

Voluntary Sentencing Guidelines

Pilot Program Evaluation
September 1989



Supreme Court of Virginia



**Final Report
of the
Judicial Sentencing Guidelines
Oversight Committee
on the
Sentencing Guidelines Pilot Program**

**Presented to
The Judicial Conference of Virginia
September 1989**

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INTRODUCTION

In July 1982, Governor Charles S. Robb appointed a special Task Force on Sentencing, citing the pivotal role which sentencing plays in the the criminal justice process. He asked this group to conduct a thorough study of sentencing policies and practices throughout the Commonwealth and to recommend changes where appropriate.

When the Task Force on Sentencing issued its final report in December 1983, it concluded that wide variations in the use of incarceration and the length of prison terms for similar offenses and offenders existed across Virginia. It also concluded that these variations were partially attributable to factors like the race and socioeconomic circumstances of the offender and the location of the court.

Pursuant to these conclusions, the Task Force's most prominent recommendation in its final report was for the development of historically based sentencing guidelines to articulate a consistent sentencing policy. In fact, ten of the twelve recommendations included in the final report were concerned with the development of such guidelines. Shortly thereafter, Secretary of Transportation and Public Safety Franklin B. White authorized the institution of an automated system for collecting data on sentenced felons through the Department of Corrections in order to insure the existence of an historical foundation for the development of sentencing guidelines.

In March 1985, Chief Justice Harry L. Carrico appointed an ad hoc committee on sentencing guidelines with the explicit charge of constructing a methodology for the development of sentencing guidelines in Virginia. This committee issued its "blueprint" for such development in May 1985 and presented it to the members of the Judicial Conference.

Though the Judicial Conference endorsed the methodology constructed by the ad hoc committee, it voted to postpone the actual development of sentencing guidelines until more historical data had been collected. Furthermore, some judges believed that the conclusion of the Governor's Task Force regarding the existence of sentencing disparity might have been different had the judiciary participated in the interpretation of the data.

Consequently, Chief Justice Carrico appointed the Judicial Sentencing Oversight Committee in April 1986 to oversee the most detailed and comprehensive analysis of historical sentencing practices ever undertaken in the nation, an analysis of over 18,000 felony sentencings.

The primary conclusion of this committee's final report, issued in October 1986, was that unwarranted sentencing disparity did indeed exist throughout Virginia, both on a general statewide level and on the more specific regional and circuit levels. The committee recommended that constructive use be made of the information studied since it provided an excellent foundation for the operation of sentencing guidelines.

Following the presentation of the Judicial Sentencing Oversight Committee's conclusions and recommendations, the Judicial Conference voted in February 1987 to proceed with the development of voluntary sentencing guidelines. The Chief Justice consequently appointed the Judicial Sentencing Guidelines Oversight Committee to oversee the development of these guidelines and their pilot implementation on July 1988 in six judicial circuits: 4 (Norfolk); 12 (Chesterfield and Colonial Heights); 16 (Albemarle, Fluvanna, Goochland, Louisa, Charlottesville, Greene, Madison, Culpeper, and Orange); 19 (Fairfax County, Fairfax City, and Falls Church); 21 (Henry, Patrick, and Martinsville); and 29 (Tazewell, Russell, Buchanan, and Dickenson). These six pilot circuits have now been using the guidelines for more than a year.

This report presents the final evaluation of the sentencing guidelines pilot program as well as the conclusions and recommendations of the Judicial Sentencing Guidelines Oversight Committee on the matter. It consequently represents the culmination of nearly five years of work by Virginia's judiciary on the issue of sentencing guidelines. The Commonwealth's circuit judges have been fortunate in having had this amount of time to study the issue, and they have similarly been fortunate in having been able to control the research themselves—these are luxuries which judges in other states have not often enjoyed. The Judicial Sentencing Guidelines Oversight Committee therefore presents this report to the Judicial Conference of Virginia with the assurance that the committee has exercised every care to perform its duties in such a manner as to benefit the cause of justice in the Commonwealth.

PURPOSE AND DESCRIPTION OF THE GUIDELINES

The single purpose of Virginia's sentencing guidelines, as stated by the committee charged by the Chief Justice of the Supreme Court of Virginia with developing a method for their construction, is "the establishment of rational and consistent sentencing standards which reduce unwarranted sentencing disparity" (report of the Ad Hoc Committee on Sentencing Guidelines, August 15, 1985, page 1).

Unwarranted and dramatic differences in sentences imposed in similar cases are generally condemned for a variety of reasons. First and foremost, it is unjust for similarly situated offenders convicted of the same offense to receive markedly different sanctions. Such disparities erode the public's confidence in the entire judicial system. Second, when sentencing varies so dramatically, no reasonable expectation exists of what the actual penalty will be for a crime. Without such an expectation for a specific penalty, it is very unlikely that our sanctions can ever serve as effective deterrents of future criminal conduct, because deterrence is strengthened largely through certainty of punishment. Third, many criminal justice professionals, including prison administrators, have noted that unjustified sentencing disparities often arouse great anger towards the "system" on the part of offenders, anger which severely impairs rehabilitation efforts. Many studies have documented that offenders' perception of having been treated unfairly by the "system" is one of the causes of riots and other prison misconduct and well as of recidivism.

Unwarranted sentencing disparity is a complex problem that is not easily solved. Individualized sentencing—tailoring a sentence to a specific case—has been an important component of the American criminal justice system since the late nineteenth century, and many fear that proposed reforms may abandon the goal of individualized justice. The proposed sentencing guidelines system, however, is completely compatible with this concept.

In order to accomplish the stated purpose of reducing unwarranted sentencing disparity, Virginia's judiciary has developed sentencing guidelines which differ from other guidelines systems in several very significant ways.

First, the guidelines are not intended to reduce prison populations, to increase or decrease the severity of sentences, to change the philosophy or policy of sentencing throughout Virginia, or to lessen judicial discretion.

Second, the data base used to develop Virginia's guidelines was by far the largest and most comprehensive of its kind in the country: 33,573 felony sentences were analyzed to formulate the original guidelines. Virginia's closest rival in the size of its sentencing data base, Wisconsin, formulated guidelines based on 7,240 cases—a data base about one-

fifth the size of Virginia's. Other states have used even fewer cases in the formulation of their guidelines: Michigan 5,999; Florida 5,100; North Carolina 5,098; Minnesota 4,359; Pennsylvania 2,907; Maryland 1,800; and Massachusetts 1,440. The U.S. Sentencing Commission based the federal sentencing guidelines on an analysis of 11,000 cases. Since the inception of Virginia's guidelines, the supporting data base has continued to grow: it contained 48,077 cases when the guidelines were revised half-way through the pilot program, and it currently contains over 60,000 cases.

Third, Virginia's guidelines indicate only the historical pattern of sentencing throughout the Commonwealth. The guidelines developed by the federal government and by other states reflect a sentencing commission's opinion of what sentencing should be, not what it actually has been. These "normative" guidelines systems—so called because they prescribe a sentencing norm or standard—seek to alter sentencing practice significantly, not simply to articulate it. Virginia's Judicial Sentencing Guidelines Oversight Committee, however, declined to substi-

tute its judgment on sentencing policy for that of the Commonwealth's judiciary as a whole. As a result, Virginia's sentencing guidelines provide a succinct description of historical judicial decision-making.

Fourth, Virginia's guidelines incorporate sentence ranges which are considerably broader than those of the federal system and most other state guidelines systems, thus preserving judicial discretion in sentencing. The guidelines explicitly consider and weigh the circumstances of the crime and the relevant characteristics of the offender, thus providing a judge with a sentence range that encompasses at least 50% of historical sentences for similar cases. The provision of a sentence range acknowledges that for any combination of offense and offender factors, some differences among cases may still exist. The sentencing ranges also recognize that reasonable judges will sometimes reasonably disagree on particular sentencing decisions.

Fifth, Virginia's guidelines have been developed solely by the judiciary. Most other states have employed legislatively created sentencing commissions composed of both judicial and non-judicial members to formulate their guidelines, and the number of judges in these other states has generally totaled about 30% of the commission membership. Of the seven voting members of the U.S. Sentencing Commission, only three are judges. Virginia is one of the very few states in which all the members of the guidelines development group were judges.

Sixth, Virginia's guidelines are voluntary: judges use them as a reference but are not constrained by them. In contrast, the federal guidelines and most other states' guidelines bind judges to adherence through legislative mandate; consequently, departures from these guidelines constitute grounds for appeal. Virginia's guidelines, however, are not legislatively mandated and therefore do not impede a trial judge's authority to sentence outside the guidelines if he or she sees fit to do so.

In seeking to devise a tool which will assist the judiciary in reducing unwarranted sentencing disparity, the Judicial Sentencing Guidelines Oversight Committee believes it has developed a reference instrument which accurately mirrors historical sentencing practices and, at the same time, preserves judicial discretion.

EVALUATION OF THE GUIDELINES

The methodology employed in this evaluation of the effectiveness of the sentencing guidelines examines judicial sentencing practices in the six pilot circuits both before and during the use of the guidelines. In order to determine whether the guidelines were responsible for any observed changes in sentencing practices, the methodology also employed control sites: judicial sentencing practices both before and during the introduction of the sentencing guidelines were examined in the 25 circuits not participating in the pilot use of the guidelines. The use of these control sites allowed the Judicial Sentencing Guidelines Oversight Committee to determine (1) whether sentencing practices in the pilot sites were similar to those in the non-pilot sites before the introduction of the guidelines, and (2) whether any shifts in sentencing practices occurred that were unique to the pilot sites.

Though this methodological design is well suited to the evaluation, one circumstance could not be controlled in the study: since the sentencing guidelines manual was developed as a voluntary decision aid for judges, the committee decided that any judge in the state who requested a manual should receive one. Consequently, over the course of the one-year pilot period, guidelines manuals were mailed to approximately 70 circuit judges outside the six pilot circuits. Of course, systematic use of the guidelines in non-pilot circuits would contaminate the effect of having a control group to compare with the experimental sites. Although anecdotal evidence

suggests that some of the non-pilot judges referred to the guidelines during the pilot period, none of this evidence shows that the guidelines were used in a systematic fashion by a significant number of non-pilot judges. Therefore, the committee believes that the methodology explained in the previous paragraph yielded valid conclusions on the effectiveness of the guidelines in reducing unwarranted sentencing disparity.

Since the goal of Virginia's sentencing guidelines is "the establishment of rational and consistent sentencing standards which reduce unwarranted sentencing disparity," the evaluation of the pilot program had to be based on how well the guidelines achieved this goal. The assessment of such achievement, in order to be objective, therefore had to derive from an analysis of measurable criteria. The two measurable criteria by which the Judicial Sentencing Guidelines Oversight Committee evaluated the success of the guidelines were consistency and neutrality in sentencing. These two criteria are defined and discussed in the following pages.

Sentencing Consistency

The first aim of the sentencing guidelines was to increase consistency in sentencing—that is, to enhance the probability that similarly situated offenders who commit similar crimes would receive similar sentences. The existence of inconsistent sentencing throughout Virginia was proved by the work of the Judicial Sentencing Oversight Committee: the committee's data showed hundreds of instances in which offenders possessing very similar criminal histories and committing the same crimes received widely dissimilar sentences.

As noted earlier, the sentencing guidelines provided judges with a range that encompassed at least 50% of historical sentences for similar cases. This sentencing guidelines range excluded the extreme sentences—both those that were very harsh and those that were very lenient—in its portrayal of a judicial consensus on sanctioning. If these voluntary sentencing guidelines were to be judged effective in increasing consistency in sentencing, judicial compliance with the guidelines would therefore have to be significantly above the 50% threshold established in the guidelines' development. Though the committee set out no specific criterion as a standard for determining "success" in increasing consistency, compliance rates of 75% to 80% have been cited in some other state guidelines programs which have been judged successful in reducing disparity.

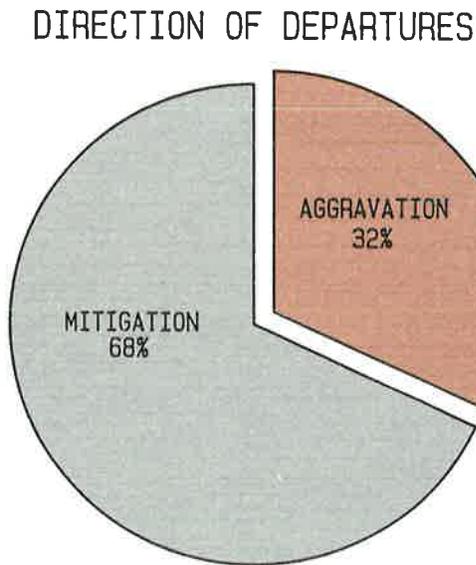
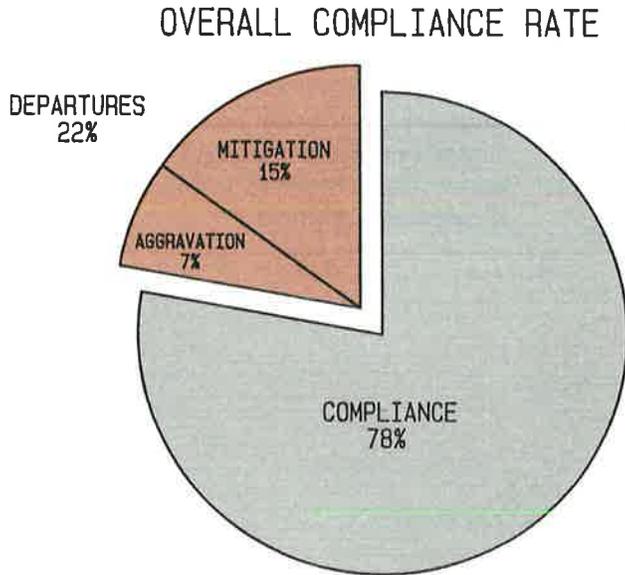
Figure 1

ALL SENTENCING GUIDELINES OFFENSES

SENTENCING GUIDELINES COMPLIANCE RESULTS

TOTAL NUMBER OF CASES: 1561

(1/1/89 - present)



**FIGURE 1**

◦ As Figure 1 shows, overall judicial compliance with the sentencing guidelines in the pilot circuits was 78%. This high compliance rate indicates that judges used the guidelines as a decision aid despite their voluntary nature.

