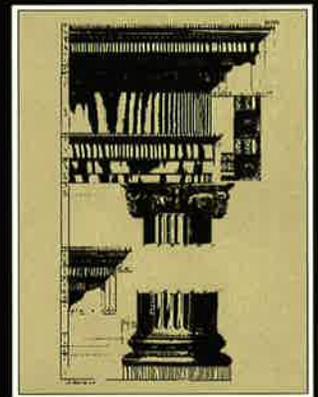
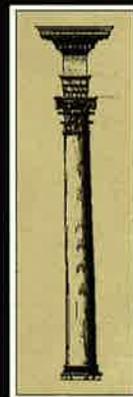
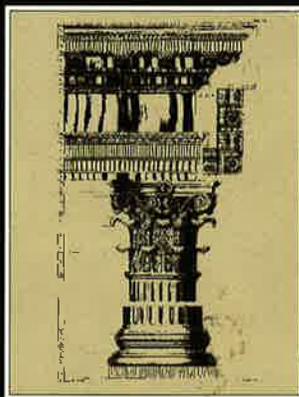
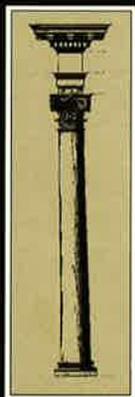
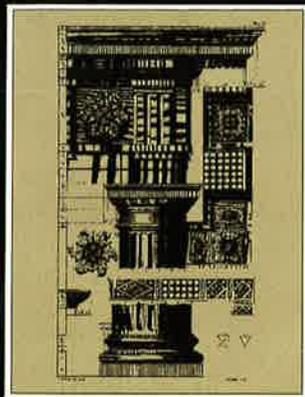
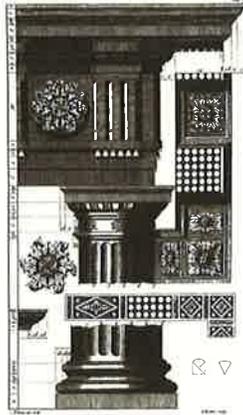


Virginia Criminal Sentencing Commission



1996 Annual Report





# Virginia Criminal Sentencing Commission

## 1996 Annual Report

December 1, 1996

## **Virginia Criminal Sentencing Commission Members**

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

**Judge Ernest P. Gates**  
Chairman, Chesterfield County

Appointments by the Chief Justice of the Supreme Court

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

Attorney General

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

Senate Appointments

**Reverend George F. Ricketts**, Mathews County  
**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

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

HON. ERNEST P. GATES  
CHAIRMAN

# Commonwealth of Virginia



RICHARD P. KERN, PH.D.  
DIRECTOR

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## Supreme Court of Virginia Virginia Criminal Sentencing Commission

December 1, 1996

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

§17-235(10) of the Code of Virginia requires the Virginia Criminal Sentencing Commission to report annually upon its work and recommendations. Pursuant to this statutory obligation, we respectfully submit for your review the 1996 Annual Report of the Criminal Sentencing Commission.

This report details the work of the Commission over the past year and outlines the ambitious schedule of activities that lie ahead. The report also provides a comprehensive examination of judicial compliance with the felony sentencing guidelines for cases received by October 22, 1996. Chapter 6 of this report contains the recommendations of the Commission.

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,

A handwritten signature in cursive script that reads "Ernest P. Gates".

Ernest P. Gates, Chairman

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**Kim S. Hunt, Ph.D.,** Associate Director

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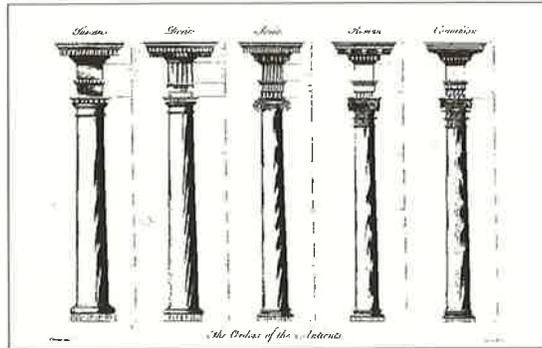
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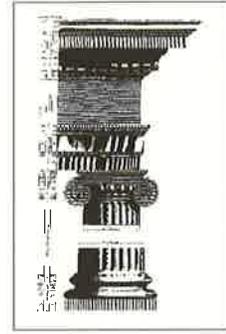
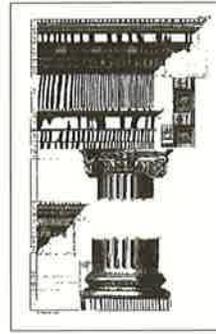
#### **8 Appendices**

The artwork appearing on the cover of this report was made available from the Virginia Department of Historic Resources.

Our appreciation is extended to Margaret T. Peters.



Roman orders as illustrated by William Chambers in *A Treatise on the Decorative Part of Civil Architecture* (London, 1791).



Depictions by Asher Benjamin in *The Practical House Carpenter* (Boston, 1830).



# Introduction

# 1

## Overview

This is the second annual report of the Virginia Criminal Sentencing Commission. The report is organized into seven chapters.

Chapter One provides a general profile of the Commission and its various activities and projects undertaken during 1996. Chapter Two includes the results of a detailed analysis of judicial compliance with the discretionary sentencing guidelines system as well as other related sentencing trend data. Chapters Three through Five contain the Commission's reports on specific legislative directives: the development of an offender risk assessment instrument, a study of the effect of statutory mandatory minimum penalties, and a study of juvenile sentencing practices. Chapter Six presents the Commission's recommendations. Finally, Chapter Seven discusses some of the future plans of the Commission.

## Commission Profile

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

During the past year, Commission member Vivian Watts, an appointee from the Senate, resigned her position. On May 24, 1996, the Senate Committee on Privileges and Elections appointed Mark C. Christie to Ms. Watts' unexpired term which ends on October 31, 1997.

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

## Activities of the Commission

The full membership of the Commission met four times in 1996: April 15, June 24, September 23 and November 19. In addition, the Commission's three subcommittees, the Executive Committee, the Research Subcommittee, and the Legislative Issues Subcommittee, met throughout the year. The following discussion provides an overview of some of the Commission actions and initiatives during the past year.

## Monitoring and Oversight

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

The guidelines work sheets are reviewed by the Commission staff as they are received. The Commission staff performs this check to ensure that the guidelines forms are being completed accurately and properly. 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, last year's Annual Report documented a variety of work sheet completion problems.

These problems included missing judicial departure explanations, confusion over the post-release term and supervision period, missing work sheets, and lack of judicial signatures. However, as a result of the Commission's review process and the fact that users and preparers of the guidelines are more accustomed to the new system, fewer errors have been detected during the past year.

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

## Training and Education

Training and education are on-going activities of the Commission. The Commission gives high priority to instructing probation and parole officers and Commonwealth's attorneys how to prepare complete and accurate guidelines work sheets. The Commission also realizes the importance of providing guidelines instruction to new members of the judiciary, public defenders and private defense attorneys, and other criminal justice system professionals.

During 1996, the Commission offered 17 training seminars in ten different locations in the Commonwealth. The sites for these seminars included the Richmond Police Training Center, the Fairfax Public Safety Academy, the Cardinal Criminal Justice Training Academy in Salem, the Virginia Beach Fire Training Center, and the Department of Corrections' Training Academy. By special request, seminars were also held in specific probation or Commonwealth's attorneys' offices throughout the state. A significant number of probation officers, prosecutors, public defenders, and private defense attorneys attended

these seminars. Additionally, the Commission provided training on the guidelines and no-parole sentencing system to newly elected judges during their pre-bench training program.

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

In addition to 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 over 5,000 calls through its hot line service.

