia

Distribute imitation drug, marijuana on school property

Distribute imitation drug to minor

Possess Schedule I/II drug

Drug - Section B
Prescription fraud

Drug paraphernalia

Distribute imitation drug, marijuana on school property

Distribute imitation drug to minor

Fraud - Section A
Passing bad checks, credit card fraud, receiving goods from credit card, making false statements to obtain goods $200 or more

Fraud - Section B
Welfare and food stamp fraud, $200 or more

Kidnapping - Section A
Felony kidnapping by parent

Larceny - Section A
Attempted or conspired larceny

Any larceny with a maximum penalty of 5 years

Larceny - Section B
Any attempted or conspired larceny

Murder/Homicide - Section A
Involuntary manslaughter

Attempted or conspired involuntary manslaughter

Other Sexual Assault - Section A
Carnal knowledge, accused minor 3 years junior

Carnal knowledge, person providing service under purview of court

Marital sexual assault

Bigamy

Various prostitution charges

Other Sexual Assault - Section B
All sexual assault offenses other than aggravated sexual battery

Robbery - Section A
Attempted or conspired robbery

Miscellaneous - Section A
Threatening to bomb, burn, or explode

Fail to appear in court for a felony offense

Possession of Schedule III drug or marijuana by prisoner

Hit and run, driver fails to stop and aid victim

Maliciously shoot, throw missile at train, car

Miscellaneous - Section B
Child neglect/abuse

The Commission's proposal eliminates scores of zero without altering guidelines recommendations in any substantive way. For example, on Section A of the Burglary of Dwelling guidelines, burglary of an occupied dwelling with intent to commit a misdemeanor (without a deadly weapon) receives a score of zero for the primary offense factor on the worksheet. Under the Commission's proposal, the primary offense score for every offense on the worksheet would be increased by one point in order to maintain the same distribution of points (Figure 57). At the same time, the scoring threshold at the bottom of the worksheet would need to be adjusted.

Currently, the worksheet instructs the preparer to complete Section B (the worksheet for probation or incarceration up to six months) if the score on Section A is 13 or less and to complete Section C (the worksheet for incarceration over six months) if the total is 13 or more. If the Commission gave each offense on the worksheet an additional point but did not adjust this threshold, the proportion of offenders recommended for incarceration in excess of six months would increase. Under the proposal, the threshold for completing Section C would be increased by one point, in order to maintain the current distribution of sentencing recommendations (Figure 57).

Figure 57

Primary Offense Factor and Scoring Threshold
Burglary of Dwelling - Section A

Primary Offense	Current	Proposed
A. Occupied dwelling with intent to commit a misdemeanor without deadly weapon (all counts)	0	1
B. Dwelling with intent to commit larceny, etc. without deadly weapon; Dwelling at night without deadly weapon		
1 count	2	3
2 counts	4	5
3 or more counts	6	7
C. Dwelling at night with intent to commit larceny, etc. with deadly weapon (all counts)	6	7
D. Dwelling with intent to commit larceny with deadly weapon (all counts)	4	5
E. Occupied dwelling with intent to commit misdemeanor with deadly weapon (all counts)	8	9
F. Dwelling with intent to commit murder, rape or robbery or arson with or without a deadly weapon (all counts)	13	14

Current If total is 12 or less, go to Section B. If total is 13 or more, go to Section C.

Proposed **If total is 13 or less, go to Section B. If total is 14 or more, go to Section C.**

Similar changes would be made to Section B worksheets. On Section B of Burglary of Dwelling guidelines, for example, two offenses receive a score of zero on the primary offense factor. Under the proposal, all primary offense scores on the worksheet would be increased by one point (Figure 58). Without also adjusting the recommendation table which accompanies this worksheet, a larger share of offenders would be recommended for incarceration than in the past. If each range in the table is augmented by one point, current sentencing recommendations will be maintained (Figure 59). The proposal does not alter the guidelines in a substantive way, but serves to alleviate the perception that some primary offenses have no value under the guidelines.

Figure 58

Primary Offense Factor
Burglary of Dwelling - Section B

	Current	Proposed
A. Dwelling with intent to commit larceny, etc. without deadly weapon (all counts)	0	**1**
B. Dwelling at night with intent to commit larceny, etc. without a deadly weapon (all counts)	0	**1**
C. Other than listed above (all counts)	3	**4**

Figure 59

Recommendation Table
Burglary of Dwelling - Section B

Current Score	Proposed Score	Guideline Sentence
0 - 5	1 - 6	Probation/No Incarceration
6 - 7	7 - 8	Incarceration 1 Day up to 3 Months
8+	9+	Incarceration 3 to 6 Months

Recommendation 7

Modify the larceny sentencing guidelines to factor in the amount of money or the value of goods stolen in embezzlement cases

Issue

The guidelines currently do not factor in the dollar amount or value of goods stolen or other potentially important factors related to the crime of embezzlement. Although compliance with the guidelines for embezzlement is high (85% for FY1998), the guidelines have received some criticism for not taking into account dollar amount or value in embezzlement cases.

Analysis

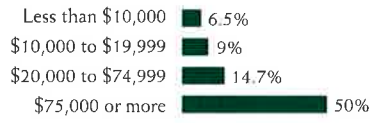
In 1997, the Commission began to examine embezzlement cases to see if the guidelines could be modified to better reflect judicial sentencing practices for this crime. The Commission studied embezzlement cases sentenced under truth-in-sentencing laws between January 1, 1995 and June 30, 1997. Pre-/post-sentence investigation (PSI) report narratives were obtained for these cases in an effort to collect information regarding dollar amount taken and other elements of the crime, such as the duration of the embezzlement act and the nature of the victim. Each section of the larceny guidelines was studied individually.

Section A

Based on the study cases, there is a relationship between dollar amount embezzled and whether or not the offender received a sentence of more than six months incarceration (Figure 60). Judges were more likely to sentence an embezzler to more than six months of incarceration as the amount embezzled grew larger. Yet, the vast majority of offenders still received a lesser sanction. For dollar amounts less than $75,000, at least 85% received probation or incarceration of six months or less. Only when the amount embezzled reached $75,000 or more did the sentencing pattern change substantially, with 50% receiving incarceration in excess of six months. The number of cases involving such large quantities, however, is small (12 cases).

Figure 60

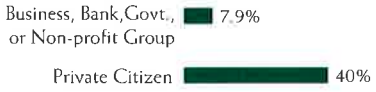
Percentage of Embezzlers Receiving Incarceration >6 Months by Amount Embezzled



Analysis of the study cases also reveals a relationship between the nature of the victim (specifically, that the victim was a private citizen and not a business, bank, government agency or a charitable group) and whether or not the offender received a sentence of more than six months incarceration (Figure 61). Among the embezzlements from a private citizen, 40% were given a sentence exceeding six months, while only 8% of the embezzlements from other types of victims were given such a sanction.

Figure 61

Percentage of Embezzlers Receiving Incarceration >6 Months by Nature of Victim



Under the Commission's proposal, the larceny sentencing guidelines would be amended by adding a new factor to Section A, applicable only in embezzlement cases, to account for the amount embezzled (Figure 62). Under this modification, offenders who embezzle larger amounts would be much more likely to be recommended for Section C (incarceration over six months) than in the past because of the additional points added. With regard to the nature of the victim, the Commission decided not to recommend inclusion of this factor on the sentencing guidelines forms.

Figure 62

Proposed Amount of Embezzlement Factor Larceny - Section A

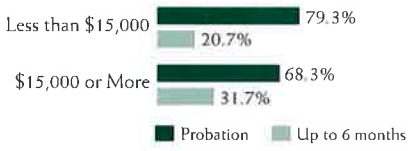
Amount of Embezzlement	
Less than $10,000	0
$10,000 - $19,999	3
$20,000 - $74,999	6
$75,000 or more	9

Section B

Analysis conducted on only those cases of offenders receiving probation or up to six months incarceration indicated a relationship between the amount embezzled and whether or not an incarceration sentence was imposed (Figure 63). A simplified categorization of dollar amount (less than $15,000 or $15,000 or more) proved to be the most useful. The results show that judges were more likely to impose incarceration up to six months if the amount embezzled was at least $15,000. The shift in the sentencing pattern is small but important statistically.

Figure 63

Percentage of Embezzlers Receiving Probation or Incarceration Up to 6 Months by Amount Embezzled



Under the Commission's proposal, an offender who embezzles at least $15,000 who has multiple counts of the primary offense, or any additional offenses or any prior record would be recommended automatically for incarceration up to six months (Figure 64).

Section C

For offenders in the study who were sentenced to incarceration in excess of six months, no consistent relationship between amount embezzled and sentence length, or between type of victim and sentence length, could be determined. However, in over half of the cases sentenced to prison terms exceeding the guidelines recommendation, judges cited a large dollar amount as the reason for giving a lengthier than recommended sentence. While judges may believe large embezzlements deserve longer sentences, there does not appear to be consensus in what constitutes a large amount or how much additional time it should add to an offender's sentence when a term over six months is imposed.