◦ Approximately one out of five sentences (22%) imposed in the pilot circuits was not within the sentencing guidelines.

◦ Overall, 15% of all sentences imposed in the pilot areas were lower than the guidelines, and 7% of all sentences imposed in the pilot areas were higher. In sum, when judges chose to sentence outside the guidelines range, two out of every three sentences were less than the minimum sentence in the guidelines range.

Figure 2

SENTENCING GUIDELINES COMPLIANCE RATES BY OFFENSE

(1/1/89 - present)

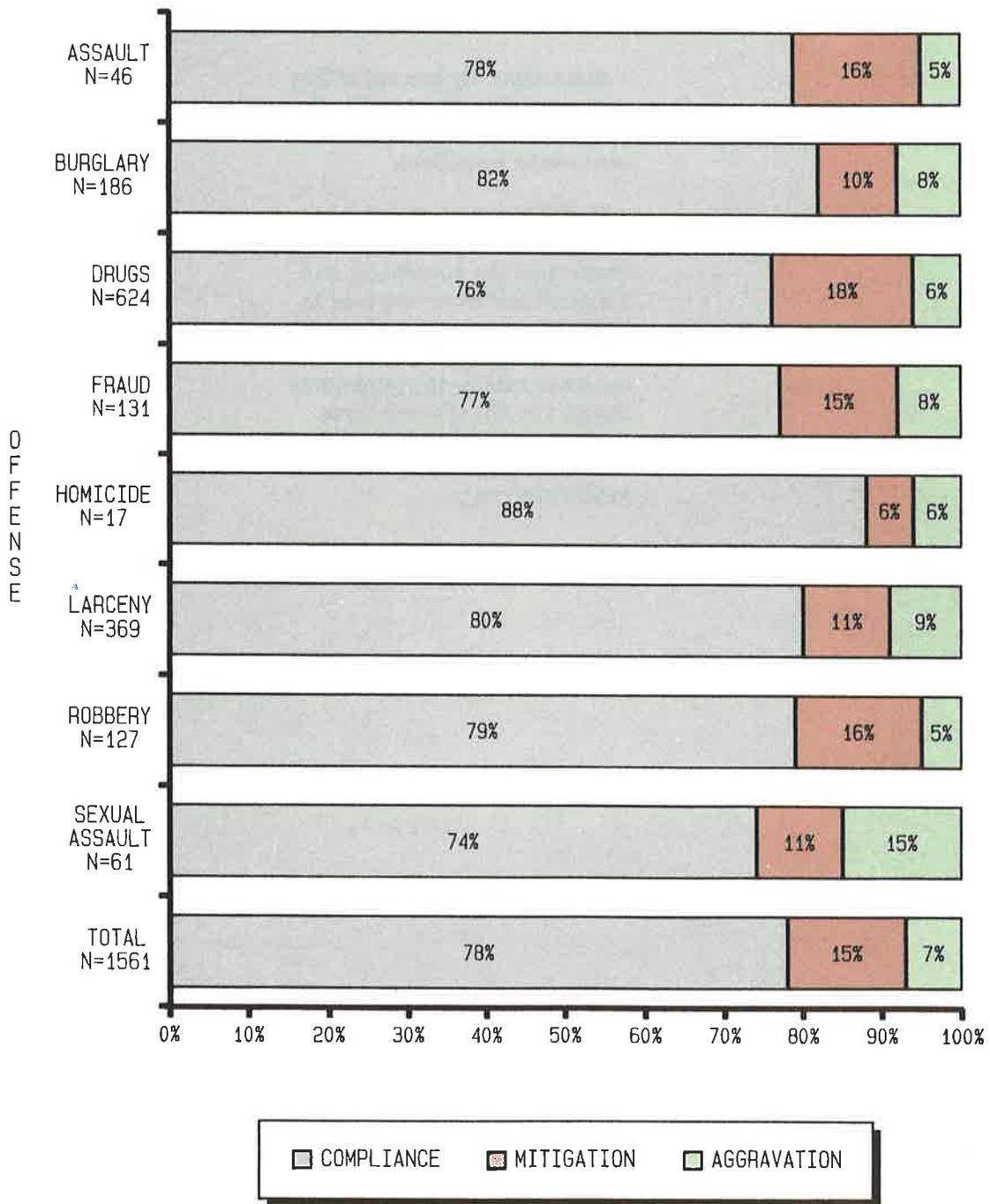


FIGURE 2

- Figure 2 presents the sentencing guidelines compliance rates for each of the eight felony offense groups covered by the guidelines.
- Judicial compliance with the sentencing guidelines for assault was 78%. When judges elected to depart from the guidelines, they were more likely to impose a sentence below the guidelines range. Mitigated sentences were imposed in 16% of all pilot assault sentences, with aggravated sentences making up only 5% of all sanctions.
- The second highest compliance rate was exhibited by the burglary sentencing guidelines (82%). Departures from the burglary guidelines were fairly evenly split, with 10% of all sanctions falling below the guidelines and 8% falling above.
- More than for any other offense studied, judicial sentencing practices for drug offenses have shifted in recent years towards harsher sanctions. The initial drug sentencing guidelines were revised to reflect this recent trend, thereby producing a compliance rate of 76%. The departure trends in guidelines drug sentencing yielded the highest percentage of mitigated sentences (18%). Only 6% of all drug sentences imposed in the pilot sites were greater than the maximum sentence in the guidelines range.
- The highest compliance rate was observed in homicide cases, with 88% of sentences falling within the guidelines.
- The lowest compliance rate was found for sexual assault cases, with 74% falling within the guidelines. Sexual assault sentences provided the only instance in which aggravated departure patterns were more prominent than mitigated: sentences more severe than the guidelines' maximum were imposed in 15% of all cases, while 11% of all sanctions were less severe than the guidelines' minimum.
- In sum, compliance rates across all eight offense groups were consistently high. Judges' departure patterns were also consistent, with mitigated sentences below the guidelines being more likely than aggravated sentences above the guidelines.

Figure 3

SENTENCING GUIDELINES COMPLIANCE RATES BY CIRCUIT

(1/1/89 - present)

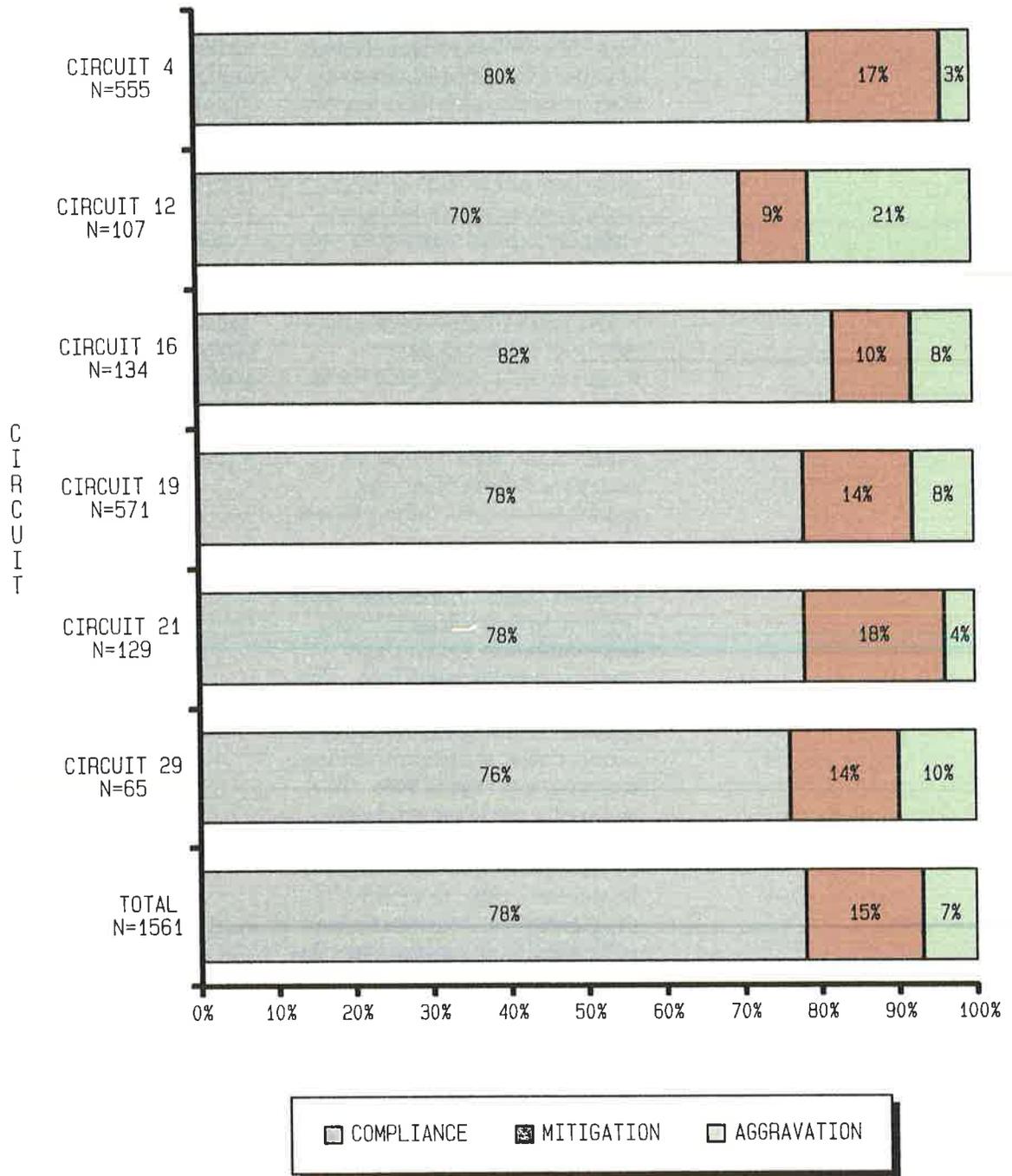


FIGURE 3

- Figure 3 examines judicial compliance rates across the six judicial circuits participating in the pilot program. Overall compliance rates within the circuits ranged from a low of 70% in Circuit 12 to a high of 82% in Circuit 16.
- The two large urban circuits in the pilot study had very similar compliance rates: 80% for Circuit 4 and 78% for Circuit 19.
- The smallest circuit in the pilot study, Circuit 29, had a 76% compliance rate.
- Circuits 4 and 21 had very similar departure patterns from the guidelines: almost all the departures were below the minimum sentence in the guidelines' range.
- Circuits 19 and 29 also shared similar departure patterns from the guidelines, with the majority of the departures falling below the minimum sentence in the guidelines' range.
- Circuit 16's departure pattern was almost evenly split between aggravated and mitigated sentences, though the latter were slightly more common.
- Circuit 12's departure pattern contrasts sharply with the patterns of the other pilot sites in that the majority of departures were above the maximum sentence in the guidelines range. The 21% aggravated departure rate is at least twice that of any other pilot circuit and seven times as great as that of Circuit 4.
- Overall, these similarly high compliance rates across the six pilot circuits are strong evidence that the guidelines were found to be a useful decision aid across judicial circuits diverse in demography, geography, and crime patterns.