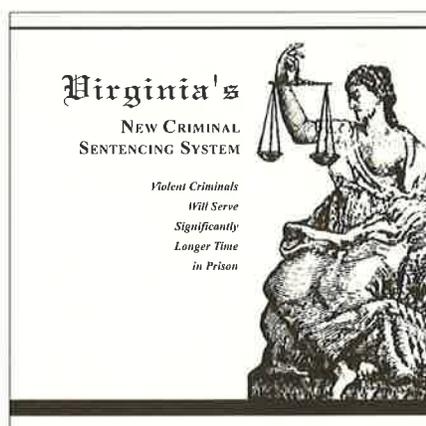
The Commission also distributes sentencing guidelines work sheets and instruction manuals. The Commission staff ensures that Commonwealth's attorneys and probation offices are amply stocked with a supply of sentencing guidelines work sheets and manuals, and fulfills requests for additional work sheets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

## Brochures on New Criminal Sentencing System

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

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

### Sentencing Commission's 1996 No-Parole Policy Brochure



## Crime Seriousness Survey

The Commission has initiated a research project to determine if it is possible to develop a more precise measure of relative crime seriousness than that provided by the general statutory penalty structure. If successful, the resulting offense seriousness measure could be adapted for use within the structure of the sentencing guidelines system. For example, the current statutory maximum penalty of 40 years in prison applies to both the sale of a Schedule I or II drug (§18.2-248C) and second degree murder (§18.2-32). Since weighing the relative seriousness of an offender's prior record on the guidelines is tied to statutory maximums for past convictions, each of these crimes receives the same value in determining a sentence recommendation. The question to be answered in this research is whether a more refined offense seriousness measure can be developed to provide a clearer distinction between these and other crimes.

The Commission's survey will produce offense seriousness evaluations on 287 crimes - 235 felonies and 52 misdemeanors. The crime descriptions in the survey match exactly the legal terminology used

in the Code of Virginia. Any felony crime which appeared as a conviction offense in 1995 was included in the survey along with the most frequently occurring misdemeanors.

The survey has been administered to circuit court judges, district court judges, public defenders, Commonwealth's attorneys, and a random sampling of criminal defense attorneys. One of the central research questions to be addressed in this study is whether there is consensus within and across justice system occupational groups with regard to perceptions of crime seriousness. No aggregation of survey responses across diverse groups of respondents will be used unless the research evidence supports it.

The Commission is currently in the analysis phase of this study which will address the question of whether the survey results have produced a reliable and useful indicator of the relative gravity of crimes. If this is answered in the affirmative, the Commission will explore possible applications of the crime seriousness measure to its work.

## Projecting Prison Space Impact of Proposed Legislation

§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 prison populations and any necessary adjustments in guideline midpoints.

During the 1996 legislative session, the Commission prepared 45 separate impact analyses on proposed bills (27 House bills and 18 Senate bills). These proposed bills fell into four categories: 1) bills to increase the felony penalty class of a specific crime; 2) proposals to add a new mandatory minimum penalty for a specific crime; 3) proposals to create a new criminal offense; and 4) bills that increase the penalty class of a specific crime from a misdemeanor to a felony.

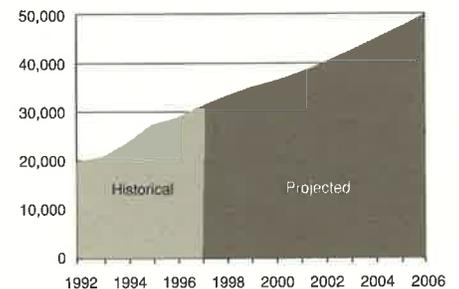
The Commission utilized its computer simulation forecasting program to estimate the projected impact of these proposals on the prison system. In most instances, the projected impact and accompanying analysis of each bill was presented to the General Assembly within 48 hours of our notification of the bill's introduction. 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, Commission staff members served on the technical committee that provided methodological and statistical review of the forecasting work. Also, the Commission Chairman and Executive Director served on the Policy Advisory Committee.

**1996 State Responsible Inmate Forecast (1997-2006)**



## Community Corrections Revocation Data System

With the abolition of parole, circuit court judges now handle post-release supervision violation cases that formerly were dealt with by the Parole Board. Furthermore, the significant expansion of alternative sanction options available to judges (e.g., detention center incarceration, diversion center incarceration, day reporting centers) also means that the judiciary will be dealing with offenders who violate these new programs. Recognizing that it is the responsibility of the Commission to monitor all felony sentencing practices, an initiative has begun to gather systematic information on the judiciary's handling of these violation cases. Among other uses, information on cases involving re-imposition of suspended prison time is critically important to accurately forecast future correctional bed space needs.

The Commission recently endorsed the implementation of a simple one-page form which will succinctly capture a few critical pieces of information on the outcome of these violation proceedings. The Commission is currently working closely with the Department of Corrections to implement this data system throughout the Commonwealth.

## Offender Notification Program

The offender notification program is a joint effort by the Commission and the Department of Corrections to provide inmates departing the prison system with educational information on Virginia's new sentencing system.

The rationale for initiating this program is twofold. First, as an education service, it is only fair to inform inmates about to re-enter society about the dramatic changes in our sentencing and parole laws. On average, a violent offender sentenced under the new guidelines should expect to serve anywhere from 100% to 500% more time incarcerated than typically served under our old laws.

Second, it is hoped that this program will prove to have some specific deterrent value in reducing the likelihood of recidivism. Deterrence is one of the commonly acknowledged goals of our criminal justice system. However, a number of criminological

studies which have researched the deterrent value of new punishment initiatives have produced mixed evidence of their efficacy in this regard. An important conclusion reached in some of these studies is the fact that a great many of the offenders typically were unaware of the new sanctions that were enacted in hopes of deterring the behavior they engaged in. From a theoretical perspective, it follows that the deterrent value of a specific punishment will be enhanced when the targeted population is adequately informed of the punishment. If the likely punishment for future misconduct is specifically detailed and communicated to the intended audience, the deterrent value of the sanction should be increased.

Unfortunately, there is no precedent in the American criminal justice system for implementing educational programs designed to ensure that our new punishment initiatives have maximum potential for achieving a deterrent effect. The offender notification program would likely be the first of its kind in the nation.

The program is currently in the final stages of development and is expected to be implemented shortly. When initiated, the program will provide to all departing inmates a brief review of the new guidelines and no parole system along with a wallet-sized card which contains specifics on the possible sentencing consequences of new recidivism. Inmates would be encouraged to keep the card in their wallets as a reminder of what might await them if they recidivate. Two cards would be available for distribution - one for violent offenders and another for nonviolent offenders. The use of multiple cards will convey the message to the inmate that the new sanction recommendations have been particularized to his situation.

## Legislative Directives

The Sentencing Commission is currently undertaking three separate studies at the direction of the General Assembly.

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

House Joint Resolution 172, passed in the 1996 session of the General Assembly, requests the Commission to study the effects of mandatory minimum sentencing. Specifically, the Commission was requested to

identify all existing mandatory minimum sentences for felony offenses, determine and analyze any deviations that their use causes from otherwise applicable sentencing guidelines, identify the number of inmates currently serving such sentences and a projected population of such prisoners over the next ten years, as well as the fiscal impact of these sentences as compared with sentences under the guidelines.

House Joint Resolution 131, also passed in the 1996 session of the General Assembly, requests the Commission to study sentencing of juveniles. This study is to examine juvenile sentencing by the circuit courts when sentencing juveniles as adults and by the juvenile courts when sentencing serious juvenile offenders and delinquents.

The Commission's reports on these legislative directives are contained in Chapters Three, Four and Five of this report.



# Guidelines Compliance

## 2

### Introduction

Virginia's truth in sentencing guidelines became effective January 1, 1995, and apply to felony offenses committed on or after that date. At the outset, the Commission anticipated the new sentencing system would not achieve full implementation until sometime well into the second year. Given the usually lengthy criminal justice processing time (from offense to date of sentencing) for felony offenses, particularly violent crimes, the Commission did not expect to see typical or fully representative cases until 1996.

For the period January 1, 1995, through October 22, 1996, the Commission has received 20,042 cases sentenced under the truth in sentencing guidelines. While the Commission received only 56 cases in the first quarter of 1995, 4,381 cases were submitted to the Commission in the second quarter of 1996 (Figure 1). This quarterly figure translates into an annual rate of over 17,500 felony sentencings per year.