Because amount embezzled appears to be an important factor to judges when sentencing offenders to prison terms, the Commission proposes adding a factor to Section C of the larceny guidelines to address the dollar amount or value of goods taken in an embezzlement crime. The new factor, scored only for embezzlement offenses, would increase the sentence recommendation by 24 points in cases involving $28,000 up to $89,999, and by 30 points in cases of embezzlements of $90,000 or more (Figure 65).

The Commission's proposal is designed to integrate current judicial sentencing practices into the guidelines; therefore, no impact on correctional bed space is anticipated.

Figure 64

Proposed Scores for Embezzlement Factor
Larceny - Section B

Amount of Embezzlement	
Less than $15,000	0
$15,000 or more	8

Figure 65

Proposed Scores for Embezzlement Factor
Larceny - Section C

Amount of Embezzlement	
Less than $28,000	0
$28,000 - $89,999	24
$90,000 or more	30

Recommendation 8

Amend the murder/homicide sentencing guidelines to add the crime of aggravated involuntary vehicular manslaughter

Issue

Currently, aggravated involuntary vehicular manslaughter (§18.2-36.1(B) of the Code of Virginia) is not covered by the murder/homicide guidelines.

Analysis

Aggravated involuntary vehicular manslaughter is an unclassed felony which carries a statutory penalty range of 1 to 20 years. The statute requires a one year mandatory minimum term of incarceration. According to the pre-/post-sentence investigation (PSI) data base, there were 15 cases of aggravated involuntary vehicular manslaughter resulting in conviction under truth-in-sentencing provisions during 1996-1997. In every case, the offender was sentenced to an incarceration term exceeding six months. The mean sentence for this offense was 12 years and the median (the middle value, where half the sentences are higher and half are lower) was seven years.

The Commission utilized 1996-1997 sentencing patterns for aggravated involuntary vehicular manslaughter to develop guidelines scores which better reflect current judicial thinking. Under the Commission's proposal, the

score for the Primary Offense factor on Section A of the murder/homicide guidelines would be seven points. With this number of points, an offender convicted of this offense would automatically be recommended for Section C (incarceration greater than six months). On Section C, the base score for the Primary Offense factor would be 71 points. In accordance with §17.1-805, the guidelines scores are increased for offenders with prior convictions for violent felonies. For an offender with a prior conviction for a violent felony carrying a statutory maximum penalty of less than 40 years (classified as a category II record), the score for the Primary Offense factor would increase to 142 points. For an offender with a prior conviction for a violent felony with a maximum penalty of 40 years or more (a category I rec ord), the score for the Primary Offense factor would rise to 213 points.

The Commission's proposal is designed to integrate current judicial sentencing practices into the guidelines; therefore, no impact on correctional bed space is anticipated.

Recommendation 9

Amend the drug sentencing guidelines to increase the recommended sentence length for a second or subsequent conviction under §18.248(C) of the Code of Virginia

Issue

Currently, a second or subsequent conviction under §18.248(C) of the Code of Virginia (selling, manufacturing, distributing or possessing with intent to sell, manufacture, or distribute a Schedule I or II drug) receives the same primary (i.e., most serious) offense score on the sentencing guidelines as a first conviction for this offense.

Analysis

The penalty range for a first conviction under §18.2-248(C) is 5 to 40 years, while the penalty range for a second or subsequent conviction is 5 years to life. An analysis of truth-in-sentencing cases received from January 1, 1995, through September 30, 1998, indicates the compliance rate for an initial sales-related conviction is 63%, with judges sentencing below the guidelines in more than a fourth (26%) of the cases. By comparison, the compliance rate for a second or subsequent conviction for this offense is only 53%. For a second or subsequent conviction, judges have sentenced a third (33%) of the offenders to prison terms *in excess* of the guidelines recommendation for the case. The most frequently cited reason for sentencing above the guidelines in these cases has been that the offender had a previous conviction for the same offense. Another reason frequently cited by judges is that the sentence was based on a jury recommendation.

Figure 66

Proposed Primary Offense Factor
Drug - Section C

Sell, Distribute, Possession with Intent, Schedule I or II drug

		Category I	Category II	Other
Completed	1 count	60	36	12
	2 counts	80	48	16
	3 counts	95	57	19
	4 or more counts	130	78	26
Attempted or conspired	1 count	48	24	12
	2 counts	64	32	16
	3 counts	76	38	19
	4 or more counts	104	52	26

Sell, Distribute, Possession with Intent, Schedule I or II drug, subsequent offense -

Completed	1 count	110	66	22
	2 or more counts	310	186	62
Attempted or conspired	1 count	88	44	22
	2 or more counts	248	124	62

According to the pre-/post-sentence investigation (PSI) data base, during 1996-1997, there were 144 truth-in-sentencing cases involving a second or subsequent conviction under §18.2-248(C). The data indicate that more than 90% of these convicted felons were sentenced to terms of incarceration exceeding six months. For cases involving one count of the offense, the mean sentence length was just over five years, while the median sentence length (the middle value, where half the sentences are higher and half are lower) was three years. For two or more counts, the mean sentence rose to 9½ years, with a median of six years.

The Commission utilized 1996-1997 sentencing patterns for this offense to develop guidelines scores which better reflect current judicial thinking. On Section C, the points for a second or subsequent conviction of §18.2-248(C) will appear as a separate category under the Primary Offense factor with the points shown in Figure 66.

The Commission's proposal is designed to integrate current judicial sentencing practices into the guidelines; therefore, no impact on correctional bed space is anticipated.

Recommendation 10

Amend the drug sentencing guidelines by adding a factor (on Sections A and B) to increase the likelihood that an offender convicted of possession of a Schedule I or II drug will be recommended for a term of incarceration if the offender has prior convictions for the possession or sale of a Schedule I or II drug

Issue

Currently, under the existing sentencing guidelines, offenders convicted of possession of a Schedule I or II drug (§18.2-250(A,a) of the Code of Virginia) typically are not recommended for incarceration unless there is a substantial prior record.

Analysis

An analysis of truth-in-sentencing cases received from January 1, 1995, through September 30, 1998, indicates the compliance rate for possession of a Schedule I or II drug is 79%. Nearly all the departures have been sentences above the guidelines recommendation for the case.

According to the PSI data base, there were 8,981 offenders convicted of possession of a Schedule I or II drug under truth-in-sentencing provisions during 1996-1997. The data indicate that there is a relationship between the number of prior convictions for the possession or sale of a Schedule I or II drug (under §18.2-250(A,a) or §18.2-248(C) of the Code) and the probability that the offender received a term of incarceration. With no prior possession or sale convictions, only 33% of offenders were incarcerated, but, with one prior possession or sale conviction, the incarceration rate rose to 60% (Figure 67). Over 90% of offenders convicted for possession of a Schedule I or II drug who had four prior convictions for possession or sale were given incarceration sentences, and most of these received an incarceration term in

Figure 67

Actual Dispositions for Possession of a Schedule I or II Drug

Number of Prior Possessions or Sales of Schedule I/II Drug	No Incarceration	Incarceration ≤ 6 months	Incarceration > 6 months
None	67%	25%	8%
One	40	35	25
Two	32	36	32
Three	26	29	45
Four or more	8	18	74

excess of six months rather than a shorter term of confinement.

The Commission utilized 1996 - 1997 sentencing patterns for the possession of a Schedule I or II drug to develop guidelines scores which reflect current judicial thinking. Under the Commission's proposal, when the primary offense is possession of a Schedule I or II drug, a new factor will be scored on Sections A and B of the drug guidelines. The new factor will add two points to the total score on the worksheet if the offender has a prior record that includes two or more convictions for possession or sale of a Schedule I or II drug under §18.2-250(A,a) or §18.2-248(C) of the Code of Virginia. The same factor is recommended for both Sections A and B. The intent is to increase the likelihood that an offender convicted of possession of a Schedule I or II drug will be recommended for a term of incarceration if the offender has prior convictions for the possession or sale of a Schedule I or II drug.

The Commission's proposal is designed to integrate current judicial sentencing practices into the guidelines; therefore, no impact on correctional bed space is anticipated.

Recommendation 11

Amend the drug sentencing guidelines to add crimes defined in §18.2-248(G) of the Code of Virginia relating to an imitation Schedule I or II drug

Issue

Currently, convictions under §18.248(G) of the Code of Virginia (selling, manufacturing, distributing or possessing with intent to sell, manufacture, or distribute an imitation Schedule I or II drug) are not covered by the drug sentencing guidelines.

Analysis

A conviction under §18.2-248(G) is punishable as a Class 6 felony with a penalty range of one to five years. According to the pre-/post-sentence investigation (PSI) data base, during 1996 - 1997, there were 135 offenders convicted of this offense under truth-in-sentencing provisions. About 37% of these cases received no incarceration, 36% received incarceration of six months or less, and 27% received an incarceration term of more than six months. Among the latter group, the mean sentence length was just under two years and the median sentence length (the middle value, where half the sentences are higher and half are lower) was one year.