Figure 4

CONSISTENCY IN SENTENCING

Percentage of Sentences Within Sentencing Guidelines Ranges

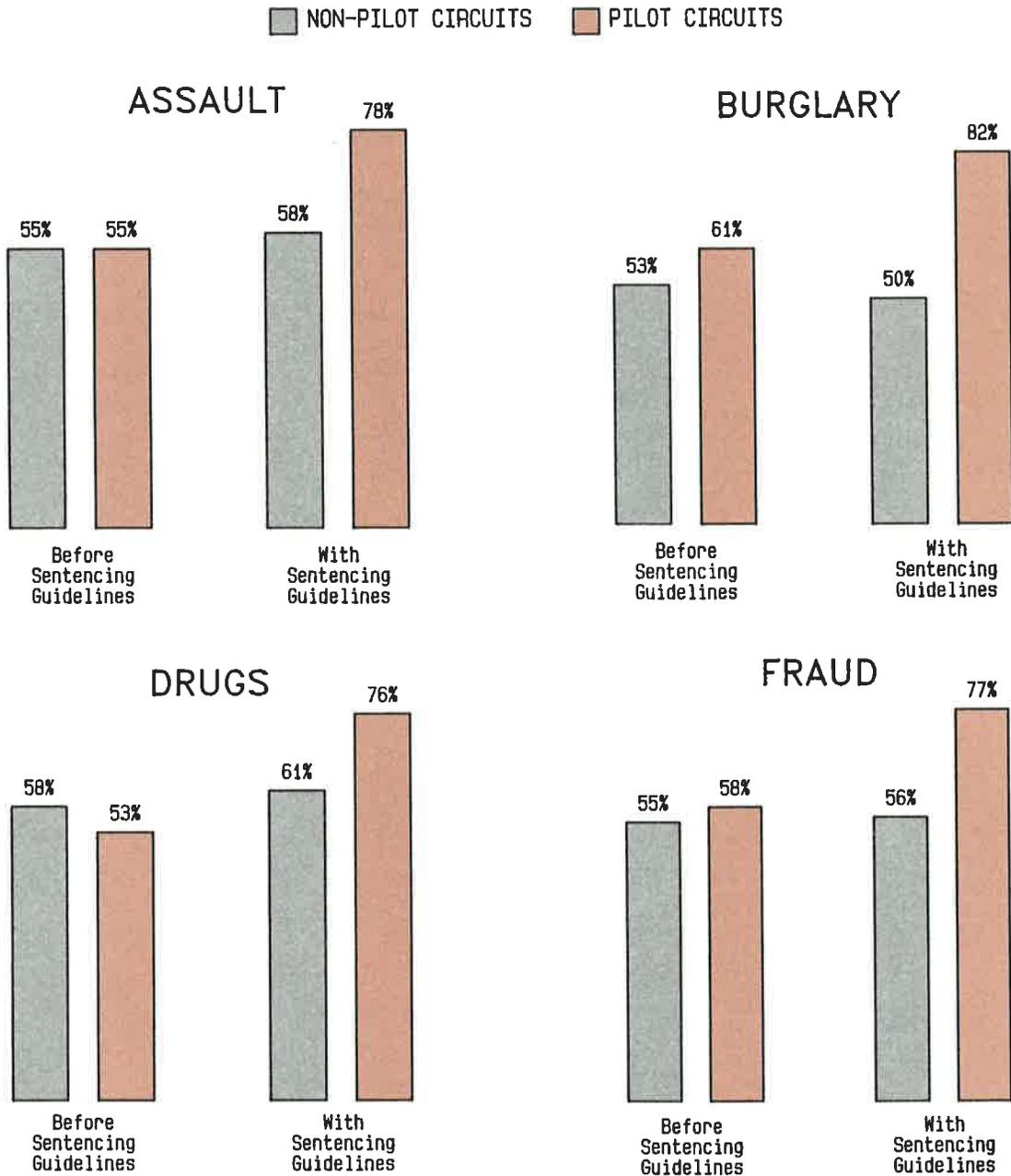


FIGURE 4

- The high compliance rates reported in Figures 1, 2, and 3 strongly suggest that the guidelines have promoted greater consistency and predictability in sentencing. To determine conclusively, however, whether the guidelines were responsible for the greater consistency in sentencing, the evaluation also examined sentencing patterns in both pilot and non-pilot sites before and during the use of the sentencing guidelines.
- Figure 4 portrays the percentages of assault, burglary, drug, and fraud sentences within the guidelines range for the pilot sites and control sites, both before and during the pilot program.
- As noted earlier, the sentencing guidelines are historically premised in that they subsume in their ranges at least 50% of all sanctions imposed in similar cases. Figure 4 reveals that the assault guidelines covered 55% of all sentences imposed before the pilot project in both pilot and non-pilot sites. After the introduction of the guidelines, however, 78% of all assault sentences in the pilot sites fell within the guidelines, as opposed to only 58% of assault sanctions in the non-pilot sites. Similar findings appear in the sentencing patterns for fraud.
- Though the pilot circuits had a larger share of their pre-guidelines burglary sentences within the guidelines than the non-pilot circuits (61% as opposed to 53%), a marked increase in sentencing consistency nonetheless appeared in the pilot circuits. Pilot judges imposed sanctions within the guidelines at a rate of 82% during the pilot period, while only 50% of non-pilot judges did so.
- Before the pilot program began, non-pilot sites had a larger share of drug sentences within the guidelines (58%) than pilot sites (53%). As in every other case, however, sentencing patterns in pilot sites for these offenses became much more consistent during the program than patterns in non-pilot sites, with 76% of pilot sentences falling within the guidelines as opposed to 61% of non-pilot sentences.
- In sum, Figure 4 illustrates that pre-guidelines sentencing patterns in the pilot circuits were similar to those in non-pilot circuits. Furthermore, the findings reveal that sentencing patterns have shifted towards much greater consistency in the pilot sites after the introduction of the sentencing guidelines. Conversely, sentencing patterns in the non-pilot sites remained similar, with little change from pre-guidelines sentencing.

Figure 5

CONSISTENCY IN SENTENCING

Percentage of Sentences Within Sentencing Guidelines Ranges

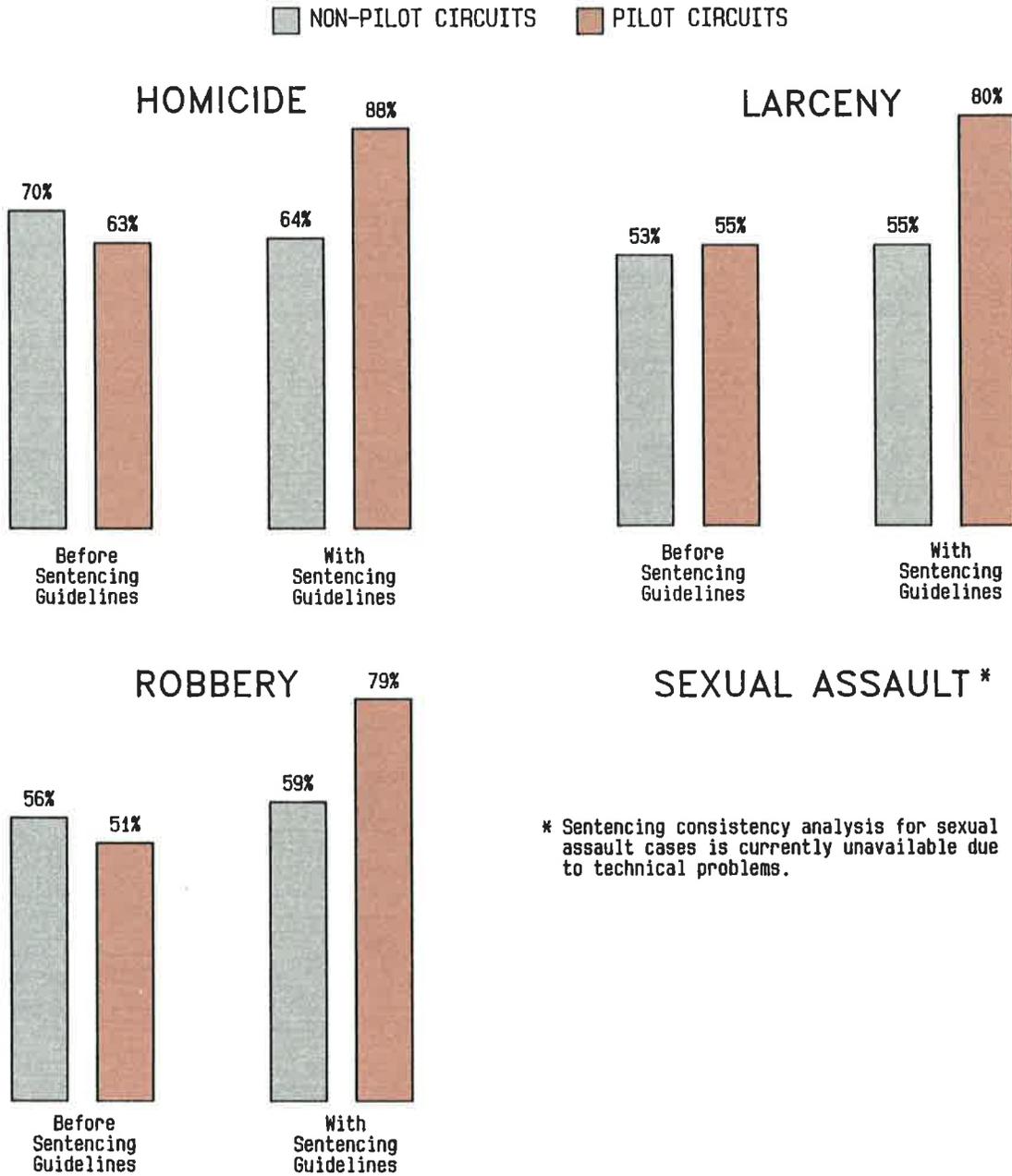


FIGURE 5

- Figure 5 presents the sentencing consistency results for homicide, larceny, and robbery. The findings for sexual assault are currently unavailable due to problems related to the computerized source of the data file.
- Interestingly, the homicide sentencing guidelines contained the largest percentage of pre-guidelines sentences in both the pilot sites (63%) and the non-pilot sites (70%). After the introduction of guidelines, however, sentencing consistency increased 25 percentage points in the pilot sites while it decreased 6 percentage points in non-pilot sites.
- Before the sentencing guidelines were introduced, 56% of robbery sentences in non-pilot sites would have fallen into the guidelines' ranges. Sentencing for this offense in non-pilot sites remained consistent during the program, with 59% of the sanctions falling within the guidelines.
- In contrast, robbery sentencing in the pilot sites shifted markedly towards greater consistency after the introduction of the sentencing guidelines: before the project's introduction, 51% of pilot circuit sentences would have fallen into the guidelines' ranges; during the project, however, 79% of the pilot sites' sentences were within the guidelines.
- The findings for larceny sentences were similar to the findings for other offenses, with a significant shift towards more sentencing consistency occurring only in the pilot sites.
- The findings presented in Figures 4 and 5 provide strong evidence that voluntary judicial reference to the sentencing guidelines has led to more consistent and predictable sentencing.

Sentencing Neutrality

The second aim of the sentencing guidelines was to increase neutrality (impartiality) in the sentencing of all felony offenders—that is, to emphasize the legal facts of the case in the sentencing decision and to de-emphasize those “extralegal” factors which most people believe should be extraneous to the sentencing decision. Such factors included the sex, race, and socioeconomic status of the offender; the identity of the judge; and the geographic location of the court. The work of the Judicial Sentencing Oversight Committee proved beyond question that these and other extralegal factors have sometimes influenced sentencing in the past.

Using a methodology similar to that employed in the analysis of sentencing consistency, an examination of the pre- and post-guidelines sentencing practices in pilot and non-pilot circuits was conducted in order to ascertain the degree of influence of “extralegal” factors in sentencing. This methodology employed sophisticated statistical procedures (see Appendix D) designed to isolate which of the over 200 factors studied exerted influence on sentencing decisions. Any factor determined to be “significant” by this process exerted an independent influence on sentencing decisions beyond that exerted by all the other important factors identified. Thus, in those instances in which the identity of certain judges was found to be a significant factor in sentencing, it can be concluded that, all other

things being equal (same conviction offense, same prior record, same weapon use, and so on), certain judges systematically gave either much harsher or much more lenient sentences than the majority of their colleagues.

Figures 6 through 13 present the findings of this analysis for sentencing decisions for burglary, larceny, drug offenses, and robbery. Two separate sentencing decisions for each of these four offenses were studied: the decision to impose a prison sentence (the “in/out” decision) and, if a prison term was imposed, the decision regarding the length of the prison term (see Appendix C). Technical problems with a computer file and time constraints prohibited the completion of this analysis for the remaining offense groups covered by the guidelines (assault, fraud, homicide, and sexual assault).

If the sentencing guidelines were successful in increasing neutrality in sentencing, the influence of extralegal factors in pilot site sentencing would be expected to decrease, with a corresponding increase in the influence of the legal factors. To insure that any observed changes in judicial behavior in the pilot sites could be attributed to the sentencing guidelines, the analysis also examined sentencing decisions in the 25 non-pilot circuits.

Figure 6

NEUTRALITY IN SENTENCING

Significant Factors for Burglary
(Prison/Non-prison Decision)

LEGAL FACTORS EXTRALEGAL FACTORS

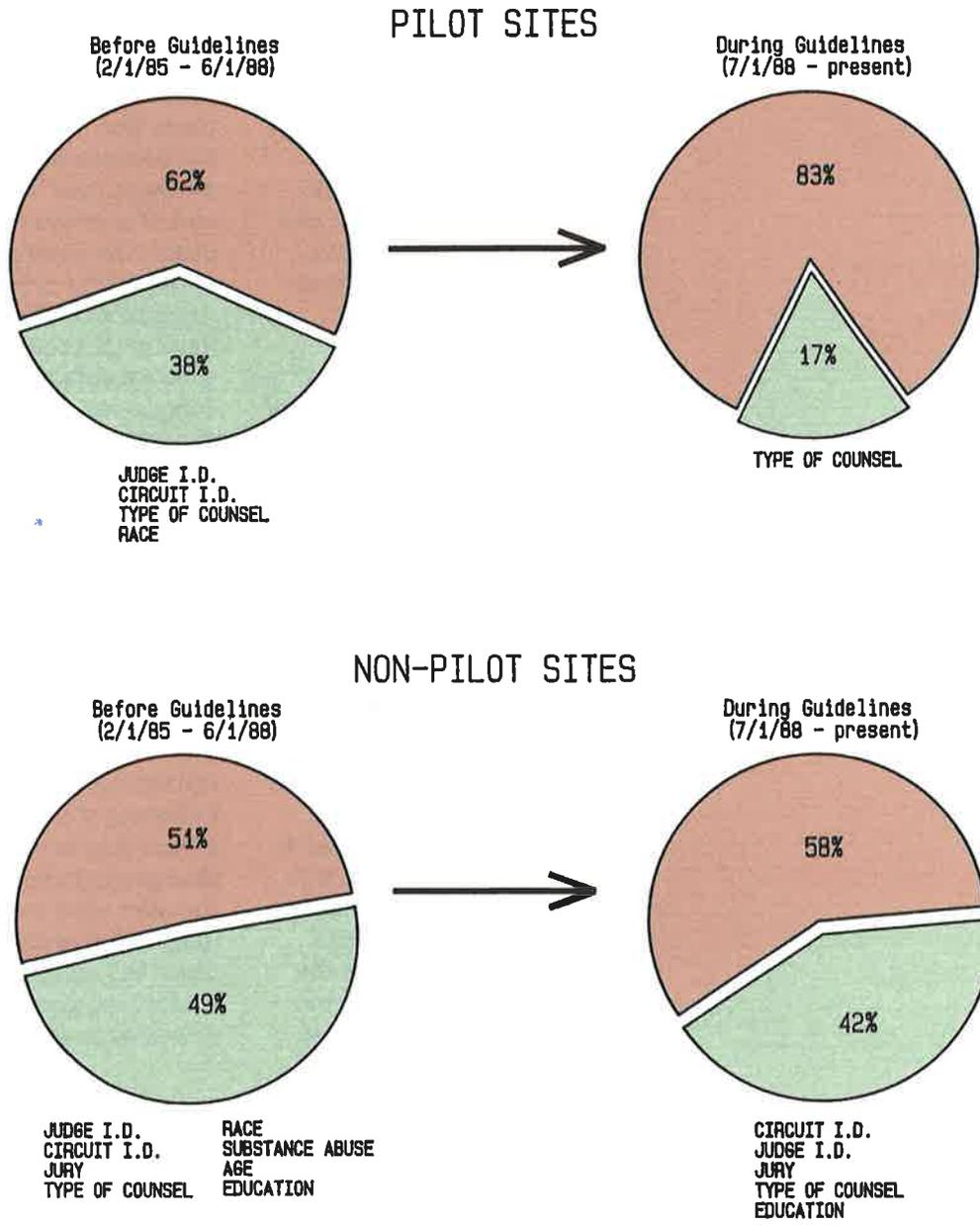


FIGURE 6

- Figure 6 presents the results of an analysis of judicial decisions to impose a prison sentence for offenders convicted of burglary.
- The pie charts illustrating the influence of both legal and extralegal factors on these sentencing decisions show that the latter of these factors played a larger role before the guidelines in the non-pilot sites than in the pilot sites.
- Almost half of the variation in these non-pilot burglary sentences was accounted for by factors unrelated to the legal circumstances of the case. (The significant extralegal factors are listed below each pie chart.)
- While the influence of race, age, and substance abuse became insignificant in the non-pilot sites after the introduction of the guidelines, the five extralegal factors that remained influential still accounted for a significant share (42%) of the circumstances that best explained sentencing variation.
- By contrast, the influence of extralegal factors on these sentencing decisions in the pilot sites was reduced by over one-half during the guidelines' pilot period. Specifically, of the four extralegal factors found to be influential in the pilot sites before the introduction of guidelines, only one (type of counsel) continued to play a significant role during the pilot period.
- Most striking is the finding that, during the test period, the legal circumstances of these cases (type of offense, additional offenses at conviction, prior record, weapon use, and so on) accounted for 83% of sentencing variation in the pilot sites, while only 58% of such variation in the non-pilot sites could be similarly accounted for.