Because 1995 cases sentenced under the truth in sentencing guidelines are not representative of the full range of cases the Commission receives today, and because 1995 and 1996 offenses were governed by the same set of truth in sentencing guidelines, the data for 1995 and 1996 are combined in the Commission's second Annual Report.

**Figure 1**  
**Number of Cases Received by Month of Sentencing**



\* Preliminary

**Figure 2**  
**Number and Percentage of Cases Received by Circuit**

Circuit	Number	Percent
1	482	2.4%
2	1514	7.6
3	661	3.3
4	1709	8.5
5	570	2.8
6	307	1.5
7	1019	5.1
8	354	1.8
9	376	1.9
10	435	2.2
11	356	1.8
12	518	2.6
13	1545	7.7
14	806	4.0
15	856	4.3
16	478	2.4
17	693	3.5
18	577	2.9
19	1261	6.3
20	337	1.7
21	389	1.9
22	557	2.8
23	800	4.0
24	867	4.3
25	601	3.0
26	576	2.9
27	344	1.7
28	203	1.0
29	154	0.8
30	108	0.5
31	589	2.9

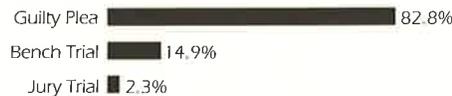
**Case Characteristics**

While the courts in all 31 judicial circuits in Virginia have sentenced cases under the truth in sentencing guidelines, several urban circuits have submitted a large proportion of the 20,042 cases received to date (Figure 2). Virginia Beach (Circuit 2), Norfolk (Circuit 4), Newport News (Circuit 7), the City of Richmond (Circuit 13), and Fairfax (Circuit 19) each have submitted more than 1,000 truth in sentencing cases to the Commission. In fact, sentencings from these five judicial circuits together comprise over 35% of all cases the Commission has received. Virginia's criminal cases are resolved as the result of guilty pleas or plea agreements, adjudication by a judge in a bench trial, or by determination of a jury composed of Virginia's citizens. Of the 20,042 cases received by the Commission as of October 22, 1996, more than four out of every five felony cases in Virginia's circuit courts were resolved by guilty pleas or plea agreements (Figure 3).

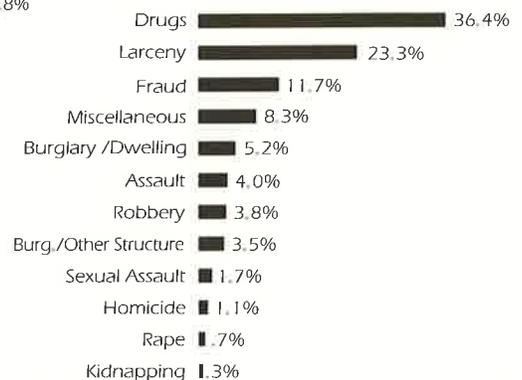
Only 15% of these cases were adjudicated by a judge. Under the truth in sentencing guidelines, only 2% of the felony cases have been tried by juries.

Virginia's truth in sentencing guidelines system is made up of 12 offense groups based on the primary offense (i.e., most serious) in the case. These offense groups are: assault, burglary of dwellings, burglary of other structures (non-dwellings), drugs, fraud, larceny, homicide, kidnapping, rape, other sexual assault offenses, robbery, and miscellaneous felony offenses. By far, drug offenses represent the largest share (36%) of the truth in sentencing guidelines cases to date (Figure 4). The vast majority of the drug cases are convictions for the possession of a Schedule I/II drug, such as cocaine, and convictions for the sale, distribution, or manufacture of a Schedule I/II drug, or the possession with intent to sell, distribute or manufacture such a drug. In fact, one out of every five cases received by the Commission was a conviction for the possession of a Schedule I/II drug.

**Figure 3**  
**Percentage of Cases Received by Method of Adjudication**



**Figure 4**  
**Number of Cases Received by Primary Offense Group**



The larceny offense group represents nearly a quarter of the truth in sentencing cases. The crime of grand larceny (not from a person) is the most common property offense and itself comprises over 9% of the sentencing cases received to date. Nearly one out of every eight cases received by the Commission falls into the fraud offense group, due to the frequency of crimes such as forgery, uttering and credit card theft. The miscellaneous grouping has grown into a large offense group because of the significant number of cases of habitual traffic offenders and convictions for the possession of a firearm by a convicted felon.

The cases currently under analysis contain far fewer instances of convictions for violent offenses. For example, of the 20,042 cases received, there are only 215 homicides, 147 rapes and 64 kidnapping cases, each representing 1% or less of the total cases. The most common violent offense groups are assault and robbery, which each represent about 4% of the truth in sentencing cases.

The felony classification of the offenses indicates the statutory seriousness level of the crimes committed. Class 1 crimes are the most serious felony offenses and Class 6 are the least serious. An unclassified felony is one with a unique penalty which does not fall into one of the established

Class 1 through Class 6 penalty ranges. Nearly half of all the truth in sentencing cases (over 46%) involve these unclassified felonies, mainly due to the overwhelming number of unclassified drug offenses, particularly relating to the sale of a Schedule I/II drug, and the number of grand larceny offenses (Figure 5). The most frequently occurring classed felony is that of Class 5 (30%). As cited above, the possession of a Schedule I/II drug is the most frequently occurring offense, and this crime is punishable as a Class 5 felony.

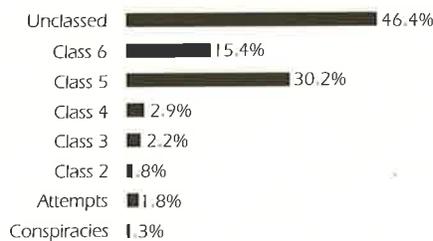
The truth in sentencing guidelines provide for each case a recommendation for the type of disposition (probation/alternative sanctions, jail or prison) and the length of incarceration in jail or prison, if the guidelines recommend incarceration. For the 20,042 cases under analysis, the guidelines recommended that 46% of the offenders be sentenced to a prison term (a sentence of greater than six months) and an additional 19% be given a jail term (any incarceration term of

6 months or less). Thirty-five percent of the offenders were recommended for probation or a non-incarceration sanction (Figure 6).

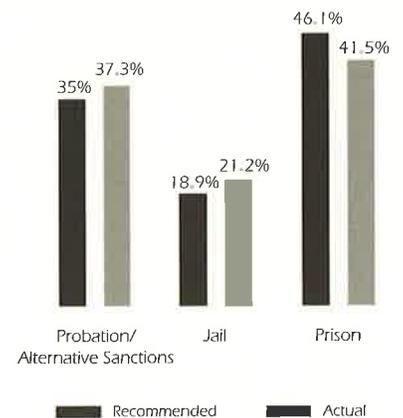
The actual dispositions imposed by judges reflect a high degree of consensus with the guidelines recommendations for type of disposition. Nearly 42% of these offenders were sentenced to prison and 21% to a local jail, while 37% were, in fact, sentenced to probation or some other alternative sanction.

The legislation which established the truth in sentencing guidelines in 1994 specifies that only probation officers and Commonwealth's attorneys may complete the guidelines work sheets for the court. To date, probation officers are completing the guidelines work sheets in over 60% of the cases, and Commonwealth's attorneys are preparing the guidelines in the remaining 40%, typically in cases involving plea agreements with the defendant.

**Figure 5**  
**Percentage of Cases Received by Felony Class of Primary Offense**



**Figure 6**  
**Recommended Disposition and Actual Disposition**



## 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 one less stringent than that called for by the guidelines. In cases in which the judge has elected to sentence outside of the guidelines recommendation, he or she must, as stipulated in §19.2-298.01 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, jail or prison) 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 boot camp/jail equivalency. General com-

pliance results from the Commission's attempt to understand judicial thinking in the sentencing process, and is also meant to accommodate special sentencing circumstances.