The Commission utilized 1996-1997 sentencing patterns for this crime to develop guidelines scores which better reflect current judicial thinking. Under the Commission's proposal, the score for the Primary Offense factor would be four points on both Sections A and B. On Section C, the base score for the Primary Offense factor would be three points for one count of the offense, and five points for two or more counts. In accordance with §17.1-805, the guidelines scores are increased for offenders with prior convictions for violent felonies. For an offender with a prior conviction for a violent felony carrying a statutory maximum penalty of less than 40 years (classified as

Figure 68

Actual and Proposed Guidelines Dispositions for Selling an Imitation Schedule I or II Drug

Type of Disposition	Actual	Recommended Under Proposed Guidelines
No Incarceration	37%	39%
Incarceration ≤ 6 months	36	36
Incarceration > 6 months	27	25

a category II record), the score for the Primary Offense factor would increase to six points for one count of the crime and to ten points for two or more counts. For an offender with a prior conviction for a violent felony with a maximum penalty of 40 years or more (a category I record), the score for the Primary Offense factor for one count would rise to 12 points, and increase further to 20 points for an offender convicted of two or more counts. The Commission's proposal will approximate actual sentencing dispositions for this crime (Figure 68).

The Commission's proposal is designed to integrate current judicial sentencing practices into the guidelines; therefore, no impact on correctional bed space is anticipated.

Recommendation 12

Amend the drug sentencing guidelines to add the crime of transporting five or more pounds of marijuana into the Commonwealth

Issue

Currently, transporting five or more pounds of marijuana into the Commonwealth with intent to sell or distribute such substance (§18.248.01 of the Code of Virginia) is not covered by the drug guidelines.

Analysis

Transporting five or more pounds of marijuana into the Commonwealth with the intent to sell or distribute the drug is an unclassed felony with a statutory range of five to 40 years. According to the pre-/post-sentence investigation (PSI) data base, during 1996-1997, 20 offenders were convicted for this crime under truth-in-sentencing provisions. More than 70% of these offenders were sentenced to an incarceration term of greater than six months, while most of the others (25%) were sentenced to no incarceration. Of those sentenced to more than six months, the mean sentence was 6.8 years and the median was 2.5 years. Every offender sentenced to serve more than six months was also convicted of a lesser charge involving the sale of marijuana.

The Commission utilized 1996-1997 sentencing patterns for this crime to develop guidelines scores which better reflect current judicial thinking. Under the Commission's proposal, the score for the Primary Offense factor on Section A of the drug guidelines would be 12 points. With this number of points, an offender convicted of this offense would automatically be recommended for Section C (incarceration greater than six months). The base score for the Primary Offense factor on Section C would be 19 points. In accordance with §17.1-805, the guidelines scores are increased for offenders with prior convictions for violent felonies. For an offender with a prior conviction for a violent felony carrying a statutory maximum penalty of less than 40 years (classified as a category II record), the score for the Primary Offense factor would increase to 38 points. For an offender with a prior conviction for a violent felony with a maximum penalty of 40 years or more (a category I record), the score for the Primary Offense factor would rise to 76 points.

The Commission's proposal is designed to integrate current judicial sentencing practices into the guidelines; therefore, no impact on correctional bed space is anticipated.

Recommendation 13

Amend the drug sentencing guidelines to increase the likelihood that an offender convicted of manufacturing marijuana will be recommended for a term of incarceration

Issue

Currently, offenders convicted of manufacturing marijuana (§18.2-248.1(c) of the Code of Virginia) receive incarceration sentences, particularly prison terms, more often than recommended by the guidelines.

Analysis

Manufacturing marijuana under §18.2-248.1(c) of the Code is an unclassed felony with a penalty range of 5 to 30 years. Analysis of truth-in-sentencing cases received from January 1, 1995, through September 30, 1998, indicates the compliance rate for manufacturing marijuana is 71%. Judges have sentenced one in four (24%) offenders convicted of this crime to terms which exceed the guidelines recommendation for the case. As can be seen in Figure 69, the dispositions received by offenders who manufacture marijuana are frequently more severe than those called for by the guidelines. In particular, the guidelines currently recommend a much higher proportion of offenders to no incarceration than is observed in actual sentencing.

The Commission utilized 1996-1997 sentencing patterns for this crime to develop guidelines scores which better reflect current judicial thinking. Under the Commission's proposal, the score for the Primary Offense factor on Section A would increase from five to eight points. On Section B, the score for the Primary Offense factor should be increased from zero to five points. Such modifications will increase the likelihood that offenders convicted of manufacturing marijuana will be recommended by the guidelines for a term of incarceration. Figure 70 demonstrates that these changes bring the guidelines dispositional recommendation into line with judicial practice.

The Commission's proposal is designed to integrate current judicial sentencing practices into the guidelines; therefore, no impact on correctional bed space is anticipated.

Figure 69

Actual and Current Guidelines Dispositions for Manufacturing Marijuana

Type of Disposition	Actual	Recommended under Current Guidelines
No Incarceration	56%	78%
Incarceration ≤ 6 months	14	5
Incarceration > 6 months	30	17

Figure 70

Actual and Proposed Guidelines Dispositions for Manufacturing Marijuana

Type of Disposition	Actual	Recommended under Proposed Guidelines
No Incarceration	56%	53%
Incarceration ≤ 6 months	14	14
Incarceration > 6 months	30	33

Recommendation 14

Amend the robbery sentencing guidelines to add the crime of carjacking

Issue

Currently, carjacking (§18.2-58.1(A) of the Code of Virginia) is not covered by the robbery guidelines.

Analysis

Carjacking is an unclassed felony with a penalty range of 15 years to life. According to the pre-/post-sentence investigation (PSI) data base, during 1996-1997, there were 68 offenders convicted of carjacking sentenced under truth-in-sentencing provisions. Nearly all of these offenders (88%) were sentenced to terms of incarceration greater than six months. About 10% of these cases were sentenced to no incarceration, while only 2% received incarceration of six months or less. For offenders sentenced to more than six months, the mean sentence was just over 16 years and the median (the middle value, where half of the sentences are higher and half are lower) was 10 years. When the carjacking was accompanied by felony assault or abduction, however, the mean sentence increased to over 23 years, with a median of 21 years.

The Commission utilized 1996-1997 sentencing patterns for this crime to develop guidelines scores which better reflect current judicial thinking. Under the Commission's proposal, the score for the Primary Offense factor on Section A would be four points for a carjacking committed without a firearm and six points for a carjacking committed with a firearm. With these point values, an offender convicted of carjacking with a gun would automatically be recommended for Section C (incarceration greater than six months). For carjackings without a gun, an offender would only need one additional point on the worksheet to be recommended for such a sanction.

On Section C, the points for primary offense are shown in Figure 71. In addition to points assigned for the Primary Offense factor, a new factor would be scored only for carjacking cases. If there is an accompanying felony assault or abduction conviction, then the Section C score would be increased by 57 points. This is equivalent to adding more than 4½ years to the sentence recommendation.

The Commission's proposal is designed to integrate current judicial sentencing practices into the guidelines; therefore, no impact on correctional bed space is anticipated.

Figure 71

Proposed Primary Offense Factor
Robbery - Section C

	Category I	Category II	Other
Residence, bank, business, street or carjacking without a gun or simulated gun			
1 count	84	56	28
2 counts	162	108	54
3 or more counts	336	224	112
Carjacking with gun or simulated gun			
All counts	246	164	82

Recommendation 15

Amend the assault sentencing guidelines to increase the recommended sentence length for malicious wounding offenses resulting in serious physical injury to more than one victim

Issue

Currently, when there are multiple victims in a malicious wounding case, points are assigned on the guidelines based on the one victim receiving the most serious injury. The assault sentencing guidelines have received some criticism for not making a higher sentence length recommendation when there are multiple victims who receive serious physical injury.

Analysis

For the analysis, the number of counts for the primary offense was used to approximate the number of victims. An analysis of truth-in-sentencing cases received from January 1, 1995, through September 30, 1998, indicates the compliance rate for one count of malicious wounding is 62% when a victim suffers serious physical injury, with judges imposing terms above the guidelines in 17% of these cases (Figure 72). The rate at which judges sentence above the guidelines recommendation (the aggravation rate) in these cases rises dramatically as the number of counts of malicious wounding increases.

Figure 72

Sentencing Guidelines Compliance in Malicious Wounding Cases with Serious Physical Victim Injury

Number of Counts	Compliance	Mitigation	Aggravation
1	62%	21%	17%
2	69	0	31
3+	50	12	38

According to the pre-/post-sentence investigation (PSI) data base for 1996-1997, there is a relationship between sentence length and the number of counts of malicious wounding when the case involves serious physical victim injury. With one count, the mean sentence length was 8½ years and the median (the middle value with half the sentences falling above and half below) was 5 years. With two counts, the mean sentence length rose to 10 years. In cases involving three or more counts, judges imposed an average sentence of more than 15 years.