Figure 7

NEUTRALITY IN SENTENCING

Significant Factors for Burglary
(Prison Length Decision)

LEGAL FACTORS EXTRALEGAL FACTORS

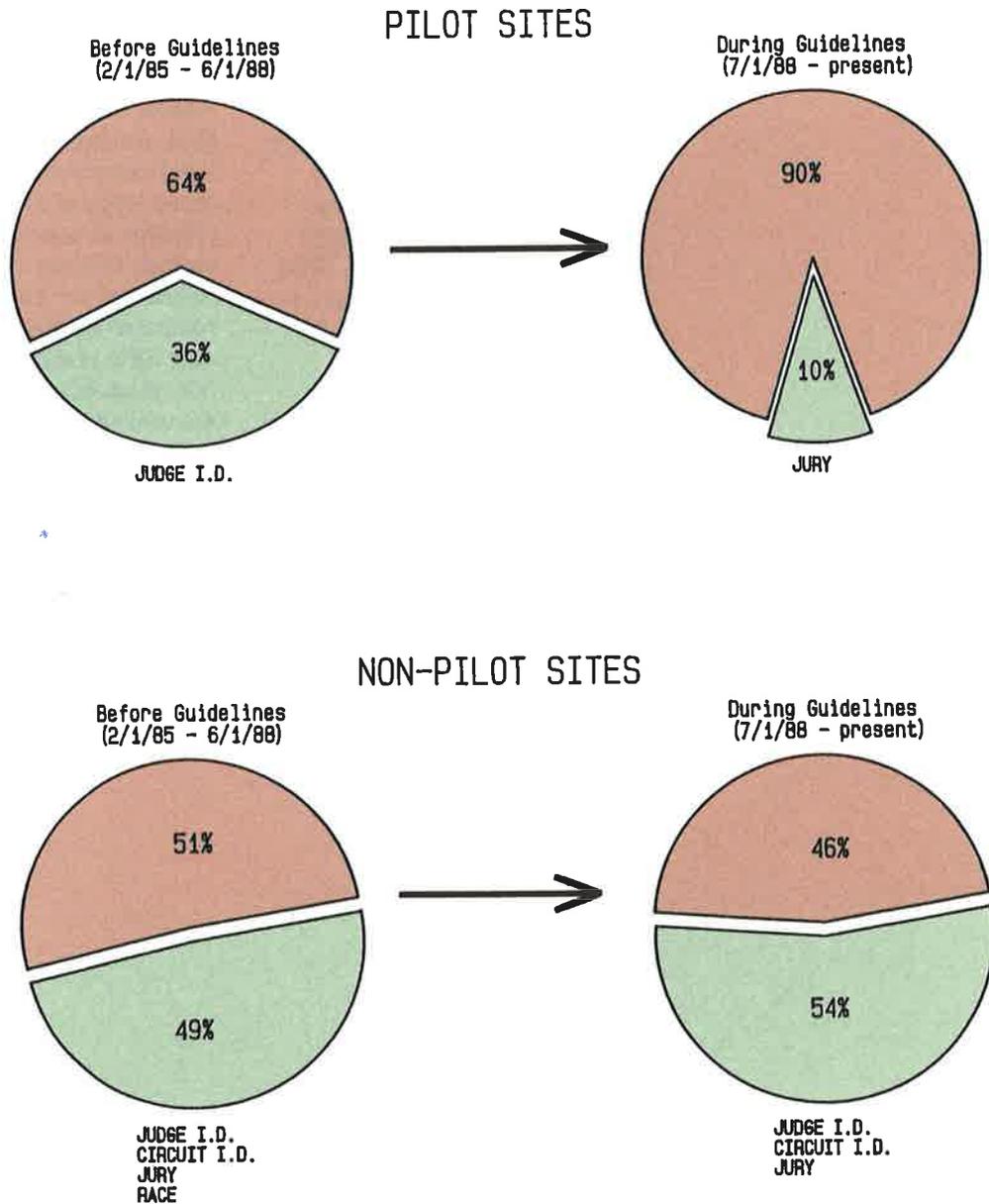




FIGURE 7

- Figure 7 presents the results of an analysis of the prison length decision for those burglary offenders sent to prison. These pie charts illustrate that, once again, the influence of extralegal factors was more prominent in the non-pilot sites than the pilot sites before the introduction of the sentencing guidelines.
- The four extralegal factors found influential in non-pilot sites before the introduction of the guidelines (identity of the judge, identity of the circuit, the presence of a jury, and the race of the offender) accounted for about half of the variation in the length of these prison terms.
- After the introduction of the guidelines, the influence of the offender's race became insignificant in the non-pilot circuits, but the overall impact of the extralegal factors actually increased.
- By contrast, the one extralegal factor which exerted a strong pre-guidelines influence on sentencing in the pilot sites (identity of the judge) was eliminated as a significant factor during the pilot period. Only one factor external to the legal circumstances of the case (the presence of a jury) was determined to be important during the pilot period.
- Most impressively, only 10% of the variation in prison terms in the pilot sites during the test period were accounted for by an extralegal factor, whereas over half (54%) of the variation in non-pilot site prison terms could be similarly explained.

Figure 8

NEUTRALITY IN SENTENCING

Significant Factors for Larceny
(Prison/Non-prison Decision)

LEGAL FACTORS EXTRALEGAL FACTORS

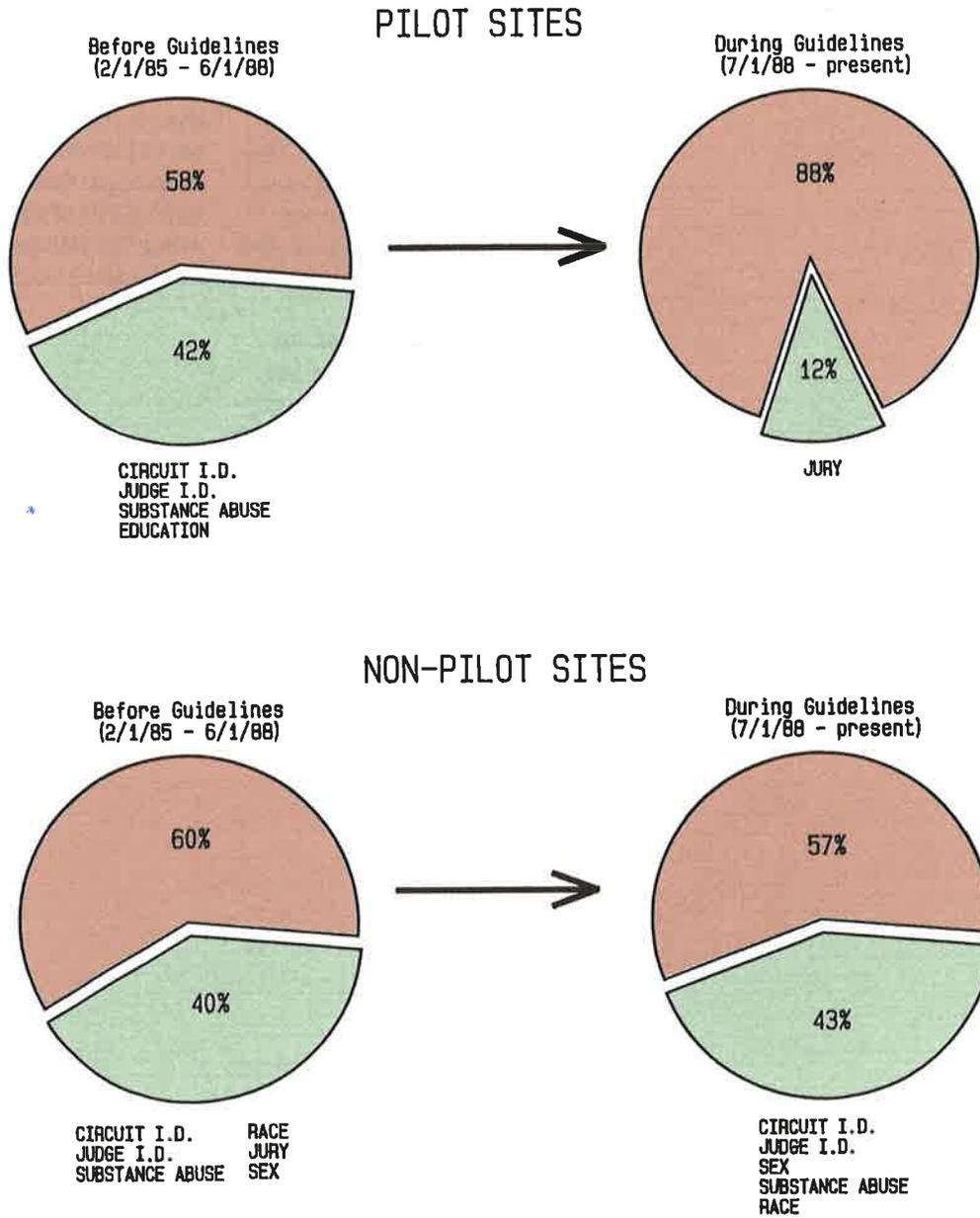




FIGURE 8

- Figure 8 presents the results of an analysis of the judicial decision to impose a prison sentence for offenders convicted of a felony larceny.

- The pie charts illustrate that the extralegal factors, though somewhat different, exerted a similar degree of influence in pilot and non-pilot sites before the introduction of sentencing guidelines (about 40% of the total variation in sentences). In each case, the identity of the judicial circuit and judge demonstrated the strongest explanatory role among the significant extralegal factors.

- The influence of the extralegal factors was significantly curtailed in the pilot sites after the introduction of the sentencing guidelines. The only factor external to the legal circumstances of larceny cases which exerted a significant influence on whether an offender went to prison was the presence of a jury, which accounted for just 12% of this sentencing variation.

- In contrast, the influence of the extralegal factors in non-pilot site sentencing remained constant during the test period. Again, the identity of the circuit and judge continued to play an instrumental role in these prison incarceration decisions.

Figure 9

NEUTRALITY IN SENTENCING

Significant Factors for Larceny
(Prison Length Decision)