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

Whereas other states with sentencing guidelines employ a grid system which recommends sentences in distinct blocks of time, such as whole years, Virginia's sentencing guidelines are designed to provide sentence recommendations which increase gradually as the point total on the guidelines work sheet increases. The result is a table of sentencing

recommendations which have a gradual stair step effect, but often with the consequence of providing recommendations that are not in whole years. The Commission acknowledges that judges typically sentence in round, whole years. Judges sometimes cite rounding as the reason for departure from the guidelines recommendation. In general, 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 calls 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 boot camp/jail equivalency applies when a judge sentences an offender to the state's boot camp program instead of a short jail term as called for by the guidelines recommendation. Because boot camp is a three month program, during which the offender is subjected to a military style shock incarceration program, that is followed by probation, many judges believe themselves to be in compliance when sentencing in this fashion.

In analyzing compliance, the Commission is able to examine the use of community-based programs or other alternatives to traditional incarceration by Virginia's judges. The 1994 Comprehensive Community Corrections Act and the State Community-based Corrections Act authorized the establishment of several community-based sanctioning programs. The Commission can measure the extent to which judges sentence offenders to intermediate or alternative sanctioning programs in lieu of recommended incarceration in jail or prison.

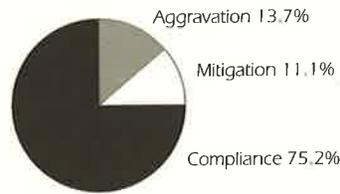
### Overall Compliance with the Sentencing Guidelines

For the 20,042 cases received by the Commission as of October 22, 1996, the overall rate of compliance with the truth in sentencing guidelines is 75% (Figure 7). For the cases under analysis, the rate at which judges sentence offenders more severely than the sentencing guidelines recommendation, known as the "aggravation" rate, is 14%. The rate at which judges sentence offenders to

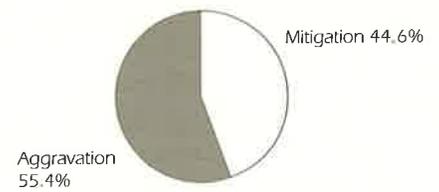
sanctions which fall below the sentencing guidelines recommendation, or the "mitigation rate," is 11%. Isolating the departure cases, 55% of the departures are cases of aggravation of the sentencing guidelines recommendation, while 45% are cases of mitigation. These patterns of compliance and departure have been stable since the truth in sentencing guidelines were instituted.

**Figure 7**  
**Overall Guidelines Compliance and Direction of Departures**

**Overall Compliance**



**Direction of Departures**



## Compliance by Sentencing Guidelines Offense Group

Examining sentencing guidelines compliance rates by the 12 primary offense groups reveals that compliance is not consistent, nor is the departure pattern uniform, across the offense groups (Figure 8). The compliance rate ranges from a high of 82% in the larceny offense group to a low of 57% in the offense group for rape.

All of the property offenses demonstrate rates of compliance higher than any of the violent offense group categories. Larceny, fraud, drugs, burglary, and the miscellaneous offense groups all have compliance rates at or above 70%.

The violent offenses, assault, homicide, rape, robbery, kidnapping, and sexual assault offenses, all have compliance rates below 70%, with rape and kidnapping falling below 60%. Because the Commission has not received a substantial number of cases for many of these violent offenses, caution should be used when examining compliance figures for these offense groups.

Departure patterns do indeed differ significantly across the offense groups.

Among the property offenses, burglary of dwellings and fraud offenses have a marked mitigation pattern among the departures, while drug, larceny and miscellaneous offenses reveal patterns of aggravation. Only burglary of other structures (non-dwellings) displays a balanced pattern between mitigation and aggravation among the departure cases.

With regard to the violent offenses, assault, rape and robbery demonstrate strong mitigation patterns. In

**Figure 8**  
**Guidelines Compliance by Offense**

	Number of Cases	Compliance	Mitigation	Aggravation
Assault	805	68.2%	17.6%	14.2%
Burglary of Dwelling	1048	70.0	18.0	12.0
Burglary of Other Structure	694	72.9	13.7	13.4
Drugs	7299	73.8	9.8	16.4
Fraud	2335	79.2	14.2	6.6
Kidnapping	64	59.4	18.7	21.9
Larceny	4662	82.0	7.1	10.9
Miscellaneous	1668	74.6	8.0	17.4
Murder/Homicide	215	68.8	11.2	20.0
Rape	147	57.1	35.4	7.5
Robbery	759	65.1	20.4	14.5
Sexual Assault	346	60.7	11.0	28.3

fact, in well over a third of the rape cases and over a fifth of the robberies, judges sentenced below the guidelines recommendation. It is pertinent to note that the offenses in the violent offense groups receive statutorily mandated midpoint enhancements which increase the sentencing guidelines recommendation in the case by either 100% or 125%. Further midpoint enhancements are applied in cases in which the offender has a violent prior record. For more detailed analysis regarding midpoint enhancements in the sentencing guidelines (see *Compliance under Midpoint Enhancements* later in this section).

Despite the midpoint enhancements for violent current offenses and violent prior records, the guidelines offense groups of kidnapping, homicide and sexual assault all show stronger aggravation patterns from the guidelines than those for the

other crime categories. To a certain degree, the aggravation patterns for kidnapping, 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. For instance, a conviction for second degree murder may be the result of a plea agreement which reduces the charge from first degree murder. Likewise, convictions for aggravated sexual battery may result from plea agreements reducing the charge from forcible rape, perhaps to protect a young victim from the rigors of a trial. Offense scoring under Virginia's sentencing

guidelines is based solely on the conviction offense, and unlike the United States Sentencing Guidelines, does not score the real offense behavior in instances where a charge reduction accommodation has been reached. Virginia's guidelines do, however, account for elements of the crime such as victim injury and use of a weapon. Aggravation rates for these offenses, then, are sometimes a manifestation of the desire on the part of judges to impose sentences more closely in line with the actual offense committed rather than the offense for which the offender plead guilty.

## Compliance by Specific Offense Codes

The truth in sentencing guidelines cover 159 felonies specified in the Code of Virginia, and collectively these encompass about 95% of all the

felony sentencing events in the circuit courts in the Commonwealth. For convenience, the guidelines are divided into 12 offense groups. For 34 specific offenses, the Commission has received 100 or more cases. Together, these 34 offenses comprise almost

89% of the 20,042 cases received as of October 22, 1996 (Figure 9).

The most common felonies are property offenses such as grand larceny, burglary of a dwelling with intent to commit larceny (no deadly weapon)

**Figure 9**

### Compliance for Specific Felony Crimes

Offense	Compliance	Mitigation	Aggravation	Cases	% of Total
Possession of Schedule I/II Drug	79.3%	3.1%	17.6%	4140	20.7%
Grand Larceny-Not from a Person	83.0	5.1	11.9	1875	9.4
Burglary of Dwelling with Intent to Commit Larceny, No Deadly Weapon	69.9	18.3	11.8	891	4.4
Possess with Intent to Sell, Manufacture or Distribute Schedule I/II Drug	57.6	24.1	18.3	890	4.4
Forgery	81.0	13.7	5.3	720	3.6
Sale of Schedule I/II Drug	65.9	24.2	9.9	695	3.5
Petit Larceny- 3rd Conviction	80.0	11.3	8.7	657	3.3
Burglary of Other Structure with Intent to Commit Larceny, No Deadly Weapon	72.4	14.3	13.3	609	3.0
Distribution of Schedule I/II Drug	63.9	26.4	9.7	546	2.7
Habitual Traffic Offense-2nd Offense, No Endangerment to Others	76.9	3.9	19.2	468	2.3
Possession of Firearm by Convicted Felon	72.5	17.8	9.7	415	2.1
Grand Larceny from a Person	74.6	8.9	16.5	393	2.0
Shoplift Goods Valued Less Than \$200, 3rd Conviction	78.2	13.1	8.7	389	1.9
Unlawful Injury	72.5	13.1	14.4	375	1.9
Sale of .5oz - 5lb. of Marijuana	79.3	4.9	15.8	368	1.8
Malicious Injury	62.9	24.2	12.9	334	1.7
Credit Card Theft	76.8	16.7	6.5	324	1.6
Habitual Traffic Offense with Endangerment to Others	73.0	2.5	24.5	322	1.6
Embezzlement of \$200 or more	90.0	1.2	8.8	319	1.6
Forgery of Public Record	75.7	16.7	7.6	317	1.6
Grand Larceny Auto	80.8	8.6	10.6	313	1.6
Uttering	79.7	14.5	5.8	310	1.5
Unauthorized Use of Vehicle Valued \$200 or more	87.7	5.1	7.2	292	1.5
Receive Stolen Goods Valued \$200 or more	82.5	8.1	9.4	235	1.2
Obtain Drugs by Fraud	90.6	0.4	9.0	223	1.1
Street Robbery, No Gun or Simulated Gun	62.2	19.8	18.0	217	1.1
Obtain Money by False Pretenses, \$200 or more	81.7	9.7	8.6	175	0.9
Robbery of a Business with a Gun or Simulated Gun	63.1	23.8	13.1	160	0.8
Street Robbery with a Gun or Simulated Gun	67.7	22.8	9.5	158	0.8
Bad Checks, Valued \$200 or more	80.3	12.1	7.6	157	0.8
Sale of Schedule I/II Drug for Accomodation	77.4	10.3	12.3	155	0.8
Hit and Run with Victim Injury	90.1	2.3	7.6	132	0.7
Aggravated Sexual Battery, Victim <13 years old	54.2	12.2	33.6	131	0.7
Robbery of a Business, No Gun or Simulated Gun	74.1	13.0	12.9	108	0.5