The Commission utilized 1996-1997 sentencing patterns for this crime to develop guidelines scores which better reflect current judicial thinking. Under the Commission's proposal, the victim injury factor on Section C of the assault guidelines would be replaced with one that accounts for multiple victims instead of the one victim most seriously injured (Figure 73).

The Commission's proposal is designed to integrate current judicial sentencing practices into the guidelines; therefore, no impact on correctional bed space is anticipated.

Figure 73

Proposed Victim Injury Factor
Assault - Section C

Number of Victims Receiving Serious Physical Victim Injury
Primary offense malicious, aggravated malicious wounding or use of firearm

Number:	1	14
	2	70
	3 or more	85

Recommendation 16

Amend the assault sentencing guidelines to add the crime of assault and battery against law enforcement, fire or rescue personnel

Issue

Currently, the crimes of unlawful wounding and malicious wounding of a law enforcement officer, a fire fighter or a rescue squad member are covered by the sentencing guidelines, but assault and battery pursuant to §18.2-57 (C) of the Code of Virginia is not.

Analysis

Assault and battery against a law enforcement officer, fire fighter or a rescue squad member is a Class 6 felony with a penalty range of one to five years. The statute requires a mandatory six month minimum term of incarceration. Prior to July 1, 1997, this offense was classified as a Class 1 misdemeanor. According to the pre-/post-sentence investigation (PSI) data base, nine offenders have been convicted of this offense since it became a felony. In 22% of the cases, the offender was sentenced to the mandatory minimum sentence of six months while the remaining offenders received sentences greater than six months.

Under the Commission's proposal, the score for the Primary Offense factor on Section A of the assault guidelines would be six points. With this number of points, an offender convicted of this offense would automatically be recommended for Section C (incarceration greater than six months). On Section C, the base score for the Primary Offense factor would be eight points. In accordance with §17.1-805, the guidelines scores are increased for offenders with prior convictions for violent felonies. For an offender with a prior conviction for a violent felony carrying a statutory maximum penalty of less than 40 years (classified as a category II record), the score for the Primary Offense factor would increase to 16 points. For an offender with a prior conviction for a violent felony with a maximum penalty of 40 years or more (a category I record), the score for the Primary Offense factor would rise to 32 points. The Commission's proposal will approximate actual sentencing dispositions for this crime (Figure 74).

Figure 74

Actual and Proposed Guidelines Dispositions for Assault and Battery of Law Enforcement, Fire or Rescue Personnel

Type of Disposition	Actual	Recommended Under Proposed Guidelines
Incarceration = 6 months	22%	0%
Incarceration > 6 months	78	100

Recommendation 17

Amend the assault guidelines to add the crime of assault and battery against a family member (third or subsequent conviction)

Issue

Currently, third or subsequent conviction of assault and battery against a family member (§18.2-57.2(B) of the Code of Virginia) is not covered by the assault guidelines.

Analysis

A third or subsequent conviction for assault and battery against a family member is a Class 6 felony which carries a statutory penalty range of 1 to 5 years. According to the pre-/post-sentence investigation (PSI) data base, during 1996-1997, there were 70 cases of assault and battery against a family member (third or subsequent conviction) convicted under truth-in-sentencing provisions. The data indicate that about 16% were sentenced to no incarceration, and 31% were sentenced to incarceration of six months or less. Over half of the offenders (53%) were sentenced to a term of incarceration greater than six months, with a mean sentence of 1.7 years.

The Commission utilized 1996-1997 sentencing patterns for assault and battery against a family member (third or subsequent conviction) to develop guidelines scores which better reflect current judicial thinking. Under the Commission's proposal, the score for the Primary Offense factor on Section A of the assault guidelines would be two points. A new factor on Section A will be scored only when the primary offense is a third or subsequent conviction of assault and battery against a family member. The new factor will add three points to the worksheet score if the offender has prior convictions for domestic violence. If an offender has been convicted previously of any felony crime against the person, four points will be added. With points added for previous domestic violence or person crime convictions, an offender convicted of a third assault and battery against a family member is more likely to be recommended for Section C (incarceration greater than six months). On Section B, two new factors would be scored for this offense (Figure 75). With these factors scored on Section B, an offender who is convicted of this crime will be more likely to be recommended for a short term of incarceration than he is to be recommended for probation. On Section C, the base score for the Primary Offense factor would be seven points. For an offender with a prior conviction for a violent felony carrying a statutory maximum penalty of less than 40 years (classified as a category II record), the score for the Primary Offense factor would increase to 14 points, and increase further to 28 points for an offender with a prior conviction for a violent felony with a statutory maximum penalty of 40 years or more (category I record).

Figure 75

Proposed Factors for Assault and Battery against a Family Member (Third or Subsequent Conviction)
Assault - Section B

Prior Incarcerations/Commitments		
Number:	1	1
	2	3
	3 or more	5
Prior Misdemeanor Convictions/Adjudications		
Number:	1 - 2	0
	3 - 5	1
	6 - 8	2
	9 or more	3

Recommendation 18

Amend the sexual assault guidelines to increase the likelihood that an offender convicted of marital sexual assault will be recommended for a term of incarceration

Issue

Currently, under the existing sentencing guidelines offenders convicted of marital sexual assault (§18.2-67.2:1 of the Code of Virginia) typically are not recommended for incarceration unless the offender has a substantial prior record.

Analysis

An analysis of truth-in-sentencing cases received from January 1, 1995, through September 30, 1998, indicates the compliance rate for marital sexual assault is 55%. The rate at which judges sentence above the guidelines recommendation (aggravation rate) is 45%.

According to the pre-/post-sentence investigation (PSI) data base, there were 19 marital sexual assault convictions under the truth-in-sentencing provisions during 1996-1997. About 42% of offenders were sentenced to no incarceration, 26% were sentenced to a short term of incarceration (six months or less), and 32% were sentenced to terms of incarceration exceeding six months.

The Commission utilized 1996-1997 sentencing patterns for marital sexual assault to develop guidelines scores which better reflect current judicial thinking. Under the Commission's proposal, the score for the Primary Offense factor on Section A of the sexual assault guidelines (not the rape guidelines) would increase from zero to three. On Section B, two factors would be added which would be applied only in cases of marital sexual assault. First, two points would be added in cases where the victim sustained physical or serious physical injury. Second, one point would be added in cases where any weapon was used, brandished, feigned, or threatened. Such modifications will increase the likelihood that offenders convicted of marital sexual assault will be recommended by the guidelines for a term of incarceration. Figure 76 demonstrates that these changes bring the guidelines dispositional recommendation more into line with judicial practice.

The Commission's proposal is designed to integrate current judicial practices into the guidelines; therefore, no impact on correctional bed space is anticipated.

Figure 76

Actual and Proposed Guidelines Dispositions for Marital Sexual Assault

Type of Disposition	Actual	Recommended Under Proposed Guidelines
No Incarceration	42%	42%
Incarceration ≤ 6 months	26	32
Incarceration > 6 months	32	26

Recommendation 19

Amend the miscellaneous sentencing guidelines to increase the recommended sentence length for violations of the habitual traffic statutes, particularly in cases involving multiple counts of the offense or an accompanying conviction for driving while intoxicated (DWI)

Issue

Currently, under the existing sentencing guidelines, offenders convicted of habitual traffic offenses under §46.2-357(B,2i) and §46.2-357(B,3) of the Code of Virginia typically are recommended for the mandatory minimum sentence of 12 months (with a range of 12 to 14 months) even when there are multiple counts of the offense or when there is a DWI as an additional offense.

Analysis

An analysis of truth-in-sentencing cases received from January 1, 1995 through September 30, 1998, indicates the compliance rate for a habitual traffic offense is 79%. As can be seen in Figure 77, the compliance rate decreases as the number of counts increases. Similarly, when DWI is an additional offense, the compliance rate drops from about 82% to 61%, with the aggravation rate more than doubling (16% vs. 38%).

Figure 77

Sentencing Guidelines Compliance for Habitual Traffic Cases by Number of Counts

Number of Counts	Compliance	Mitigation	Aggravation
1	79%	2%	19%
2	70	7	23
3+	61	6	33

Figure 78

Proposed Primary Offense Factor and DWI Factor for Habitual Traffic Cases Miscellaneous - Section C

Habitual offender operate vehicle, endangerment; Habitual offender, no endangerment subsequent

	Category I	Category II	Other
1 count	28	14	7
2 counts	48	24	12
3 or more counts	68	34	17

DWI Convictions for Current Event (Score only if primary offense is habitual offender) ..... If YES, add 11

According to the pre/post-sentence investigation (PSI) data base, during 1996-1997, 2,353 were convicted of one count of being a habitual traffic offender, while 124 were convicted of two counts and 18 were convicted of three or more counts. For a single conviction, the mean sentence length was nearly 1.4 years, but the mean sentence rose to over two years when the offender was convicted of two counts and to 2 ½ years when convicted of three or more counts. An accompanying DWI conviction added nine months to the mean sentence length for habitual traffic offenders.