LEGAL FACTORS EXTRALEGAL FACTORS

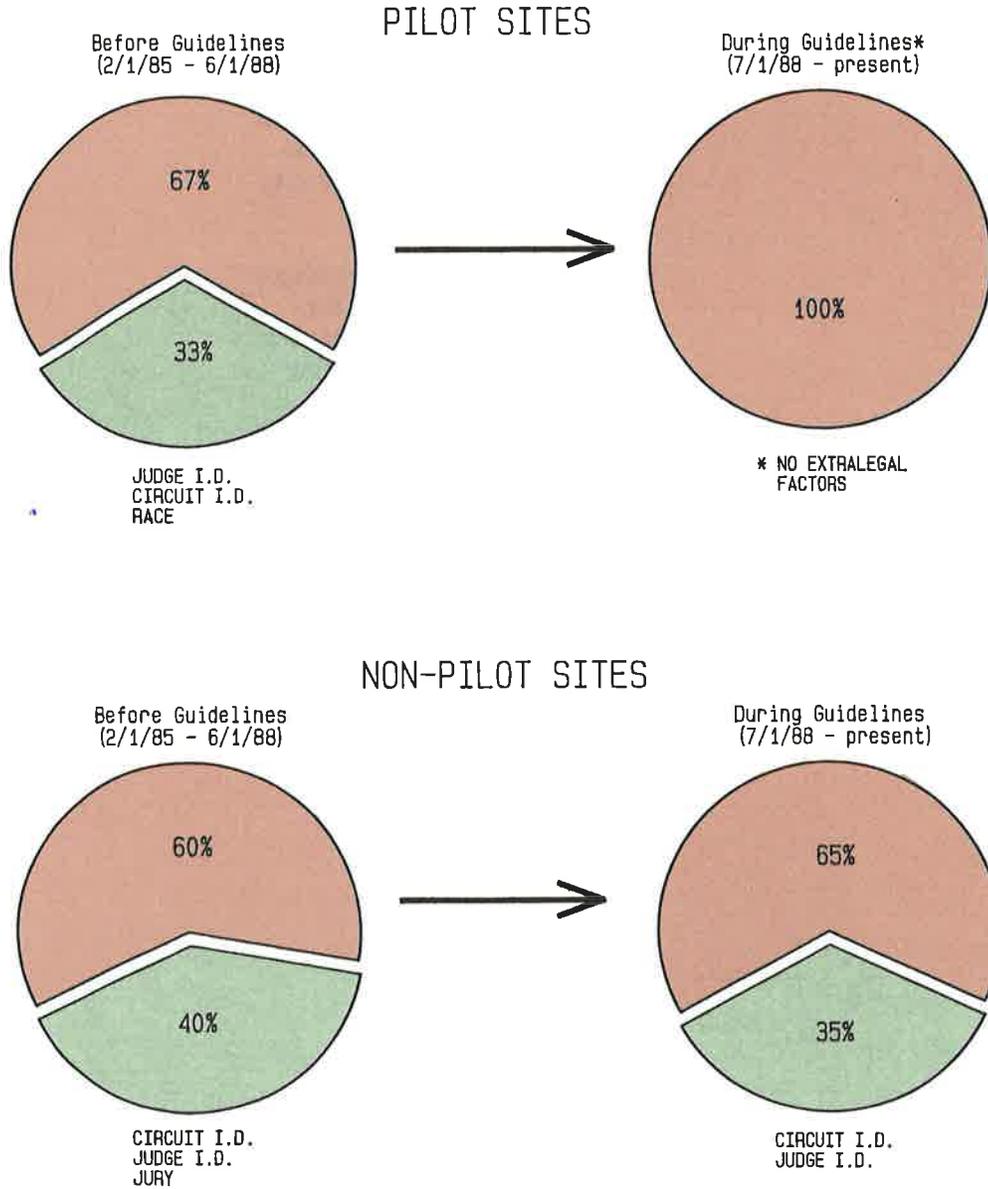


FIGURE 9

- Figure 9 presents the results of an analysis of the prison length decision for those larceny offenders sent to prison.
- The pie charts illustrate that a similar degree of influence was exerted on these sentences by extralegal factors in both pilot and non-pilot sites before the guidelines test period. Again, the identity of the judge and circuit played the strongest role among those extralegal circumstances which best explained variation in prison term lengths.
- The race of the offender exerted a significant influence in pilot site sentencings before the pilot period, while juries accounted for a significant share of the variation in non-pilot site cases for the same period.
- Again, the findings uncovered during the guidelines test period show a dramatic shift towards neutrality in sentencing in the pilot sites. Not one extralegal factor was found to be statistically significant in pilot site prison terms for larceny during the guidelines period. The variation in these prison terms that was a product of judge or circuit identity or the race of the offender before the guidelines' test period was eliminated after the guidelines went into effect.
- In contrast, the influence of the extralegal factors in larceny prison terms in the non-pilot sites continued largely unabated during the test period. The identity of the judge and circuit continued to account for over a third of the variation in prison terms for larceny cases.

Figure 10

NEUTRALITY IN SENTENCING

Significant Factors for Drugs
(Prison/Non-prison Decision)

LEGAL FACTORS EXTRALEGAL FACTORS

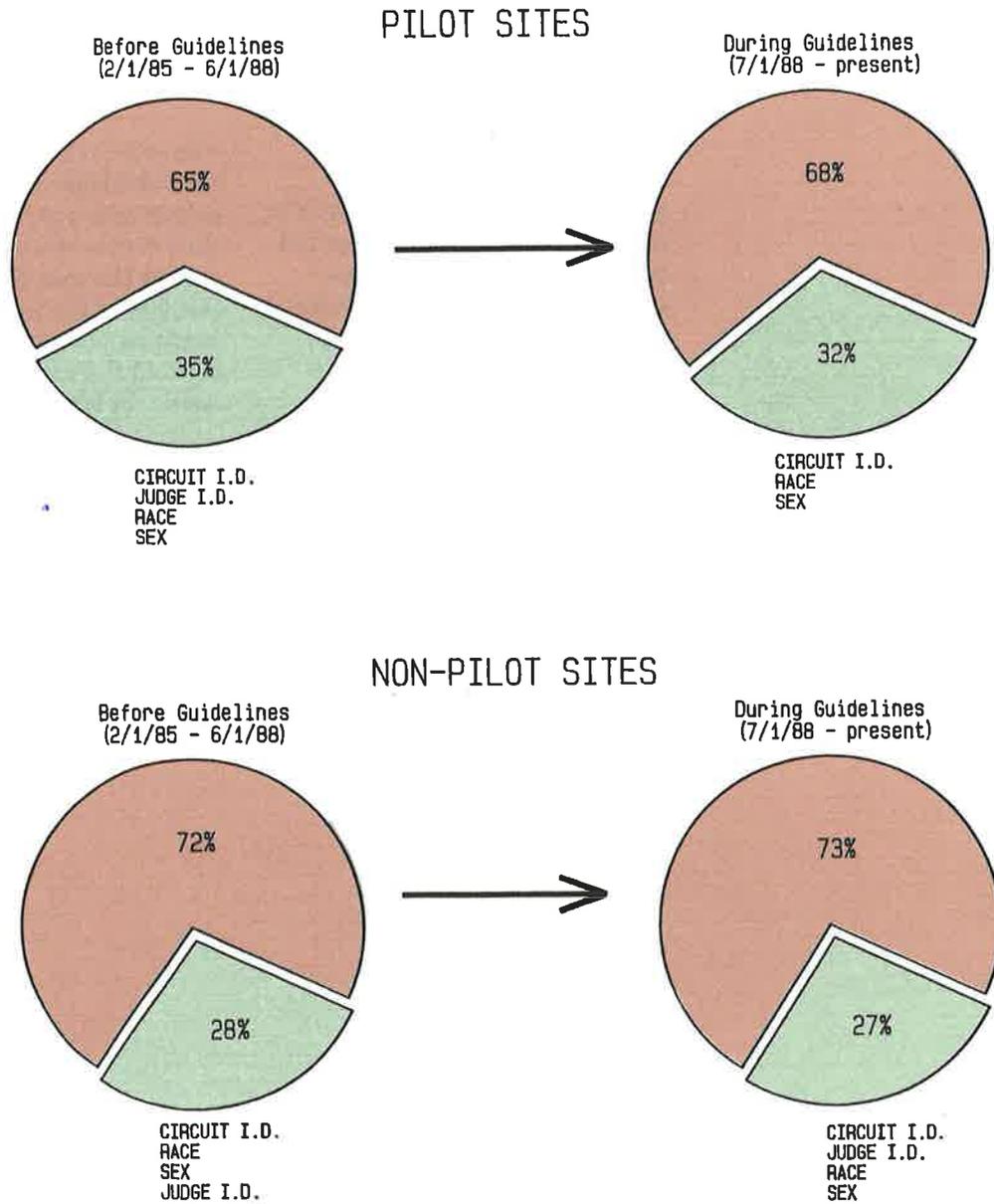


FIGURE 10

- Figure 10 presents the results of an analysis of the judicial decision to impose a prison sentence for offenders convicted of a felony drug offense.
- The pie charts show that the influence of extralegal factors on sentencing prior to the test period was greater in the pilot circuits than in the non-pilot circuits (35% versus 28% of the sentencing variation). The specific extralegal factors found important in pilot and non-pilot circuits were, however, identical: identity of the circuit, identity of the judge, race of the offender, and sex of the offender.
- All other things being equal, black male offenders sentenced by particular judges in certain circuits were significantly more likely to receive prison terms than white offenders, female offenders, or offenders sentenced elsewhere.
- During the guidelines' test period, very little change in sentencing behavior was observed in both the pilot and non-pilot sites. Only the identity of the judge ceased to play a significant role in drug sentencing decisions in the pilot sites. The influence of particular pilot circuits and the race and sex of offenders, however, continued unabated despite reference to the guidelines.
- A similar pattern emerged in the analysis of drug sentencing in non-pilot sites during the test period. In this case, the same four extralegal factors found influential before the guidelines continued to exert the same influence during the pilot period.
- Curiously, the influence of these extralegal factors during the guidelines test period was actually less in non-pilot sites than in the pilot circuits.

Figure 11

NEUTRALITY IN SENTENCING

Significant Factors for Drugs
(Prison Length Decision)

LEGAL FACTORS EXTRALEGAL FACTORS

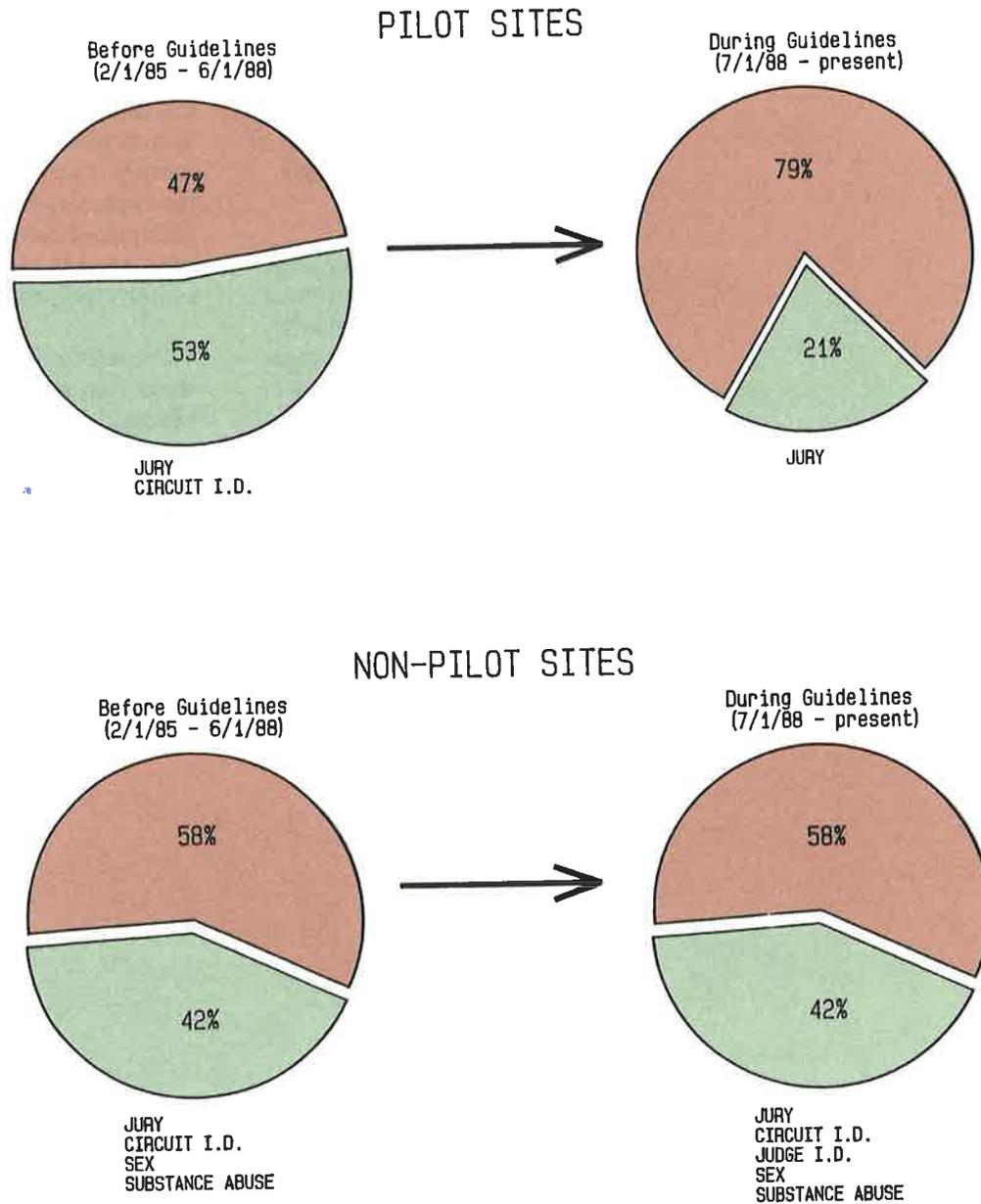


FIGURE 11

- Figure 11 presents the results of an analysis of the prison length decision for those drug offenders sent to prison.
- In findings similar to those of the previous display, the degree of influence of extralegal circumstances on drug prison terms was greater in the pilot sites prior to the introduction of the guidelines (53% versus 42% of the sentencing variation).
- In both the pilot and non-pilot sites, jury sentencing accounted for the greatest share of the extralegal variation in prison terms. All other things being equal, juries consistently imposed much longer prison terms in drug cases than judges.
- In contrast to the findings shown in Figure 10, the influence of the extralegal factors on drug prison terms was sharply reduced in the pilot sites during the guidelines test period.
- Over half of the variation accounted for by the extralegal factors in the pilot circuits was eliminated because of the reduction in the influence of the identity of the circuit. In fact, only one extralegal factor (the jury) continued to account for any significant variation in prison terms in the pilot sites.
- Unlike in the pilot sites, the influence of extralegal factors continued unabated in the non-pilot circuits during the test period. The influence of extralegal factors in drug prison terms was twice as great in the non-pilot sites as in the pilot sites after the introduction of the guidelines.
- Thus, while the guidelines do not appear to have played any role in curbing the influence of extralegal factors in the decision to incarcerate drug offenders, they did exert a significant influence in increasing the neutrality of determining the length of the prison term.