and forgery, and drug crimes, especially those relating to the possession or sale of a Schedule I/II drug, such as cocaine. Among the violent offenses, however, both unlawful wounding and malicious wounding, and several robberies, both with and without a firearm, appear on the list. No rape, homicide or kidnapping offenses appear on the list and only one sexual assault offense, that of aggravated sexual battery (victim younger than 13 years) is found. Also on the list are both of Virginia's felony habitual traffic offenses, each of which carry a mandatory minimum penalty of 12 months incarceration.

Of the most frequent 34 offenses, 11 have compliance rates of 80% or higher. In fact, embezzlement of \$200 or more, obtaining drugs by fraud, and hit and run (involving victim injury) have compliance rates above

the 90% mark. Another 14 offenses have compliance rates between 70% and 79%. Only nine offenses have compliance rates below 70%. Two of those, possession with intent to sell, distribute or manufacture a Schedule I/II drug and aggravated sexual battery (victim less than 13 years old), fall into the 50%-59% range.

The possession of a Schedule I/II drug is by a vast margin the single most common offense of the 20,042 cases. Convictions for the possession of a Schedule I/II drug represent over one-fifth of guidelines cases. This offense should not be confused with the possession with intent to sell, distribute or manufacture a Schedule I/II drug, which is a distinct offense

carrying a much higher penalty structure. The compliance rate for the possession of a Schedule I/II drug is 79%. The majority of Schedule I/II drug possession cases are recommended for probation or other nonprison sanction; actual sentences, therefore, will be either in compliance with or aggravations of the guidelines

Grand larceny (not from a person) is the second most common offense among the cases received by the Commission, representing almost one out of every ten guidelines cases. This offense demonstrates a compliance rate of 83%.

## Dispositional Compliance

Dispositional compliance with the sentencing guidelines is the rate at which judges sentence offenders to the same type of disposition that is recommended by the guidelines for the case. Dispositional compliance is an important feature of overall compliance with guidelines. For the cases received as of October 22, 1996, the dispositional compliance rate is nearly 84% (Figure 10).

Much higher than the rate of overall compliance with the guidelines, the dispositional compliance rate indicates that judges agree with the type of sanction being recommended in the vast majority of cases. The rate of dispositional compliance has remained largely stable since the truth

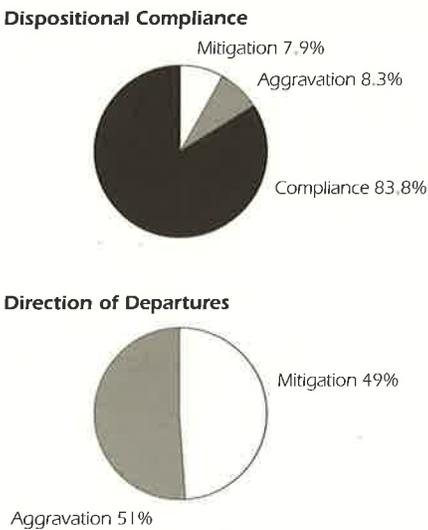
in sentencing guidelines were initiated. Of the cases not in dispositional compliance, those receiving more severe sanctions are nearly equal in number to those receiving sanctions less severe than the guidelines recommend.

Much of the dispositional aggravation is attributable to larceny and possession of Schedule I/II drug cases in which judges imposed a short incarceration term in jail or prison, despite the recommendation that many of these offenders receive suspended incarceration and active probation. A large share of the dispositional mitigation results from cases in which judges sentence offenders convicted of selling a Schedule I/II drug, for which the guidelines recommend a prison term, to community-based sanctions, residential drug

treatment, or another alternative, such as the state's boot camp program.

Dispositional compliance rates by primary offense group range from a high of 94% in robbery cases to 69% for sexual assault (Figure 11). The low dispositional compliance rate for sexual assault offenses is in large part due to cases in which judges sentence offenders convicted of aggravated sexual battery to prison or jail, despite the recommendation for probation for offenders with little or no prior criminal history. It is believed that many of these cases involve forcible rapes that have been reduced to the crime of aggravated sexual battery during plea agreements. Dispositional compliance rates for all other offense groups are 80% or better.

**Figure 10**  
**Dispositional Compliance and Direction of Departures**



**Figure 11**  
**Dispositional Compliance by Offense**

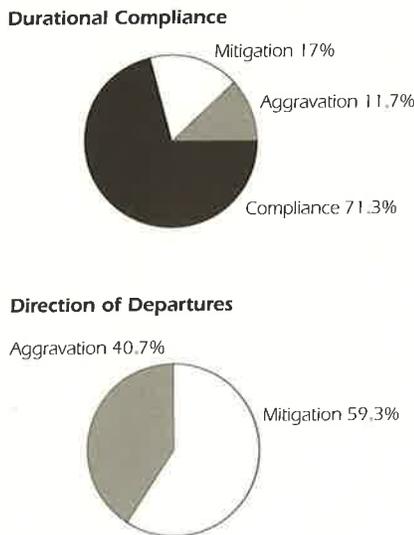
	Number of Cases	Compliance	Mitigation	Aggravation
Assault	805	83.8%	10.6%	5.6%
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Larceny	4662	85.5	5.4	9.1
Miscellaneous	1668	87.7	7.0	5.3
Murder/Homicide	215	91.2	3.2	5.6
Rape	147	86.4	13.6	0.0
Robbery	759	93.8	4.2	2.0
Sexual Assault	346	69.1	5.5	25.4

## Durational Compliance

Durational compliance is defined as the rate at which judges sentence offenders to terms of incarceration that fall exactly within the recommended guidelines range. Durational compliance considers only those cases in which the guidelines recommend an active term of incarceration. For the 1995-1996 cases received by the Commission, durational compliance is 71% (Figure 12).

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.

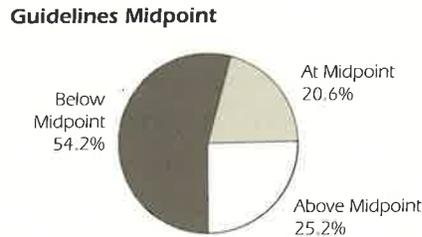
**Figure 12**  
**Durational Compliance and Direction of Departures**



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

Analysis of prison cases that are in durational compliance reveals that over one-fifth are sentenced to prison terms equivalent to the midpoint recommendation (Figure 13). Nearly 75% of the cases recommended for prison that are in durational compliance were sentenced at or below the sentencing guidelines midpoint recommendation. Only 25% of the prison cases were sentenced above the recommended midpoint, in the upper portion of the recommended range. This pattern of durational

**Figure 13**  
**Distribution of Sentences within Guidelines Range - Prison Cases in Compliance**



compliance in prison cases has been consistent since the truth in sentencing guidelines took effect.