The Commission utilized 1996-1997 sentencing patterns for this crime to develop guidelines scores which better reflect current judicial thinking. Under the Commission's proposal, the scores for the Primary Offense factor on Section C of the miscellaneous guidelines are increased and a new factor "DWI conviction for Current Event," scored only in habitual traffic cases, would be added (Figure 78). The result is an increase in the sentence length recommendations for habitual traffic offenders, particularly in cases with multiple counts of the offense or an accompanying conviction for DWI.

The Commission's proposal is designed to integrate current judicial sentencing practices into the guidelines; therefore, no impact on correctional bed space is anticipated.

Recommendation 20

Amend the larceny sentencing guidelines for grand larceny from a person to better reflect current judicial sentencing patterns

Issue

Currently, offenders convicted of grand larceny from a person (§18.2- 95 of the Code of Virginia) often receive dispositions other than those recommended by the guidelines.

Analysis

According to the pre-/post-sentence investigation (PSI) data base, during 1996-1997, there were 518 cases of grand larceny from a person convicted under truth-in-sentencing provisions. Thirty-one percent of these cases were sentenced to no incarceration, 31% were sentenced to incarceration less than six months, and 38% were sentenced to a longer term of incarceration. The dispositions recommended by the sentencing guidelines for these cases appear to be out of sync with actual sentencing practice (Figure 79). In particular, the guidelines currently recommend a much higher proportion of offenders for a short term of incarceration, and less to incarceration over six months, than is observed in actual sentencing. In addition, more offenders receive a disposition of no incarceration than are recommended by guidelines.

The Commission utilized 1996-1997 sentencing patterns for grand larceny from a person to develop guidelines scores which better reflect current judicial thinking. Under the Commission's proposal, the score for the Primary Offense factor on Section A of the larceny guidelines would be increased by one point. On Section B, two points would be deducted from the Primary Offense score. With these modifications, the guidelines will more closely reflect judicial sentencing patterns for this offense (Figure 79).

The Commission's proposal is designed to integrate current judicial sentencing practices into the guidelines; therefore, no impact on correctional bed space is anticipated.

Figure 79

Actual and Current Guidelines Dispositions for Grand Larceny from a Person

Type of Disposition	Actual	Recommended under Current Guidelines	Recommended under Proposed Guidelines
No Incarceration	31%	23%	29%
Incarceration ≤6 months	31	47	35
Incarceration > 6 months	38	30	36

Recommendation 21

Amend the larceny sentencing guidelines to add (1) failure of a bailee to return an animal, vehicle, boat, etc., valued at $200 or more and (2) grand larceny of a firearm

Issue

Currently, failure of a bailee to return an animal, vehicle, boat or other item valued at $200 or more and grand larceny of a firearm (§§18.2-117 and 18.2-95(iii) of the Code of Virginia) are not covered by the larceny sentencing guidelines.

Analysis

Failure of a bailee to return an animal, vehicle, boat or other item valued at $200 or more (§18.2-117) is an unclassed felony with a penalty range of 1 to 20 years. According to the pre-/post-sentence investigation (PSI) data base, there were 21 offenders convicted of this offense under truth-in-sentencing provisions during 1996-1997. About 53% of these cases were sentenced to no incarceration, 14% to incarceration six months or less, and 33% were sentenced to more than six months incarceration. For the latter group, the mean sentence length was 1½ years and the median (the middle value, with half the sentences falling above and half below) was two years.

Grand larceny of a firearm is also an unclassed felony with a penalty range of 1 to 20 years. The PSI data base for 1996-1997 contains 28 truth-in-sentencing cases for this crime. For grand larceny of a firearm, about 39% of these offenders were sentenced to no incarceration, while 29% were given incarceration up to six months and 32% were sanctioned with a longer term of incarceration. For the latter group, the mean sentence length was just under two years and the median was approximately 1½ years.

The Commission utilized 1996 - 1997 sentencing patterns for these offenses to develop guidelines scores which better reflect current judicial thinking. Under the Commission's proposal, the score for the Primary Offense factor on Section A would be four points for failure of bailee to return animal, vehicle, etc., and one point for grand larceny of a firearm. On Section B, both offenses would score one point on the Primary Offense factor. On Section C, failure of bailee to return animal, vehicle, etc., would score the same as any other larceny offense with a maximum penalty of 20 years. For grand larceny of a firearm, the base score for the Primary Offense factor on Section C would be 22 points. In accordance with §17.1-805, the guidelines scores are increased for offenders with prior convictions for violent felonies. For an offender with a prior conviction for a violent felony carrying a statutory maximum penalty of less than 40 years (classified as a category II record), the score for the Primary Offense factor for grand larceny of a firearm would increase to 44 points. For an offender with a prior conviction for a violent felony with a maximum penalty of 40 years or more (a category I record), the score for the Primary Offense factor would rise to 88 points. The distribution of actual and recommended dispositions are displayed in Figures 80 and 81.

The Commission's proposal is designed to integrate current judicial sentencing practices into the guidelines; therefore, no impact on correctional bed space is anticipated.

Figure 80

Actual and Proposed Guidelines Dispositions for Failure of a Bailee to Return Animal, Vehicle, Boat, etc., Valued at $200 or more

Type of Disposition	Actual	Recommended Under Proposed Guidelines
No Incarceration	53%	57%
Incarceration ≤ 6 months	14	10
Incarceration > 6 months	33	33

Figure 81

Actual and Proposed Guidelines Dispositions for Grand Larceny of a Firearm

Type of Disposition	Actual	Recommended Under Proposed Guidelines
No Incarceration	39%	36%
Incarceration ≤ 6 months	29	29
Incarceration > 6 months	32	35

Recommendation 22

Amend the assault, sexual assault and miscellaneous sentencing guidelines such that probation supervision following a period of incarceration for a felony will be scored the same as parole or post-release supervision

Issue

Most of the sentencing guidelines worksheets contain a factor which assigns additional points if the offender was under some form of legal restraint at the time the new felony offense was committed. The assault (Section A), sexual assault (Section C) and miscellaneous (Section A) guidelines make a distinction between parole and post-release supervision and other types of legal restraint, such as supervised probation. The legal restraint factor on these worksheets was designed to give more points to offenders on some form of legal restraint following a period of incarceration for a felony than to offenders who had been given probation without incarceration for their previous crime(s). The abolition of parole has meant that offenders sentenced under truth-in-sentencing provisions are not released from prison incarceration to a term of supervision called "parole." Instead, after an incarceration term has been completed, they are released to fulfill any terms of probation or post-release supervision set by the sentencing judge. Currently, offenders who are released from prison and placed on probation will not always score additional points for being on a form of post-incarceration supervision at the time they committed a new felony crime.

Analysis

When parole was abolished, the General Assembly created a new sentencing tool for judges called the post-release term. With this tool, judges could impose and suspend an additional term of incarceration of up to three years (per felony count) on the condition that the offender satisfy a period of post-release supervision in the community. The conditions of post-release supervision are the same as probation. However, since the abolition of parole, judges have used this tool in less than 1% of cases. The majority of offenders are placed under a traditional probation supervision period. Judges have utilized probation instead of post-release

In 1840 Spotsylvania County's courthouse was built on land known locally as "Tavern Tract." The land was on the major road connecting Fredericksburg to Richmond, and had been a profitable location for the local tavern owner. This location, however, was also important to General Grant in May of 1864. During the battle of Spotsylvania Courthouse, one of the bloodiest of the Wilderness Campaign, he declared, "I intend to fight it out on this line if it takes all summer."

supervision as the preferred method of community supervision following incarceration.

Under the Commission's proposal, the legal restraint factor on Section A of the assault guidelines, Section C of the sexual assault guidelines and Section A of the miscellaneous guidelines would be modified. Instead of "parole/post-release supervision," the factor would read "post-incarceration supervision." Under this modification, offenders on probation following incarceration for a felony would receive the same score on the legal restraint factor as offenders who had been released on parole or post-release supervision.

Recommendation 23

Modify the drug sentencing guidelines recommendation for cases that involve offenders with no prior felony record who are convicted of selling one gram or less of cocaine to include the Boot Camp Incarceration Program

Issue

Currently, the sentencing guidelines for drug offenses recommend incarceration of seven to 16 months or the Detention Center Incarceration Program for offenders who sell one gram or less of cocaine who have no prior felony record.

Analysis

Both the Detention Center and Boot Camp programs are highly-structured alternative incarceration programs operated by the Community Corrections division of the Department of Corrections. In the Detention Center program, offenders are confined from four to six months. Starting January 1, 1998, the Boot Camp program was lengthened from three months to four months. Both programs have drug education/ treatment components.