Figure 12

NEUTRALITY IN SENTENCING

Significant Factors for Robbery
(Prison/Non-prison Decision)

LEGAL FACTORS EXTRALEGAL FACTORS

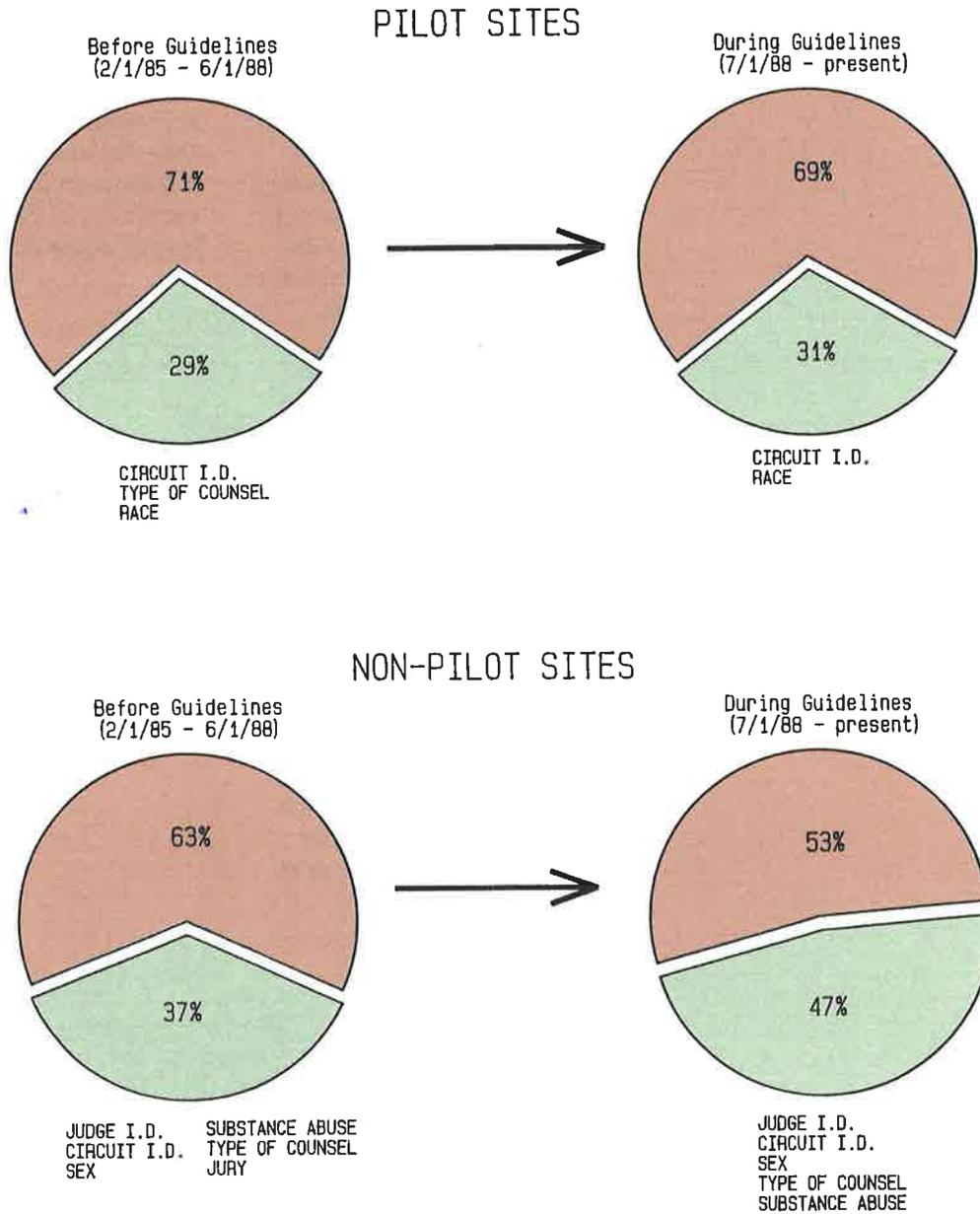


FIGURE 12

- Figure 12 presents the results of an analysis of the judicial decision to impose a prison sentence for offenders convicted of a robbery.
- The pie charts illustrate that the influence of the significant extralegal factors was somewhat greater in the non-pilot circuits prior to the introduction of the guidelines (37% versus 29%). A wider variety of extralegal factors was also found to be important in the non-pilot sites prior to the initiation of the test period.
- During the pilot period, the influence of extralegal factors on pilot site robbery prison “in/out” decisions continued to be strong and slightly increased. Reference to the guidelines in the pilot sites did not lead to more neutral sentencing for black offenders and those sentenced in particular circuits.
- While the influence of extralegal factors slightly increased in the pilot sites during the test period, their influence increased significantly in the non-pilot sites over the same period. Almost half of the variation in these robbery sentencings was accounted for by factors external to the legal circumstances of the case.
- The identity of the judge and the circuit demonstrated the most significant role among these extralegal factors in the non-pilot sites.

Figure 13

NEUTRALITY IN SENTENCING

Significant Factors for Robbery
(Prison Length Decision)

■ LEGAL FACTORS ■ EXTRALEGAL FACTORS

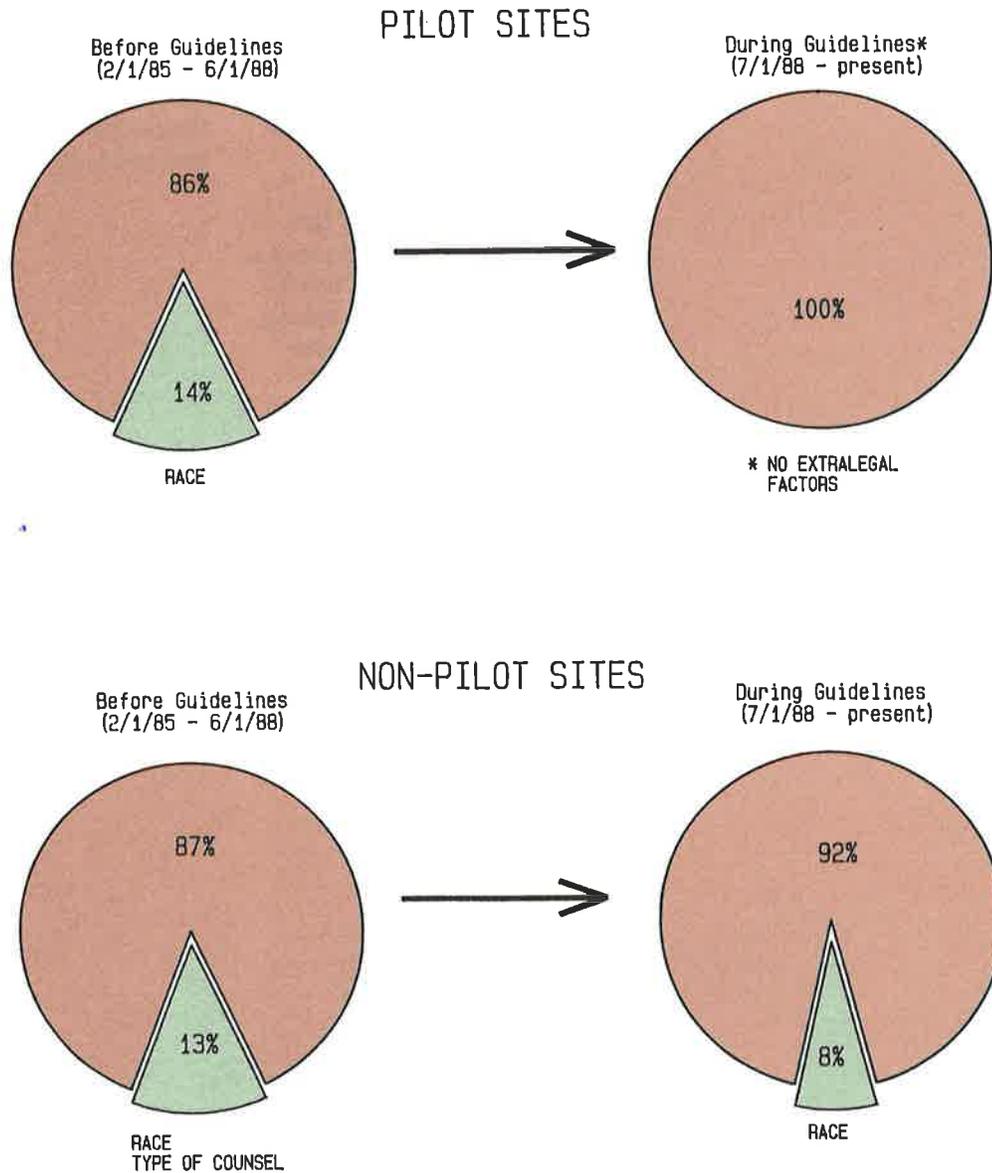


FIGURE 13

- Figure 13 presents the results of an analysis of the prison length decision for those robbery offenders sent to prison.
- The pie charts illustrate that only a small percentage of the variation in robbery prison terms in both pilot and non-pilot sites was accounted for by extralegal factors prior to the introduction of the guidelines.
- In both pilot and non-pilot sites, however, black offenders were found to be more likely to receive significantly longer prison terms despite their similarity to other offenders in all other circumstances studied. The influence of race on sentencing was actually more prominent in the pilot sites than in the non-pilot sites prior to the guidelines' test period.
- Those offenders represented by privately retained defense counsel were also found to fare significantly better in the non-pilot sites than those represented by a public defender or by court-appointed counsel.
- During the guidelines' test period, no extralegal factors were found to exert an influence on prison terms imposed in the pilot sites. Reference to the sentencing guidelines eliminated the offender's race as a consideration in the length of the prison term.
- In contrast, the race of the offender continued to be a significant factor in robbery prison terms imposed in non-pilot circuits, although this factor accounted for only a small share of the total variation in these sentencings.
- Thus, while reference to the guidelines in the pilot sites did not seem to influence the neutrality of robbery sentencing when the prison "in/out" decision was in question, the guidelines did exert a positive influence in eliminating the impact of an offender's race in the prison length decision.

Evaluation Summary

- In sum, the analysis documented instances in which black offenders received significantly harsher sanctions than white offenders, despite being similar in all other respects. The analysis also found that the identity of the judge was often one of the most important factors in the sentence decision.
- Such practices undermine the public trust and confidence in the entire judicial process. The interests of justice demand that distinctions in sentences be premised on differences in case circumstances and not on the demographic attributes of the offender or on the identity of the judge.
- Use of the sentencing guidelines in the pilot sites has fostered more neutrality in sentencing because the guidelines weigh only the legal distinctions in the offense (e.g., weapon use or victim injury) and the offender (e.g., prior criminal record).
- The evidence presented in Figures 6 through 13 demonstrates many instances in which judicial reference to the sentencing guidelines has resulted in more neutrality in the imposition of sanctions. No such effect, however, was shown in the circuits not participating in the pilot program.
- Before the introduction of the sentencing guidelines, the identity of the sentencing judge usually played a significant role in determining sentences throughout the Commonwealth: judicial identity was a significant sentencing factor in five out of eight studied instances in the pilot sites and in six out of eight studied instances in the non-pilot sites. After the introduction of the sentencing guidelines in the pilot circuits, however, judicial identity ceased to play any significant role in all the instances examined. Conversely, judicial identity continued to be a significant factor in seven of the eight instances studied during the same period in the non-pilot sites. In short, these findings provide strong evidence that reference to the guidelines has eliminated that disparity in sentencing which is solely attributable to the identity of the sentencing judge.
- The fact that reference to the guidelines did not have an impact in curtailing the influence of extralegal factors in two instances out of the eight studied indicates that some problems still remain and that the guidelines are not a panacea which will overcome the traditions of past practices overnight. Nonetheless, these findings provide strong empirical support that the voluntary sentencing guidelines are an important tool in reducing unwarranted disparity in sentencing.

JUDICIAL PERCEPTION OF THE GUIDELINES

On the whole, the judicial perception of the guidelines throughout the pilot circuits was overwhelmingly positive, and this positive perception was informally communicated to the Judicial Sentencing Guidelines Oversight Committee and its staff with great frequency during the course of the pilot program. The most important evidence of the judges' favorable reception of the guidelines, however, was the response to the survey of all judicial participants in the guidelines pilot program.

On June 2, 1989, surveys were mailed to the 33 active judges in the six judicial circuits which had been participating in the sentencing guidelines pilot program for the previous eleven months. The purpose of this survey was to assess the judicial perception of the pilot program from the point of view of those judges with experience in the use of the guidelines.

As of July 7, 1989, 32 judges had responded (97% of those surveyed), either by completing and returning the survey or by agreeing to answer the survey questions in telephone interviews with the guidelines staff.

The following summary of judicial perceptions, therefore, applies to the 32 judges who responded to the survey. The summary is organized according to the six major issues addressed by the survey:

1. the existence of unwarranted sentencing disparity throughout Virginia,
2. the guidelines' diminishment of that disparity,

3. the guidelines' effect on judicial discretion,
4. the advantages of the guidelines,
5. the disadvantages of the guidelines, and
6. the continuation of the guidelines program.

Although these six issues were the major ones addressed by the survey, judicial perceptions of other issues were documented as well. Furthermore, this summary includes only a selection of representative responses to the survey. A complete tabulation of all the responses to all the questions was compiled and is available on request from the sentencing guidelines staff.

Issue 1: The Existence of Unwarranted Sentencing Disparity

The majority of judges (78%) said they had believed that unwarranted sentencing disparity existed in Virginia even before they became familiar with the work of the Judicial Sentencing Guidelines Oversight Committee, with most of these respondents characterizing the disparity as "widespread" or "significant." Some judges (15%) said they had not believed in the existence of unwarranted sentencing disparity before becoming familiar with the work of the committee, and the rest said they had not known.

Most of the judges (62%) said that their experiences with the sentencing guidelines had not changed their previous perceptions of the prevalence of unwarranted sentencing disparity. These were largely the same judges who said they had believed in the existence of unwarranted sentencing disparity even before becoming familiar with the work of the commit-

tee. Of those who said their perceptions had changed, most said they now believed that unwarranted disparity was more widespread than they had formerly thought.

Addressing this issue, one of the judges said, "I always felt that there was considerable unwarranted disparity, but I couldn't prove it. Experiences in classes on sentencing at the National Judicial College first made me aware of the existence of unwarranted disparity. Observation of my colleagues also contributed to the awareness." Another judge said, "I didn't realize that so many judges had 'unwritten policies' that had no correlation to the general level of sentencing throughout the Commonwealth."