Examination of cases not in durational compliance with the guidelines reveals that judges tend to sentence offenders to terms of incarceration shorter than what the guidelines recommend more often than they do to terms which exceed the guidelines recommendation (59% to 41%, respectively). In cases receiving shorter than recommended sentences, "effective" sentences (sentences less any suspended time) fell below the guidelines by a median value of 9 months (Figure 14). For offenders receiving longer than recommended sentences, the effective sentence exceeded the guidelines by a median value of 12 months. Thus, the relatively small average length of these departures is evidence that when there is disagreement with the guidelines recommendation it is, in most cases, not of a dramatic nature.

**Figure 14**  
**Median Length of Durational Departures**



## Reasons for Departure from the Guidelines

While compliance with the guidelines recommendation is still voluntary, §19.2-298.01 of the Code of Virginia requires each judge to articulate and submit his or her reason(s) for sentencing outside the guidelines recommended range. The explanations that judges impart will indicate to the Commission where judges disagree with the sentencing guidelines and where the guidelines may need adjustment or amendment. Because the new sentencing guidelines represent a combination of historical sentences imposed, actual time served, and statutorily enacted enhancements, it is very important to identify the specific areas of the guidelines where compliance is weakest. The opinions of the judiciary, as reflected in their departure reasons, are highly relevant to the Commission as it deliberates on revision recommendations. Unlike their counterparts in the many other states using sentencing guidelines, Virginia's judges are not limited by any prescribed or standardized reasons for departure set forth by the Commission; they are free to depart for any reason they find compelling and must only communicate that reason to the Commission. Multiple reasons for departure can be cited in each guidelines case, and the Commission studies departure reasons in this context.

As previously reported, for the 20,042 cases received by October 22, 1996, the rate at which judges sentence offenders to sanctions which fall below the sentencing guidelines recommendation, or the "mitigation rate," is 11%. Isolating these mitigation cases reveals that judges reported the decision to sentence an offender to a community treatment or other alternative sanction more frequently than any other mitigation departure reason, that is, in nearly one out of every five mitigation cases (Figure 15). These alternatives include, but are not limited to: the boot camp program, the detention center program, intensive supervised probation, and the day reporting center probation program. These mitigation cases represent diversions from a recommended incarceration term in those cases in which the

judge felt the offender was amenable to such punishment.

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

In over 9% of the mitigation cases, judges referred to the offender's cooperation with authorities, such

**Figure 15**  
**Most Frequently Cited Reasons for Mitigation**



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

as aiding in the apprehension or prosecution of others. Almost as often, however, judges noted that the evidence against the defendant was weak or that a relevant witness refused to testify in the case. Judges, in 8% of the low departures, indicated only that they sentenced in accordance with a plea agreement.

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

In 8% of the mitigation cases, no reason for departure was submitted to the Commission. Cases lacking departure reasons are typically those cases submitted during the initial implementation period of the truth in sentencing guidelines, as judges adjusted to the new requirement to report departure reasons. Under the previous sentencing guidelines sys-

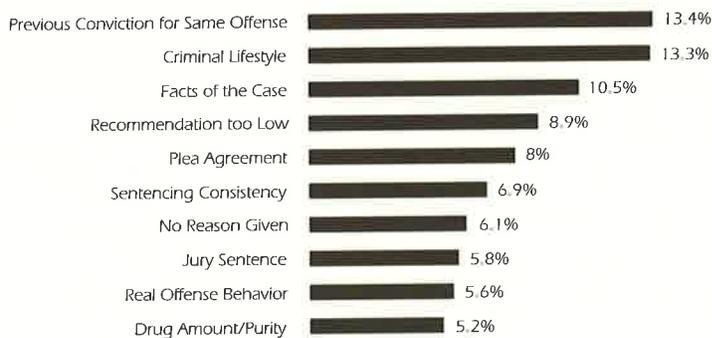
tem, judges were not required to submit their reasons for departure. Through its oversight and monitoring efforts, the Commission attempts to obtain the reasons for departure in these cases whenever possible.

Overall, the rate at which judges sentence offenders more severely than the sentencing guidelines recommendation, or the "aggravation" rate, is 14%. Examining only the aggravation cases, the Commission finds that the most common reason for sentencing above the guidelines recommendation, cited in over 13% of the aggravations, is the offender's prior convictions for the same or a very similar offense as the current case (Figure 16). Only slightly less often, however, judges indicated that the offender's criminal lifestyle or history of criminality far exceeds the contents

of his formal criminal record of convictions or juvenile adjudications of delinquency. Since only the offender's convictions and delinquent adjudications are scored on the guidelines work sheets, judges may feel that the guidelines cannot take into account the full extent of the offender's criminality, so they elect to sentence some offenders more harshly than the guidelines recommendation for this reason.

In almost 11% of the aggravation cases, judges reported that the facts of the case, or extreme aggravating circumstances, existed such that the offender deserved a higher than recommended sentence. Judges stated in 9% of the upward departures that they felt the guidelines recommendation was too low. In almost as many cases, judges recorded "plea agree-

**Figure 16**  
**Most Frequently Cited Reasons for Aggravation**



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

ment" as the only departure reason. This is somewhat of a curious result since plea agreements are often thought of as a device to secure a more favorable sanction outcome on the defendant's behalf in exchange for some concession on his part to the prosecution (usually a guilty plea).

Judges referred to sentencing consistency with a codefendant's case or with similar cases in 7% of the high departures. Judges related to the Commission that 6% of the aggravation cases were the result of sentences imposed by a jury. For nearly 6% of the cases which received sanctions more severe than the guidelines recommendation, judges reported that the offender's true behavior or the actual offense was more serious than the offenses for which the offender was ultimately convicted. In 5% of the aggravation cases, judges cited the large quantity of drug involved or above average drug purity. While this departure reason is applicable only in drug cases, its overall prominence as a frequent aggravation reason is a function of the large number of drug crimes.

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

## Use of Alternative Punishment Programs

The Commission collects and maintains a wealth of data pertaining to the sentencing of Virginia's felons, and is able to examine the use of alternative punishment programs by Virginia's judges. In addition, the Commission can measure the extent to which judges sentence offenders to alternative sanctions in cases that represent diversions of offenders who would otherwise be incarcerated if sentenced according to the guidelines recommendation.

The 1994 Comprehensive Community Corrections Act and the State Community-based Corrections Act authorized the establishment of several community-based and alternative sanctioning programs both at the state and local level. At the state level, the Community Corrections Act instituted two new programs, detention centers and diversion centers, that when added to the state's existing boot camp incarceration program, create an array of alternative sanctioning programs operated by the Virginia Department of Corrections (DOC). The detention center is designed conceptually like the boot camp program, but is intended for offenders who cannot undergo the rigorous physical demands of boot camp. To date, DOC has opened two detention centers housing up to 150 offenders each. Diversion centers are

not yet operational. The boot camp and detention center programs both require that the judge impose a state prison sentence (greater than six months), which is then suspended upon the condition that the offender complete the specified program. Both require some term of confinement, from three to six months, to be followed by probation supervision in the community.

Among the 20,042 cases the Commission has received to date, 505 offenders have had their prison sentences suspended and have been designated by judges for either boot camp or placement in detention centers (Figure 17). Nearly three-fourths of the boot camp offenders and over two-thirds of the detention center offenders were recommended for prison incarceration by the sentencing guidelines. Using the sentencing guidelines as the gauge, these cases represent diversions of those offenders, considered by the judges as appropriate for or better served by alternative programs. This is not to say that other offenders, recommended by the guidelines for probation or jail, do not also derive benefit from participation in the boot camp or detention center programs. Drug offenders represent the majority, nearly 60%, of the offenders targeted for these two programs.