The Commission believes that the Boot Camp Incarceration Program is also an appropriate option in the cases of first-time felons who sell one gram or less of cocaine. This would result in a guidelines recommendation with three options: incarceration from seven to 16 months, Detention Center Incarceration or Boot Camp Incarceration. A judge sentencing an offender to any of the recommended options would be considered in compliance with the sentencing guidelines. The Virginia Department of Corrections supports this recommendation.

Caroline County's courthouse was built in the 1830's. Its Tuscan design bears many similarities to the Madison County courthouse, and so it is believed by many that it was also designed and built by William Phillips and Malcolm Crawford. The distinctive bell tower, once described as a "party hat," is square and covered by lattice, but it probably was not part of the original structure.

Recommendation 24

Modify guidelines preparation procedures to require that only the truth-in-sentencing guidelines be prepared for a felony which occurred over a period of time spanning before and after January 1, 1995

Issue

When the commission of an offense spanned across a period governed by parole laws into a period governed by Virginia's truth-in-sentencing provisions, the court must decide under which system to sentence the offender. This decision is typically made on the date of sentencing. Currently, two sets of guidelines must be prepared for a felony offense which began prior to the abolition of parole (prior to January 1, 1995) and continued until sometime after parole was abolished and truth-in-sentencing was instituted. Both the truth-in-sentencing guidelines and the sentencing guidelines that were in use under the parole system must be prepared so that the judge is provided a sentence recommendation for the old and new systems. If there are several offenses in a sentencing event which occurred over a period of time that encompassed the abolition of parole, the number of worksheets that must be prepared multiplies. For example, if there is a conviction for a felony with an offense date period that spanned between 1994 and 1996 and an additional conviction with an offense date period extending from 1989 into 1995, the guidelines preparer might prepare as many as six different worksheets.

Analysis

It is not possible to use the data sources available to the Commission to evaluate how often multiple worksheets are completed. However, based on calls to the Commission, the majority of these offenses involve drug conspiracies and sexual abuse. Under current preparation procedures, whoever is preparing the guidelines must complete multiple sets of guidelines forms, when, ultimately, only one set will be used by the court for its sentencing decision. Moreover, if the court does not make it clear on which system (parole or truth-in-sentencing) the sentence is based, the Department of Corrections will determine if the offender is parole eligible.

The Commission's proposal would eliminate the need to prepare multiple sets of guidelines and establish that the sentence is based on the truth-in-sentencing system in these cases.

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	0%	2%	1.9%	0.7%	2.5%	1.5%
Minimal property or monetary loss	0.5	0	0	1	3	0
Minimal circumstances/facts of the case	2.6	3.9	1.5	2.9	2.5	16
Small amount of drugs involved in the case	0	0	2.6	0	0	1.5
Offender and victim are friends	2.1	1	0	1.9	2	1.5
Little or no injury/offender did not intend to harm; victim requested lenient sentence	2.6	2	0	1.4	1.7	1.5
Offender has no prior record	0	0	0.7	0.5	0	0
Offender has minimal prior record	1	2.9	4.2	3.1	2	6.9
Offender's criminal record overstates his degree of criminal orientation	2.1	0	0.9	1.2	0	2.3
Offender cooperated with authorities	8.4	18.6	13.4	9.3	7.7	9.2
Offender is mentally or physically impaired	0	1	2.4	4.5	5	3.1
Offender has emotional or psychiatric problems	2.6	4.9	0.5	3.1	4.2	3.1
Offender has drug or alcohol problems	2.6	2	0.4	0.2	1.2	0.8
Offender has good potential for rehabilitation	13.1	19.6	19.7	34.2	23.3	13.7
Offender shows remorse	1	1	1.3	2.9	0.7	6.1
Age of Offender	7.9	2.9	3.9	1.4	3	1.5
Multiple charges are being treated as one criminal event	1	0	0	1	0	0
Sentence recommend by Commonwealth Attorney or probation officer	1	4.9	3.3	4.3	3.2	6.1
Weak evidence or weak case	5.2	3.9	5.3	4	6	6.1
Plea agreement	5.2	8.8	14.2	14.7	17.9	15.3
Sentencing Consistency with co-defendant or with similar cases in the jurisdiction	0.5	0	0.1	0.7	1.5	0
Offender already sentenced by another court or in previous proceeding for other offenses	9.4	2	2.5	8.6	5.2	9.9
Offender will likely have his probation revoked	2.1	1	1.2	1	0.7	0.8
Offender is sentenced to an alternative punishment to incarceration	32.5	26.5	31.9	12.4	15.9	3.8
Guidelines recommendation is too harsh	1	0	0.5	3.3	0.5	3.1
Judge rounded guidelines minimum to nearest whole year	4.2	2	1.3	1.7	2.5	0.8
Other reasons for mitigation	11.8	8.7	6.1	4.7	7.2	5.2

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	0.8%	0%	2.5%	0.7%	1.8%	1.1%
Extreme property or monetary loss	4.8	8.5	0	7.2	9.3	1.1
The offense involved a high degree of planning	0.8	3.4	0.3	4.3	2.6	0
Aggravating circumstances/flagrancy of offense	24.2	23.7	3.8	8.6	9.3	11.7
Offender used a weapon in commission of the offense	0	0	1.6	0	0.2	2.3
Offender's true offense behavior was more serious than offenses at conviction	3.2	3.4	5.8	7.9	5.3	3.4
Extraordinary amount of drugs or purity of drugs involved in the case	0	0	8.2	0.7	0	0
Aggravating circumstances relating to sale of drugs	0	0	0.4	0	0	0
Offender immersed in drug culture	0	0	3.3	0	0	0
Victim injury	0.8	0	0.1	0	1	1.5
Previous punishment of offender has been ineffective	0.8	1.7	2.5	4.3	2.4	1.1
Offender was under some form of legal restraint at time of offense	1.6	5.1	6.6	1.4	3.5	2.3
Offender's criminal record understates the degree of his criminal orientation	7.3	13.6	13.6	20.9	20.9	25.8
Offender has previous conviction(s) or other charges for the same type of offense	1.6	5.1	11.9	4.3	10.2	27.7
Offender failed to cooperate with authorities	1.6	5.1	2.4	7.2	5.1	4.5
Offender has drug or alcohol problems	2.4	3.4	3.6	1.4	1.8	2.3
Offender has poor rehabilitation potential	3.2	1.7	2.7	5	3	6.4
Offender shows no remorse	0	1.7	0.8	2.2	2.8	1.1
Jury sentence	4.8	11.9	2.9	5.8	4.5	6.4
Plea agreement	21	11.9	19.9	13.7	15	6.4
Community sentiment	4	1.7	2.3	2.9	0.6	0
Sentencing consistency with codefendant or with other similar cases in the jurisdiction	4	3.4	1.9	1.4	1	0
Judge wanted to teach offender a lesson	1.6	0	0.7	0	0.6	0.4
Offender was sentenced to boot camp, detention center or diversion center	6.5	6.8	4	1.4	4.9	2.7
Guidelines recommendation is too low	9.7	10.2	5.3	7.9	6.9	8
Mandatory minimum penalty is required in the case	0	0	0.9	0.7	0.2	2.7
Other reasons for aggravation	9.8	6.5	9.5	6.6	8.4	7.2

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 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	2.5%	0%	0%	0.5%	0%	0%
Minimal circumstances/facts of the case	4.4	0	2.7	5.4	3.4	6.7
Offender was not the leader or active participant in offense	1.3	5.6	13.5	9.2	0	0
Offender and victim are related or friends	8.2	11.1	5.4	0	11.9	6.7
Little or no victim injury/offender did not intend to harm; victim requested lenient sentence	10.1	11.1	2.7	0.5	16.9	5.3
Victim was a willing participant or provoked the offense	1.3	0	5.4	0	5.1	5.3
Offender has no prior record	1.3	0	0	1.1	0	1.3
Offender has minimal prior criminal record	6.3	0	5.4	6	10.2	5.3
Offender's criminal record overstates his degree of criminal orientation	0.6	0	0	0	0	0
Offender cooperated with authorities or aided law enforcement	1.9	11.1	13.5	10.9	5.1	5.3
Offender has emotional or psychiatric problems	4.4	0	0	3.3	5.1	4
Offender is mentally or physically impaired	3.8	0	0	0	5.1	5.3
Offender has drug or alcohol problems	1.9	0	2.7	1.1	0	1.3
Offender has good potential for rehabilitation	15.8	5.6	16.2	11.4	11.9	20
Offender shows remorse	3.2	5.6	0	3.3	3.4	2.7
Age of offender	2.5	5.6	8.1	23.4	8.5	2.7
Jury sentence	3.2	5.6	18.9	4.3	10.2	0
Sentence was recommended by Commonwealth's attorney or probation officer	1.9	11.1	8.1	1.1	1.7	2.7
Weak evidence or weak case against the offender	17.1	27.8	10.8	4.3	16.9	25.3
Plea agreement	7	11.1	5.4	6	6.8	12
Sentencing consistency with codefendant or with other similar cases in the jurisdiction	2.5	0	0	4.3	1.7	0
Offender already sentenced by another court or in previous proceeding for other offenses	4.4	0	2.7	6.5	3.4	2.7
Offender will likely have his probation revoked	0	5.6	2.7	0.5	0	4
Offender is sentenced to an alternative punishment to incarceration	7	5.6	2.7	13	3.4	2.7
Guidelines recommendation is too harsh	0	0	0	0.5	1.7	2.7
Judge rounded guidelines minimum to nearest whole year	7	5.6	0	6	0	2.7
Other reasons for mitigation	3.8	0	0.1	7.3	6.6	3.6