Issue 2: The Diminishment of Unwarranted Sentencing Disparity

The great majority of judges (90%) said they believed that the guidelines have increased the consistency of sentences handed down in felony cases. Two judges said they did not believe that the guidelines have had this effect, and one judge said he did not know.

Addressing this issue, one of the judges said, "The guidelines have been remarkably successful in achieving the goal of reducing unwarranted sentencing disparity." Another judge said, "Our analysis of sentencing practices in the pilot circuits shows a high rate of compliance and a reduction in unwarranted disparity. Further, many judges operating outside of the pilot circuits have requested and received sentencing guidelines materials and are currently using them—reducing sentencing disparity even outside of the pilot sites."

Issue 3: The Guidelines' Effect on Judicial Discretion

The great majority of the judges (90%) said that the guidelines have affected judicial discretion minimally or not at all.

Addressing this issue, one of the judges said, "They have enabled me to use my discretion more effectively by causing me to be more consistent. They have enhanced my overall sentencing scheme. I know I'm treating people fairly. They have not undermined my discretion at all. I rarely go outside the guidelines." Another judge said, "I use them to check on myself. It's like talking to other judges. It's an additional tool to exercise discretion. The ranges are so broad that they encompass all judicial philosophies."

Issue 4: The Advantages of the Guidelines

Every responding judge mentioned at least one major advantage of the guidelines, and most mentioned more than one. The most commonly cited advantage was an increase in sentencing consistency and the consequent reduction of unwarranted sentencing disparity (75%). Another commonly cited advantage was an increased understanding of and confidence in one's own sentencing practices (59%).

Addressing this issue, one of the judges said, "They reduce disparity and act as a check on extreme sentences. They're a tool to see all other sentencing practices and are especially valuable to rural judges. They are an aid to me in articulating what I'm doing, to focus on why I'm doing what I'm doing." Another judge said, "They take an element of stress and emotional turmoil out of sentencing for the judge, the defendant, and the attorneys. There's a greater sense of confidence in a judge's fairness. The guidelines do improve the perception of judicial fairness in the public's eye."

Issue 5: The Disadvantages of the Guidelines

A little over half the judges (53%) perceived no major disadvantages to the guidelines. Of the judges who did perceive disadvantages to the guidelines, most cited one of two disadvantages: (1) the potential for infringement on judicial discretion if the guidelines become mandatory, or (2) the time lapse between a change in overall judicial sentencing practice and the guidelines' revision to reflect that change.

Addressing this issue, one of the judges said, "I see [no disadvantages], given their voluntary nature and the breadth of the ranges. It is simply more information." Another judge said, "Because they are based on an analysis of historical sentencing patterns, they are slow to reflect changing community sentiment, as with drugs. But this is something judges can easily handle pending guidelines revisions."

Issue 6: The Continuation of the Guidelines Program

The great majority of judges (97%) said that having the guidelines available as a reference is preferable to having no guidelines. (The one judge who said he preferred not having the guidelines available also said he did not believe in the existence of unwarranted sentencing disparity.)

Furthermore, the great majority of judges (97%) said that the sentencing guidelines program should be continued and made available throughout the state. (The one judge who said he did not think the program should be continued also said he did not believe in the existence of unwarranted sentencing disparity.)

Addressing this issue, one of the judges said, "Judges everywhere in the state should have the benefit of this exceedingly useful tool." Another judge said, "They have been, to my mind, an unmitigated success, and all judges should have the same advantages of this information that we in pilots districts have had."

CONCLUSIONS AND RECOMMENDATIONS

The law provides no guidance to a judge in deciding which factors to consider and how much weight each factor should have when that judge imposes a specific sentence. Such guidance can be provided by sentencing guidelines.

The members of the Judicial Sentencing Guidelines Oversight Committee support judicial discretion in sentencing. Any sentencing decision must be based on the facts of the case: the offender's prior record, the seriousness of the offenses at conviction, the offender's legal status at the time of the offense, and so on. But these facts vary considerably from one sentencing event to the next, and judges should be permitted to exercise discretion in accounting for aggravating and mitigating circumstances.

Nonetheless, similar offenders who commit similar crimes under similar circumstances should receive similar sentences. This committee believes that the imposition of radically different sanctions without apparent justification on similar offenders who commit similar offenses constitutes unwarranted sentencing disparity.

To determine whether such disparity existed in Virginia was the charge of the previous committee, the Judicial Sentencing Oversight Committee. First, this committee reviewed the comprehensive sentencing data collected by the Department of Criminal Justice Services and the Department of Corrections under the supervision of the judiciary. Next, it supervised the analysis and interpretation of these data. The results of the data analysis illustrated that unwarranted sentencing disparity did exist in Virginia.

Sentencing guidelines offer the possibility of reducing such disparity. The Judicial Sentencing Guidelines Oversight Committee believes that these voluntary sentencing guidelines will help to guide the judiciary in imposing appropriate sentences without losing the human quality of sentencing. We do not believe that sentences should be based on legislative or executive mandate but on judicial discretion following Virginia's historical sentencing practices.

Although trial judges in Virginia have consistently opposed mandatory sentencing guidelines, the great majority (95%) voted to proceed with the development of voluntary sentencing guidelines during the regional judicial meetings of 1986-87. Happily, the quantitative evaluation of the sentencing guidelines pilot program proved that the guidelines have succeeded in their major objectives of significantly increasing appropriate consistency and neutrality in sentencing throughout the six pilot circuits. Furthermore, after a year's experience with the guidelines, the judges in the six pilot circuits responded to the guidelines program very favorably, with nearly unanimous agreement that the program should be continued and expanded statewide.

We on the Judicial Sentencing Guidelines Oversight Committee hope that the enthusiasm of the judges experienced in the use of the guidelines combined with the final analysis of the sentencing data will convince judges outside the pilot circuits that these voluntary sentencing guidelines should be adopted statewide in order to assist trial judges throughout Virginia in performing their most difficult and important task.

Therefore, the Judicial Sentencing Guidelines Oversight Committee requests that the Judicial Conference of Virginia make the following recommendations:

- **that the Chief Justice of the Supreme Court of Virginia make the voluntary sentencing guidelines program available in all judicial circuits throughout the Commonwealth; and**
- **that the statewide sentencing guidelines program be overseen by a standing sentencing committee consisting of six circuit court judges, one from each of Virginia's judicial regions.**

APPENDICES

**APPENDIX A:
History of the
Guidelines****July 1982**

Governor Charles S. Robb appointed his Task Force on Sentencing to conduct a study of current sentencing policies and to recommend changes if appropriate.

December 1983

The Governor's Task Force on Sentencing issued a report recommending that the Supreme Court establish a commission to develop sentencing guidelines.

March 1984

The General Assembly appropriated \$25,000 to the Supreme Court in order to conduct judicial seminars addressing the discoveries of the Governor's Task Force on Sentencing.

September—October 1984

During regional meetings, the Judicial Conference heard presentations by Jack Foster, director of the Governor's Task Force on Sentencing; H. Lane Kneedler, Associate Dean of the University of Virginia School of Law and member of the Governor's Task Force on Sentencing; and the Honorable Marshall Levin, judge and chairman of the Maryland Sentencing Guidelines Board. After hearing these presentations, the Judicial Conference recommended to Chief Justice Harry L. Carrico that the collection and study of pertinent sentencing data continue.

November 1984

The Chairman of the Governor's Task Force on Sentencing, Secretary of Transportation and Public Safety Franklin E. White, authorized the institution of a fully automated system for collecting information on all PSI cases to insure the availability of a comprehensive profile of judicial sentencing.

January 1985

The Executive Committee of the Judicial Conference of Virginia voted to endorse the Department of Criminal Justice Services and the Department of Corrections in their attempt to collect information on historical sentencing practices in order to provide a data base for the possible development of sentencing guidelines. The Executive Committee also voted to recommend that Chief Justice Carrico appoint a judicial committee charged with producing a methodology for the creation of sentencing guidelines.

February 1985

The new standardized Pre-Sentence Information (PSI) collection system was implemented March 1985. Following the recommendation of the Executive Committee, Chief Justice Carrico appointed six judges to the Ad Hoc Committee on Sentencing Guidelines.

May 1985

The Ad Hoc Committee studied the sentencing guidelines of several other states for sources of possible models and subsequently issued recommendations for developing a guidelines program. It also endorsed the continuation of the automated PSI collection system.

September—October 1985

Judges in Regions II, III, and VI voted to approve the Ad Hoc Committee's recommendations for developing sentencing guidelines. Judges in Regions I, IV, and V voted to defer approval until further data had been collected and disseminated.

October 1985

The Executive Committee was presented with the judiciary's vote and heard the Ad Hoc Committee's proposal to set up a pilot site in each judicial region to test its recommendations.

January 1986

The Executive Committee voted to present the complete results of the sentencing data collection and analysis to the judiciary before continuing with the Ad Hoc Committee's recommendations and to postpone implementation of the proposed pilot program. It also recommended that Chief Justice Carrico appoint a new judicial committee charged with insuring judicial supervision and guidance of the Departments of Corrections and Criminal Justice Services in the data collection and analysis.

April 1986

Following the Executive Committee's recommendation, Chief Justice Carrico appointed six judges to the Judicial Sentencing Oversight Committee.

May—October 1986

The Judicial Sentencing Oversight Committee met periodically to examine collected sentencing data and to formulate policy on conducting the data analysis. The results of the data analysis led the committee to conclude that unwarranted sentencing disparity did exist in Virginia.

October 1986

After hearing the final report of the Judicial Sentencing Oversight Committee, the Executive Committee voted to have the results of the sentencing data study presented to the Judicial Conference during regional meetings.

February 1987

After seeing the results of the sentencing data study, judges in all six judicial regions voted to recommend that the Executive Committee approve the implementation of voluntary sentencing guidelines in six pilot circuits, one circuit from each region.

February 1987

The Executive Committee voted to proceed with the development of voluntary sentencing guidelines through a pilot program and to have the results presented to the Judicial Conference after the program's culmination. It also recommended that the Chief Justice appoint a new judicial committee to supervise the development of voluntary sentencing guidelines.

June 1987

Chief Justice Carrico appointed six judges to the Judicial Sentencing Guidelines Oversight Committee.

June 1987—February 1988

The Judicial Sentencing Guidelines Oversight Committee met periodically to develop voluntary sentencing guidelines.

February 1988

After examining the guidelines developed by the Judicial Sentencing Guidelines Oversight Committee, the Executive Committee voted to approve their implementation in six pilot sites. The judges in the six circuits represented by the members of the Judicial Sentencing Guidelines Oversight Committee volunteered their circuits to be the pilot sites.

March 1988—August 1989

The Judicial Sentencing Guidelines Oversight Committee continued to meet periodically to monitor the guidelines program.

May—June 1988

Training sessions in the use of the sentencing guidelines were conducted throughout the six pilot circuits for judges, Commonwealth's Attorneys, defense attorneys, probation officers, and other participants in the program.

July 1988

Voluntary sentencing guidelines went into effect in the six pilot circuits.

January—February 1989

The sentencing guidelines were revised to reflect recent changes in sentencing practices.

June 1989

The sentencing guidelines pilot program officially ended, but judges in the pilot sites decided to continue using the guidelines until such time as the Judicial Conference formally voted to decide whether or not the program should be expanded throughout the Commonwealth.

**APPENDIX B:
Judicial Supervision of
the Development of the
Guidelines**

The guidelines were developed through the work of three judicial committees, each committee consisting of one senior circuit court judge from each of Virginia's six judicial regions.

The Ad Hoc Committee on Sentencing Guidelines

First, the Chief Justice of the Supreme Court of Virginia charged the Ad Hoc Committee on Sentencing Guidelines with producing a method for the creation of voluntary sentencing guidelines. This committee was chaired by the Honorable Joshua L. Robinson (Circuit 26, Region VI), and the other members were the Honorable Robert W. Stewart (Circuit 4, Region I), the Honorable F. Bruce Bach (Circuit 19, Region II), The Honorable Thomas N. Nance (Circuit 13, Region III), the Honorable Jack B. Coulter (Circuit 23, Region V), and the Honorable Nicholas E. Persin (Circuit 29, Region IV).

The committee's recommendations, submitted to the Chief Justice on August 15, 1985, were as follows:

1. The guidelines should describe historical sentencing patterns.
2. Sentences imposed by juries should be included in the data base.
3. Consecutive/concurrent sentencing information should be included in the data base.
4. The guidelines should include those offense and offender factors found to be statistically relevant in the analysis of historical sentencing practices.
5. The guidelines should include sentence ranges but should list in each range the average and median sentences.
6. Non-incarcerative dispositions should be included in the guidelines.
7. The guidelines should deal with felonies only.
8. The guidelines sentences should not be influenced by the availability of correctional resources.
9. The guidelines sentences should be developed within the structure of current parole legislation.
10. A sentencing commission should be created in order to make policy decisions relevant to the development of sentencing guidelines.
11. The guidelines should be established and promulgated by the sentencing commission.
12. The guidelines should be advisory, not mandatory.

13. Written explanation for departure from the guidelines is necessary.

14. Departure from the guidelines should not constitute grounds for appeal.

15. Guidelines work sheets should be uncomplicated and easy to complete. They should be completed by the probation officer or by some other person designated by the sentencing judge.

The Judicial Sentencing Oversight Committee

Next, the Chief Justice charged the Judicial Sentencing Oversight Committee with determining whether or not sufficient unwarranted sentencing disparity existed throughout Virginia to justify the development of voluntary sentencing guidelines. This committee was chaired by the Honorable Ernest P. Gates (Circuit 12, Region III), and the other members were the Honorable Robert W. Stewart (Circuit 4, Region I), the Honorable F. Bruce Bach (Circuit 19, Region II), the Honorable Nicholas E. Persin (Circuit 29, Region IV), the Honorable Frank I. Richardson (Circuit 21, Region V), and the Honorable Henry H. Whiting (Circuit 26, Region VI).