The Department of Corrections, Division of Community Corrections, operates a network of probation services throughout the Commonwealth. Unlike the boot camp and detention center programs, judges sentencing offenders to these programs are not limited to imposing and suspending a state prison sentence. Often intermediate punishment or community-based programs are utilized in combination with one another, or in concert with traditional incarceration in prison or jail. The Commission tracks judicial use of DOC's intensive supervised probation and the day reporting center program, both of which impose stricter supervision requirements and involve closer monitoring of the offender than traditional probation. Intensive supervised probation is available in most jurisdictions in the Commonwealth, while DOC runs five day reporting centers in specific localities around the state. Analysis of Commission data reveals

that 452 offenders have been sentenced to these probation programs (Figure 18). Among the cases received by the Commission, few of the sanctions to intensive probation and the day reporting program would be considered diversions from incarceration, jail or prison. Three-fourths of day reporting offenders and over four-fifths of the intensive probation offenders were recommended for non-incarceration by the guidelines. Judges may feel, however, that certain offenders who are recommended for supervision in the community need more comprehensive services or more intense monitoring in order to be successful under community supervision.

Judges also have available to them a variety of community-based programming for the sanctioning of offenders, although the network of local programs currently is not uniformly available to all judges throughout the state. For offenders

who have serious substance abuse problems, judges, and offenders alike, may feel that sanctions which require residential or in-patient drug or alcohol treatment are more restrictive and punitive than a short jail or prison stay. Often, residential drug treatment programs may last a year to 18 months and may be far more demanding on the offender than traditional incarceration, and provide services the offender may not otherwise receive. According to data reported to the Commission, 91 offenders have been sentenced to such in-patient substance abuse treatment (Figure 19). In over one-fifth of these cases, the guidelines had recommended the offender for a prison sentence. The majority of offenders designated for residential treatment are drug offenders (44%) and larceny offenders (24%), those who may sell drugs or steal to support their addiction.

Figure 17

**Offenders Sentenced to Boot Camp and Detention Center Programs**

	Number of Offenders	Diversions from Prison
Boot Camp	315	71.4%
Detention Center	190	67.9%

**By Offense**

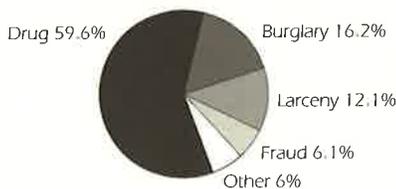


Figure 18

**Offenders Sentenced to Intensive Supervision & Day Reporting Programs**

	Number of Offenders	Diversions from Prison
Intensive Supervision	351	13.1%
Day Reporting	101	15.8%

**By Offense**

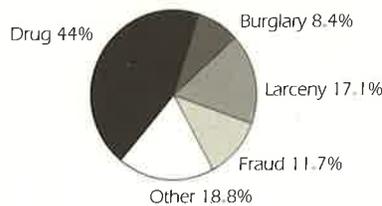
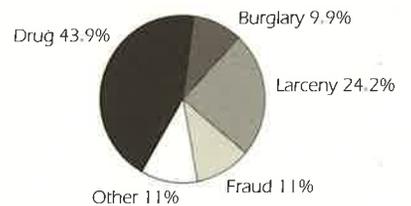


Figure 19

**Offenders Sentenced to Residential Substance Abuse Treatment**

	Number of Offenders	Diversions from Prison
Residential Sub. Abuse Treatment	91	20.9%

**By Offense**



In §17-235, paragraphs 4, 5, and 6 of the Code of Virginia, the Commission is charged with developing an offender risk assessment instrument for use in all felony cases that is predictive of the relative risk that an offender will pose a threat to public safety. The legislation directs the Commission to determine the feasibility, based on a study of Virginia's felons, of placing 25% of non-violent offenders who would otherwise be incarcerated into alternative means of punishment. This study is currently underway (see *Risk Assessment Report* in the following chapter for more information). An accurate assessment of an offender's risk of recidivism at the time of sentencing would be an extremely valuable tool for judges. The application of the risk assessment instrument could help to identify individuals who are unlikely to pose potential risk to public safety. Such offenders would be candidates for alternative, intermediate or community-based programs, such as those initiated by the Comprehensive Community Corrections and the State Community-based Corrections Acts.

### Compliance by Circuit

In Virginia, there are 31 circuits and 144 active circuit court judges. The map and accompanying table on the following pages detail the specific location of Virginia judicial circuits. Compliance rates and departure patterns across circuits vary significantly (Figure 20).

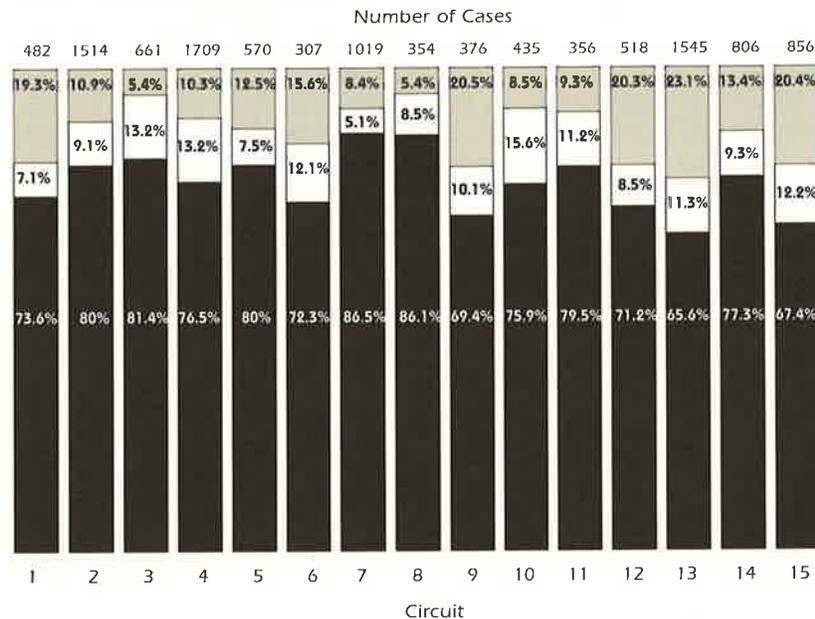
Overall, 15 of the state's 31 circuits demonstrate compliance rates in the 70% to 79% range, with an additional eight circuits reporting compliance rates 80% or above. Only eight circuits have compliance rates below 70%. There are likely many reasons for the variations in compliance across circuits.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

or community-based programs currently differs from locality to locality.

Both high and low compliance circuits were found in close geographic proximity. The degree to which judges follow guidelines recommendations does not seem to be primarily related to geography.

The highest compliance rates under the truth in sentencing guidelines, 87% and 86%, are found in Newport News (Circuit 7) and Hampton (Circuit 8), respectively. Newport News is one of the five jurisdictions which have submitted more than 1,000 truth in sentencing guidelines cases to the Commission. The others, Virginia Beach (Circuit 2), Norfolk (Circuit 4), the City of Richmond (Circuit 13) and Fairfax (Circuit 19), report compliance rates between 76% and 80%, except for

**Figure 20**  
**Compliance by Judicial Circuit**



the City of Richmond, which has a compliance rate of only 66%.

The lowest compliance rates under the truth in sentencing guidelines originate in Circuit 29 in Southwest Virginia (59%) and Circuit 23, encompassing the city and county of Roanoke (less than 66%).

Of all Virginia's circuits, Roanoke (Circuit 23) and Alexandria (Circuit 18) yield the highest rates of mitigation, 19% and 18% respectively. Of the five circuits with 1,000 or more cases, Norfolk (Circuit 4) has the highest rate of mitigation, over 13%, and it is the only one of these high volume circuits that has a mitigation rate above the statewide average.