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	Homicide	Kidnapping	Robbery	Rape	Sexual Assault
No reason given	0%	0%	0%	0%	4.3%	0%
The offense involved a high degree of planning	0.8	0	0	0.8	0	1.1
Aggravating circumstances/flagrancy of offense	19.1	21.9	25	27.3	13	22.5
Offender used a weapon in commission of the offense	2.3	0	0	3.9	0	0
Offender's true offense behavior was more serious than offenses at conviction	8.4	6.3	12.5	3.1	0	7.9
Offender is related to or is the caretaker of the victim	0	0	0	0	0	4.5
Offense was an unprovoked attack	1.5	0	0	0	0	0
Offender knew of victim's vulnerability	1.5	4.7	12.5	6.3	17.4	24.7
The victim(s) wanted a harsh sentence	0	1.6	0	5.5	8.7	5.6
Extreme violence or severe victim injury	21.4	25	12.5	10.2	8.7	0
Previous punishment of offender has been ineffective	0	0	0	0.8	0	0
Offender was under some form of legal restraint at time of offense	0	0	6.3	2.3	0	1.1
Offender's record understates the degree of his criminal orientation	5.3	7.8	0	10.2	4.3	3.4
Offender has previous conviction(s) or other charges for the same offense	1.5	0	0	0.8	4.3	10.1
Offender failed to cooperate with authorities	2.3	3.1	0	3.1	4.3	1.1
Offender has drug or alcohol problems	0	1.6	0	0.8	0	1.1
Offender has poor rehabilitation potential	9.9	4.7	12.5	7	4.3	4.5
Offender shows no remorse	6.9	7.8	18.8	4.7	8.7	9
Jury sentence	16	34.4	18.8	16.4	39.1	1.1
Plea agreement	13	4.7	6.3	3.9	4.3	11.2
Guidelines recommendation is too low	9.9	6.3	18.8	25	4.3	15.7
Mandatory minimum penalty is required in the case	0.8	0	0	3.1	0	0
Other reasons for aggravation	6.1	2.9	6.0	3.9	4.7	5.7

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

Burglary of Dwelling

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	62.9%	22.9%	14.3%	35
2	61.4	22.7	15.9	88
3	86.4	9.1	4.5	22
4	59.6	17.5	22.8	57
5	72	16	12	25
6	52.6	26.3	21.1	19
7	79.3	10.3	10.3	29
8	68.8	25	6.3	16
9	66.7	14.3	19	21
10	81.8	13.6	4.5	22
11	77.8	22.2	0	9
12	66.7	16.7	16.7	30
13	37.1	34.3	28.6	35
14	54.1	29.7	16.2	37
15	73.7	21.1	5.3	38
16	68	20	12	25
17	75	6.3	18.8	16
18	63.6	18.2	18.2	11
19	64.6	14.6	20.8	48
20	78.6	14.3	7.1	14
21	48.1	33.3	18.5	27
22	61.5	23.1	15.4	26
23	44	44	12	25
24	51.6	35.5	12.9	31
25	82.6	13	4.3	23
26	65.6	25	9.4	32
27	85	15	0	40
28	46.2	38.5	15.4	13
29	57.8	24.4	17.8	45
30	85.7	0	14.3	7
31	56.3	25	18.8	16
Total	64.2%	21.7%	14.2%	882

Burglary of Other Structure

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	71.4%	14.3%	14.3%	14
2	83.3	14.3	2.4	42
3	83.3	16.7	0	6
4	72.4	17.2	10.3	29
5	70.6	23.5	5.9	17
6	75	25	0	8
7	78.3	8.7	13	23
8	92.9	7.1	0	14
9	83.3	16.7	0	6
10	77.8	22.2	0	36
11	54.5	27.3	18.2	11
12	60.9	21.7	17.4	23
13	69.6	8.7	21.7	23
14	60	6.7	33.3	15
15	82.6	13	4.3	23
16	75.7	18.9	5.4	37
17	77.3	18.2	4.5	22
18	64.7	35.3	0	17
19	76.7	11.6	11.6	43
20	85.7	14.3	0	7
21	66.7	8.3	25	12
22	76.5	11.8	11.8	17
23	79.3	10.3	10.3	29
24	52.2	39.1	8.7	23
25	82.4	5.9	11.8	17
26	64	28	8	25
27	83.9	9.7	6.5	31
28	80	6.7	13.3	15
29	52.4	19	28.6	21
30	60	40	0	5
31	100	0	0	7
Total	73.9%	16.5%	9.5%	618

Drugs

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	73.9%	5.8%	20.3%	207
2	79.1	15.1	5.9	511
3	85.3	11.2	3.5	375
4	71.6	15.9	12.4	747
5	78.1	11	11	146
6	65	12	23.1	117
7	88.9	4.1	7.1	567
8	83	12.8	4.3	141
9	67.2	10.7	22.1	122
10	78.3	14.9	6.9	175
11	86.9	4.1	9	244
12	59.6	9.9	30.5	141
13	61.2	13	25.8	639
14	75.3	7.3	17.4	259
15	64.7	13.5	21.9	334
16	68.3	15.3	16.4	189
17	78.4	12.4	9.2	185
18	74.3	12.9	12.9	210
19	76.4	11.8	11.8	347
20	82.1	11.9	6	84
21	74.4	14.1	11.5	78
22	65.5	5.8	28.7	171
23	59.7	15.5	24.8	238
24	70.8	8.5	20.7	271
25	76.9	16.7	6.5	108
26	65.1	26.6	8.3	109
27	73.8	14.3	11.9	126
28	74.3	8.6	17.1	70
29	59.7	11.3	29	62
30	83.3	0	16.7	18
31	75.9	18.2	5.8	137
Total	73.8%	11.9%	14.3%	7128

Property, Drugs, and Miscellaneous Offenses

Fraud

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	77.5%	15.7%	6.7%	89
2	79.5	18.5	2.1	146
3	82.5	17.5	0	40
4	86.1	12.6	1.3	238
5	82.5	12.3	5.3	57
6	77.1	14.3	8.6	35
7	82.9	15.9	1.2	82
8	84.8	12.1	3	66
9	83.3	14.3	2.4	42
10	85.7	12.2	2	49
11	86.4	6.8	6.8	44
12	81.6	8.7	9.7	103
13	67.5	20.6	11.9	126
14	80.7	14.9	4.4	114
15	85.5	9.6	4.8	83
16	76.3	17.5	6.2	97
17	81.9	10.6	7.4	94
18	88.5	9.8	1.6	61
19	80.2	11.4	8.4	237
20	89.2	6.8	4.1	74
21	65.9	29.3	4.9	41
22	85	15	0	60
23	61.2	31.9	6.9	116
24	67	22.6	10.4	106
25	82	15.7	2.2	89
26	65.9	25.6	8.5	82
27	82.9	17.1	0	117
28	82.4	11.8	5.9	34
29	59.1	20.5	20.5	44
30	85.7	14.3	0	14
31	78.2	20.7	1.1	87
Total	**79%**	**15.8%**	**5.2%**	**2667**

Larceny

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	89%	5.8%	5.2%	191
2	87.1	8	4.9	348
3	81.1	14.7	4.2	95
4	83.3	9	7.6	432
5	84	8	8	100
6	63.2	10.5	26.3	57
7	92.4	3	4.5	132
8	91.9	7.5	.6	160
9	80	10	10	80
10	85.9	4.7	9.4	64
11	84.1	6.8	9.1	44
12	69.8	7.4	22.8	202
13	68.9	10.7	20.4	206
14	80.6	6.7	12.7	284
15	82	11.8	6.2	161
16	81.3	5.2	13.5	96
17	82.1	7.4	10.5	229
18	79.1	7.9	12.9	139
19	78.1	6.8	15.1	351
20	87.4	5.7	6.9	87
21	71.3	16.1	12.6	87
22	72.9	6.4	20.7	140
23	76.6	11.4	12	175
24	72.8	14.8	12.3	162
25	85.3	9.3	5.4	129
26	76.7	12	11.3	133
27	86.8	9.4	3.8	106
28	83.6	7.3	9.1	55
29	78.9	7	14	57
30	73.1	7.7	19.2	26
31	77.4	14.8	7.8	115
Total	**80.6%**	**8.7%**	**10.6%**	**4643**