The committee's conclusions and recommendations, submitted to the Chief Justice on November 18, 1986, were as follows:

1. The data analysis demonstrates the existence of unwarranted sentencing disparity in the Commonwealth, both on a general statewide level and on the more specific regional and circuit level.

2. The research staff has performed its work with the highest degree of professional integrity, devoting nearly 3,000 man-hours to the production of an analysis characterized by objectivity, completeness, accuracy, and clarity.

3. The current data system should be maintained to insure its continued reliability and should be supervised by the state's trial judges.

4. Constructive use should be made of the large amount of information examined by the committee since this information provides Virginia's judiciary with the foundation for the operation of sentencing guidelines.

The Judicial Sentencing Guidelines Oversight Committee

Finally, the Chief Justice charged the Judicial Sentencing Guidelines Oversight Committee with developing voluntary sentencing guidelines. This committee was chaired by the Honorable Ernest P. Gates (Circuit 12, Region III), and the other members were the Honorable Robert W. Stewart (Circuit 4, Region I), the Honorable F. Bruce Bach (Circuit 19, Region II), the Honorable Nicholas E. Persin (Circuit 29, Region IV), the Honorable Frank I. Richardson (Circuit 21, Region V), and the Honorable Herbert A. Pickford, III (Circuit 16, Region VI).

The committee's activity summary, conclusions, and recommendations, submitted to the Chief Justice on February 5, 1988, were as follows:

1. Since its formation, this committee has thus far met four times for a total of twelve hours over an eight-month period to look at various work products prepared by the research staff to help the committee decide policies and procedures for developing the guidelines:

a. The committee examined a 300-page manual documenting pertinent facts about all sixteen state sentencing guidelines systems developed to date.

b. The committee examined approximately sixty displays showing the results of the second data analysis of 33,573 felony cases sentenced largely between February 1985 and September 1987. At the committee's request, this second data analysis included cases sentenced by juries (unlike the first data analysis).

c. The committee closely guided both the data analysis and the drafting of sentencing guidelines premised on historical practice.

d. The committee examined approximately forty tentative guidelines work sheets and sentencing tables for eight felony offenses: assault, burglary, drug offenses, fraud, homicide, larceny, robbery, and sexual assault.

2. The tentative sentencing guidelines ranges are wide enough not to undermine judicial discretion, encompassing 50% of historical sentences across Virginia and excluding the 25% of sentences at either extreme.

3. The committee hopes that these sentencing guidelines will prove a valuable decision aid to the judiciary by providing useful sentencing benchmarks in a simple fashion. Furthermore, the guidelines may also lead to the amelioration of the unwarranted sentencing disparity previously documented by the work of the Judicial Sentencing Oversight Committee.

4. As the next step towards development, the voluntary sentencing guidelines will be piloted in six circuits which have volunteered to participate in the guidelines experiment. These six circuits are those represented by the committee members. The pilot program will give the committee the time and information required to correct problems and evaluate the utility of the guidelines as a decision aid to the judiciary. A pilot period of approximately one year will be required to complete the guidelines' development. The committee will then present both the sentencing guidelines and the results of the pilot effort to the Judicial Conference for further action.

5. During the pilot period, the Judicial Sentencing Guidelines Oversight Committee will continue to meet regularly in order to modify the guidelines in accordance with the wishes of the judiciary and to evaluate the pilot program.

6. The committee anticipates initiating the pilot stage of guidelines development early in the summer of 1988.

APPENDIX C: Format of the Guidelines

Virginia's sentencing guidelines are organized into eight offense groups: assault, burglary, drug offenses, fraud, homicide (other than capital), larceny, robbery, and sexual assault. Each of these offense groups has its own form consisting of a cover sheet and two work sheets.

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

As revealed by the data analysis guided by the Judicial Sentencing Oversight Committee, felony sentences in Virginia have historically derived from a two-step process of judicial decision-making. The first step has been for the judge to decide whether or not the offender should go to prison. The second step has taken one of two forms, depending on the results of the judge's first decision. If the judge has decided that the offender should not go to prison, then his second step is to decide whether the offender should get a jail sentence or probation. On the other hand, if the judge has decided that the offender should go to prison, then his second step is to decide how long the prison sentence should be.

The data analysis also shows that the factors considered by judges in making the first of these two decisions are not necessarily the same as the factors considered in making the second decision. For instance, in the analysis of historical robbery sentence decisions, the factor of victim injury proved significant in the judicial determination of the length of prison sentences. This factor, however, did not prove significant in the determination of whether or not a convicted robber should receive a prison sanction. Thus, just as the guidelines factors vary by the type of offense at conviction, they also vary by the nature of the judicial decision.

Of course, some very common factors--for instance, the presence of additional offenses and the counts of the most serious offense--do prove important in both decisions. But the analysis shows that the relative importance of a factor in the two decisions may vary considerably. For instance, with regards to burglary sentences, the relative historical influence of prior criminal record has been more dramatic on the decision to incarcerate in prison than it has been on the decision concerning the actual length of the prison sentence.

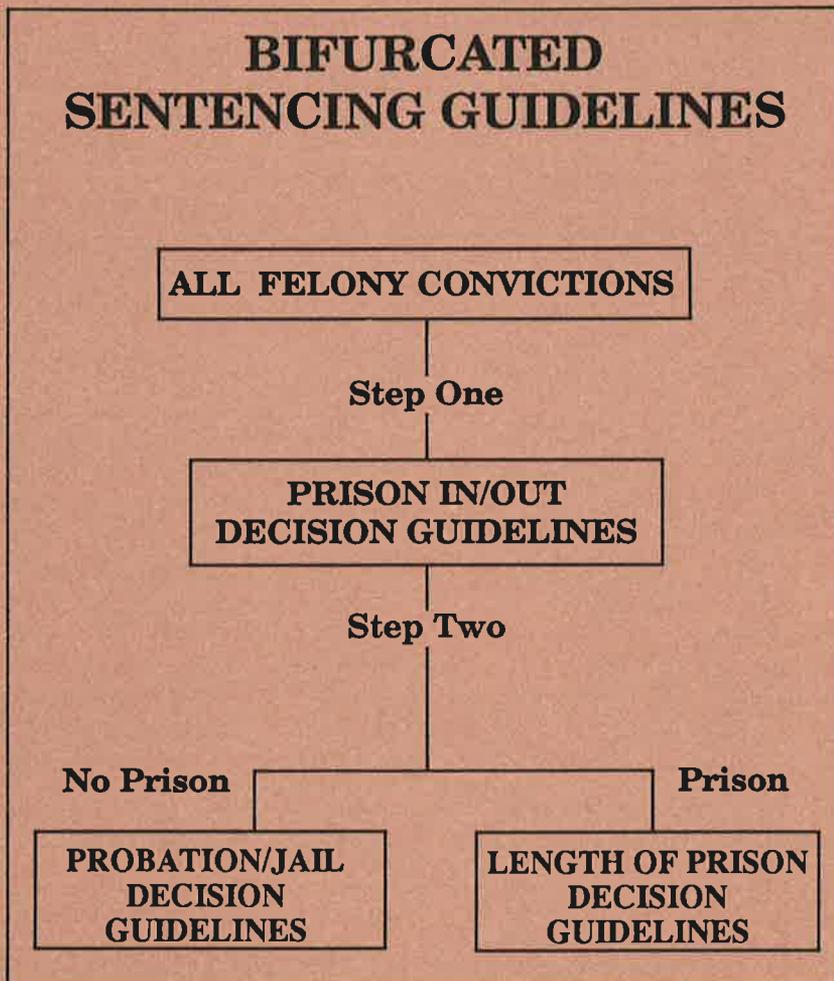
Virginia's sentencing guidelines are structurally bifurcated to reflect both the two-step process of decision-making and the varying importance of factors in each of the two decisions, thus rendering them unique among state guidelines systems (see the diagram on page 53). Therefore, the guidelines involve the scoring of two work sheets, one for each of these two decisions. Furthermore, the work sheets guide the user in considering only those factors which have proved historically important for the decision covered by a particular work sheet and in weighting these factors according to historical practice.

The form for only one offense group is completed for any case, regardless of the number of different offenses pending before the court for sentencing. The guidelines user determines the appropriate form for any particular case by selecting the most serious offense at conviction, hereafter referred to as the primary offense. The Virginia Crime Codes (VCC), found in the back of the sentencing guidelines manual, are used to identify the primary and additional offenses. The guidelines user treats two or more offenses having the same VCC number as counts of the same crime. Additional offenses at conviction, whatever their nature, and multiple counts of one offense are scored only when they have proved historically important in sentencing for a particular primary offense category. Thus, the sentencing guidelines indicate a recommended total sentence for the "sentencing event"--that is, all offenses for which the offender is convicted and which are pending before the court for sentencing at the same time.

The jail and prison sentences recommended by the guidelines are for "effective time"--that is, the time an offender is to serve after suspended time is subtracted from imposed time. Therefore, if a judge wishes to suspend any part of a sentence he imposes on an offender, he may increase the sentence recommended by the guidelines by the amount of time he wishes to suspend. Also, since the sentencing guidelines recommend a total effective sanction for the entire sentencing event, the terms under which multiple sentences run (i.e., consecutive or concurrent) are not covered by the guidelines. In essence, then, the sentencing guidelines recommend only the final historically-based sanction for a case.

In order to record sentencing information onto a court order, a judge still continues to pronounce an individual sentence for each offense at conviction. By choosing whether separate sentences are to be served consecutively or concurrently and whether any imposed time is suspended, a judge exercises great flexibility in deciding how to apply the guidelines' recommendations. For instance, if the guidelines recommend a sentence of six years for an offender convicted of three counts of burglary, the judge can impose six years for each count, the three sentences to run concurrently; or he can impose two years for each count, the three sentences to run consecutively; or he can impose ten years and suspend four for each count, the three sentences to run concurrently.

Of course, statutory sentencing mandates continue to operate independently of the recommendations of the guidelines. For instance, a judge is legally required to sentence an offender convicted of the use of a firearm during the commission of a felony (§18.2-53.1) to a two-year prison sentence for a first offense, this sentence to run consecutively to the sentence for the primary offense or to any other sentence. Offenses subject to such mandatory sentence laws, however, were included in the historical analysis of sentencing conducted by the Judicial Sentencing Guidelines Oversight Committee, and the guidelines therefore take into account their influence in the sentence decision. Whenever the guidelines' recommendation for a particular sentence (effective time) exceeds the statutory maximum penalty for the offense in question, the law takes precedence over the guidelines. Also, instances exist in which the guidelines recommend a sentence lower than the statutory minimum specified for an offense. Although the statutory mandates take precedence in these instances, it is important for the guidelines user to remember that the guidelines recommend an effective sentence, which can legally be less than the statutory minimum penalty specified for an offense.



APPENDIX D: Data and Statistical Procedures Used in the Development of the Guidelines

In accordance with the first of the Sentencing Guidelines Ad Hoc Committee's recommendations, the guidelines were developed to reflect historical sentencing patterns across Virginia. Unlike in many of the other states that have developed guidelines, these sentencing patterns were statistically determined by means of an exhaustive empirical data analysis. The factors and weights determined through this analysis were those included in the guidelines. The only adjustments to the statistical models involved the elimination of factors which, the Judicial Sentencing Oversight Committee determined, should not continue to exert any systematic influence on criminal sentencing (e.g., offender's race or sex, identity of judge or judicial circuit, and method of adjudication).

The data used for the analysis were derived largely from the Pre- and Post-Sentence Investigation (PSI) data base, the most comprehensive data base on felony convictions in the nation. For the approximately 87% of convicted felons on whom a pre- or post-sentence investigation report was completed, 212 factors were recorded and analyzed. For the remaining 13%, a supplementary data collection program provided the same 212 factors for analysis. The factors analyzed are those documented on Virginia's Pre-Sentence Investigation report form.

The sentencing data were analyzed three times: the first time for the investigation into the rate of disparity, the second time for the development of the original guidelines, and the third time for the development of the revised guidelines. The first analysis was based on 18,591 cases sentenced largely between February 1985 and May 1986. The second analysis was based on 33,573 cases sentenced largely between February 1985 and June 1987. The third analysis was based on 48,077 cases sentenced largely between February 1985 and September 1988. Each analysis included all felony convictions resulting in probation and/or a suspended sentence, a jail term, or a prison term.

The significant sentencing factors and their respective weights were determined by the application of three complex statistical procedures routinely used in scientific research.

The first of these procedures was multiple discriminant function analysis, which was used to determine the facts that were consistently important ("significant factors") in the great majority of sentencing decisions concerning whether an offender received probation or a term of incarceration. Through this procedure the staff was able to ascertain the significant scoring factors for Work Sheets "A" and "B." (For the purpose of developing the sentencing guidelines, a factor was considered consistently important if it possessed at least a 95% probability of recurrence as a significant factor through repeated analysis.)

The second statistical technique used in the development of the guidelines was probit, which was employed to refine the proportional weights of the factors for Work Sheets "A" and "B." Hence, the relative magnitude of a score on each of these two work sheets equates to the proportion of the factor's importance. For instance, an offender who is scored on Assault Work Sheet "A" receives a score of "2" if he used a firearm in the commission of the offense and another score of "2" if he seriously injured his victim. The fact that the scores are the same for these two factors indicates that firearm use and serious injury to a victim historically have exerted a comparable degree of influence on a judge's decision concerning whether such an offender should or should not go to prison.

The third statistical technique used in the development of the guidelines was ordinary least squares multiple regression analysis, which was used both to identify significant factors and to ascertain their respective weights for Work Sheet "C." The scores on this work sheet translate roughly to months of incarceration in prison. Therefore, the score of "61" for counts of primary offense on Drug Work Sheet "C" shows that a drug dealer who was convicted of four counts of the primary offense was historically likely to receive a sentence of five years longer than a similarly situated drug dealer who was convicted of one count of the same offense.

Together, these three techniques provided the appropriate combinations of statistically significant factors and weights to construct guidelines which accurately reflect historical sentencing practices across Virginia.

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Research Center.**

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