Miscellaneous

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	83.8%	10.8%	5.4%	37
2	85.1	7.1	7.8	141
3	87.5	8.3	4.2	24
4	80.5	13.8	5.7	87
5	76.4	11.1	12.5	72
6	60	8.6	31.4	35
7	87.5	2.8	9.7	72
8	86.2	10.3	3.4	29
9	83	1.9	15.1	53
10	84.3	13.7	20	51
11	70.2	4.3	25.5	47
12	87.2	4.3	8.5	47
13	77.4	4.8	17.7	62
14	66.7	9.8	23.5	51
15	82	5.6	12.4	89
16	72.2	8.3	19.4	72
17	80	5.7	14.3	35
18	66.7	33.3	0	3
19	74.1	3.5	22.4	85
20	73.3	6.7	20	45
21	84.4	4.4	11.1	45
22	73.1	3.8	23.1	78
23	64.1	13	22.8	92
24	81.3	4.2	14.6	96
25	82.7	2.7	14.7	75
26	71.3	8.8	20	80
27	73.8	12.5	13.8	80
28	85.7	9.5	4.8	21
29	75.9	3.4	20.7	29
30	72.2	11.1	16.7	18
31	80.5	4.9	14.6	41
Total	**77.9%**	**7.3%**	**14.8%**	**1792**

Appendix 4 Sentencing Guidelines Compliance by Judicial Circuit

Assault

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	64.3%	21.4%	14.3%	14
2	68	12	20	50
3	62.5	28.1	9.4	32
4	71.4	16.7	11.9	84
5	77.5	12.5	10	40
6	63	25.9	11.1	27
7	65.1	16.3	18.6	43
8	84.0	16	0	25
9	75	5	20	20
10	73.1	11.5	15.4	26
11	73.2	14.6	12.2	41
12	81.8	0	18.2	11
13	49.1	30.2	20.8	53
14	65	15	20	20
15	67.7	29	3.2	31
16	61.5	30.8	7.7	26
17	56.5	17.4	26.1	23
18	71.4	14.3	14.3	21
19	61.3	9.7	29	31
20	66.7	26.7	6.7	15
21	42.9	35.7	21.4	14
22	64	16	20	25
23	57.7	15.4	26.9	26
24	66.7	15.2	18.2	33
25	78.1	12.5	9.4	32
26	65.2	13	21.7	23
27	61.9	33.3	4.8	21
28	66.7	20	13.3	15
29	66.7	14.3	19	21
30	100	0	0	4
31	69.2	19.2	11.5	26
Total	**66.9%**	**18.1%**	**15%**	**873**

Kidnapping

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	50%	50%	0%	2
2	66.7	0	33.3	6
3	80	20	0	5
4	60	0	40	5
5	100	0	0	1
6	50	0	50	2
7	100	0	0	4
8	75	0	25	4
9	60	20	20	5
10	100	0	0	3
11	100	0	0	1
12	50	0	50	2
13	50	50	0	6
14	66.7	16.7	16.7	6
15	75	0	25	4
16	100	0	0	4
17	0	66.7	33.3	3
18	75	0	25	4
19	25	37.5	37.5	8
20	75	25	0	4
21	0	0	0	0
22	100	0	0	2
23	77.8	22.2	0	9
24	100	0	0	3
25	83.3	16.7	0	6
26	0	0	0	0
27	83.3	16.7	0	6
28	0	0	0	0
29	50	50	0	2
30	0	100	0	1
31	75	0	25	4
Total	**67.9%**	**17%**	**15.1%**	**106**

Homicide

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	100%	0%	0%	3
2	52.4	28.6	19	21
3	80	0	20	5
4	60.9	8.7	30.4	46
5	66.7	0	33.3	6
6	33.3	33.3	33.3	6
7	69.2	7.7	23.1	13
8	80	0	20	5
9	100	0	0	6
10	50	12.5	37.5	8
11	50	0	50	8
12	50	12.5	37.5	8
13	61.5	23.1	15.4	39
14	76.9	15.4	7.7	13
15	62.5	25	12.5	8
16	50	16.7	33.3	6
17	80	20	0	5
18	0	100	0	1
19	66.7	16.7	16.7	6
20	66.7	33.3	0	3
21	66.7	16.7	16.7	6
22	28.6	0	71.4	7
23	87.5	12.5	0	8
24	57.1	0	42.9	7
25	100	0	0	4
26	100	0	0	7
27	72.7	18.2	9.1	11
28	33.3	0	66.7	3
29	66.7	0	33.3	6
30	100	0	0	2
31	71.4	0	28.6	7
Total	64.4%	13%	22.5%	284

Offenses Against the Person

Robbery

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	53.1%	28.1%	18.8%	32
2	66.3	18.1	15.7	83
3	75.9	20.7	3.4	29
4	63.6	14.8	21.6	88
5	70	5	25	20
6	22.2	44.4	33.3	9
7	67.2	19.4	13.4	67
8	69.6	21.7	8.7	46
9	72.2	11.1	16.7	18
10	93.8	6.3	0	16
11	77.3	22.7	0	22
12	41.7	16.7	41.7	24
13	62.5	18.8	18.8	48
14	61.8	26.5	11.8	34
15	70.3	24.3	5.4	37
16	47.4	42.1	10.5	19
17	50	20.8	29.2	24
18	52.4	47.6	0	21
19	73.2	19.5	7.3	41
20	55.6	22.2	22.2	9
21	64.3	21.4	14.3	14
22	70.6	11.8	17.6	17
23	26.9	46.2	26.9	26
24	58.6	31	10.3	29
25	66.7	16.7	16.7	12
26	73.3	6.7	20	15
27	14.3	71.4	14.3	7
28	80	0	20	5
29	50	50	0	2
30	0	0	100	1
31	50	33.3	16.7	18
Total	62.5%	22.1%	15.4%	833

Rape

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	25%	75%	0%	4
2	50	38.9	11.1	18
3	0	50	50	2
4	70.6	11.8	17.6	17
5	100	0	0	2
6	66.7	33.3	0	6
7	75	12.5	12.5	16
8	55.6	33.3	11.1	9
9	14.3	42.9	42.9	7
10	50	33.3	16.7	6
11	100	0	0	4
12	80	20	0	5
13	77.8	11.1	11.1	9
14	57.1	42.9	0	7
15	76.9	15.4	7.7	13
16	85.7	14.3	0	7
17	71.4	0	28.6	7
18	55.6	44.4	0	9
19	60	20	20	5
20	100	0	0	5
21	0	75.0	25	4
22	57.1	28.6	14.3	7
23	20	80	0	5
24	66.7	0	33.3	6
25	66.7	33.3	0	6
26	70	30	0	10
27	57.1	42.9	0	7
28	100	0	0	3
29	0	50	50	2
30	0	0	0	0
31	70	30	0	10
Total	62.4%	27.1%	10.6%	218

Sexual Assault

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	33.3%	41.7%	25%	12
2	66.7	15.2	18.2	33
3	66.7	0	33.3	3
4	69.2	20.5	10.3	39
5	85.7	7.1	7.1	14
6	36.4	36.4	27.3	11
7	86.7	6.7	6.7	15
8	66.7	33.3	0	6
9	72.7	18.2	9.1	11
10	81.8	9.1	9.1	11
11	75	0	25	8
12	66.7	25	8.3	12
13	92.9	0	7.1	14
14	50	10	40	20
15	61.1	22.2	16.7	18
16	59.1	4.5	36.4	22
17	33.3	16.7	50	6
18	50	0	50	8
19	53.1	6.3	40.6	32
20	87.5	12.5	0	8
21	83.3	16.7	0	6
22	66.7	0	33.3	6
23	47.4	5.3	47.4	19
24	50	35.7	14.3	14
25	65.2	21.7	13	23
26	58.3	25	16.7	12
27	66.7	29.2	4.2	24
28	0	0	100	2
29	40	40	20	15
30	50	50	0	2
31	66.7	25	8.3	12
Total	62.6%	17.1%	20.3%	438

County Courthouse Appomatox County Courthouse Caroline County Courthouse Cumberland County Courthouse Fairfax Coun

nge County Courthouse Prince William County Courthouse Rockbridge County Courthouse Spotslyvania County Courthouse Alb

County Courthouse Greene County Courthouse Hanover County Courthouse Louisa County Courthouse Madison County Cour

pomatox County Courthouse Caroline County Courthouse Cumberland County Courthouse Fairfax County Courthouse Goochla

PrinceWilliam County Courthouse Rockbridge Courthouse Albermarle County Courtho

Sentencing Guidelines Hotline

For information, call
804-225-4398

unty Courthouse Hanover County Courthouse Louisa County Courthouse Madison County Courthouse Orange County Courthou

se Caroline County Courthouse Cumberland County Courthouse Fairfax County Courthouse Goochland County Courthouse Gre

urthouse Rockbridge County Courthouse Spotslyvania County Courthouse Albermarle County Courthouse Appomatox County C

ounty Courthouse Louisa County Courthouse Madison County Courthouse Orange County Courthouse Prince William County C