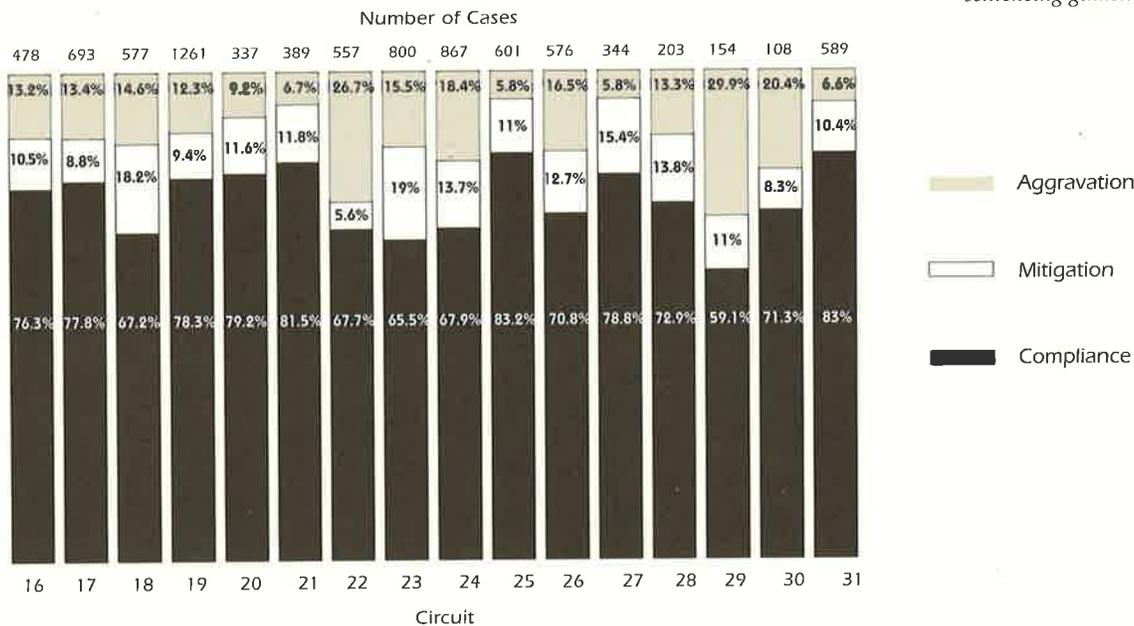
With regard to high mitigation rates, it would be too simplistic to assume

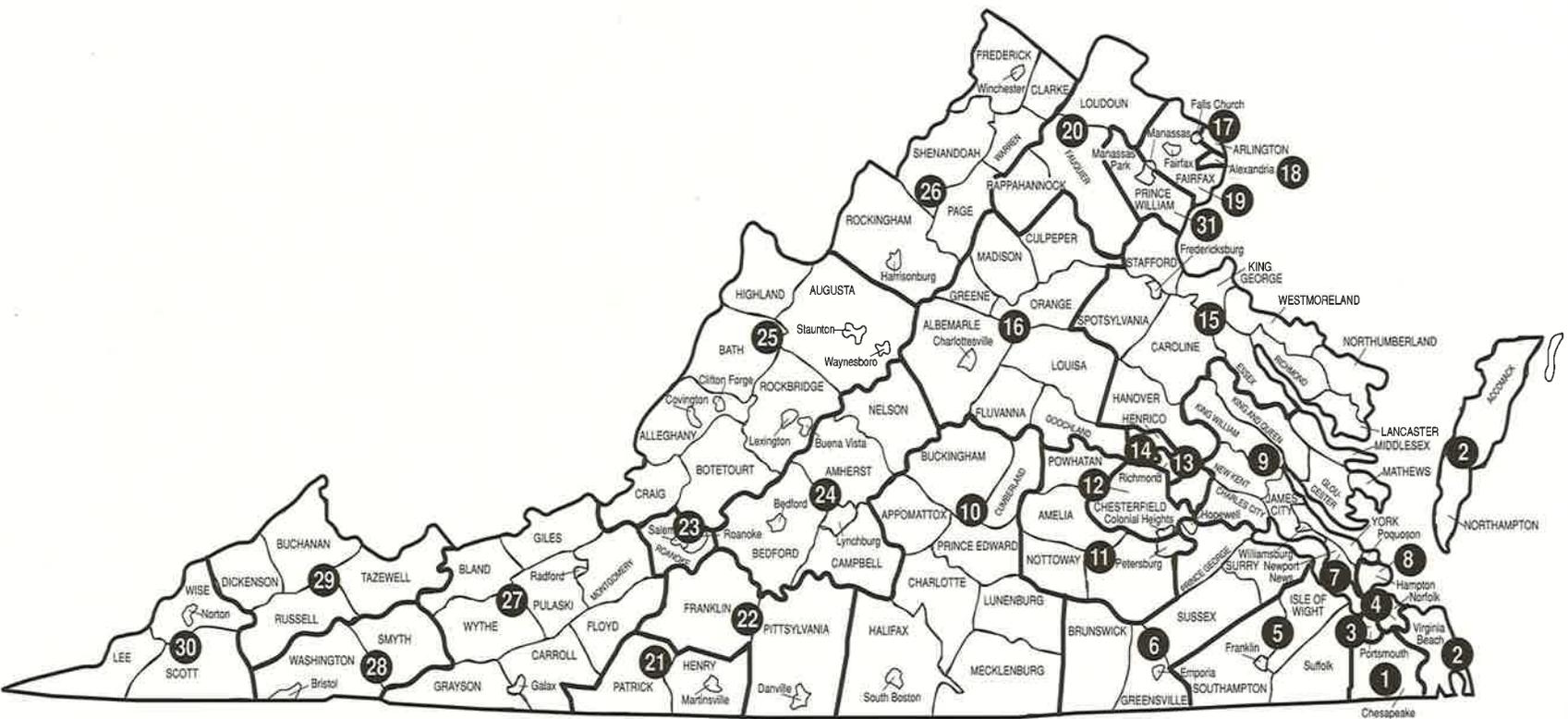
that this reflects an area with lenient sentencing habits. As noted above, the new intermediate punishment programs are not uniformly available throughout the Commonwealth. Those jurisdictions with better access to these sentencing options may be using them as intended by the General Assembly – for nonviolent offenders who otherwise would be incarcerated for short periods of time. Such sentences would appear as mitigations from the guidelines. However, it should be noted that some criminological studies which have surveyed offenders elsewhere have found that some intermediate sanction programs are perceived to be harsher than short stays in jail or prison. For example, the detention center incarceration program involves a denial of one's liberty for four to six months, mandatory work

requirements, mandatory substance abuse treatment, etc. If structured appropriately, intermediate sentencing options may be perceived by offenders as more punishment than traditional incarceration. Future research will determine also if intermediate sanctions can be proved to be more effective than traditional incarceration in terms of reducing the likelihood of recidivism.

Inspecting aggravation rates reveals that Circuit 29 in Southwest Virginia and Circuit 22 (Danville, and Franklin and Pittsylvania counties) retain the highest rates of aggravation in the state, 30% and 27% respectively. The city of Richmond (Circuit 13) records by far the highest aggravation rate, 23%, among the five circuits with 1,000 or more cases, and is the only one of these circuits with an aggravation rate above the statewide average.

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





## Virginia Localities and Their Judicial Circuits

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

### Compliance Under Midpoint Enhancements: Longer Sentence Recommendations for Violent Offenders

The truth in sentencing guidelines are designed to provide increased sentence recommendations for certain categories of crimes, prescribing prison sentence recommendations that are significantly greater than historical time served for these crimes. These statutorily mandated adjustments were implemented by increasing the new sentencing guidelines midpoint recommendation: the sentencing guidelines score for the primary offense in a case was raised, or "enhanced." Midpoint enhancements for the current most serious offense are given for certain assaults, burglaries, homicides, rape, robbery and sexual assault offenses.

In addition, there are specified degrees of enhancements for prior record based on the nature and seriousness of the offender's criminal history. The most serious prior

record receives the most extreme enhancement. A prior record labeled "Category II" contains at least one prior violent 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.

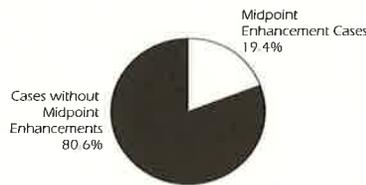
For the 20,042 cases sentenced under the truth in sentencing guidelines, 81% of the cases have not involved midpoint enhancements of any kind (Figure 21). Only 19% of the cases have qualified for a midpoint enhancement.

Of the 3,896 cases involving midpoint enhancements, nearly one-third received these upward adjustments due to the violent nature of the cur-

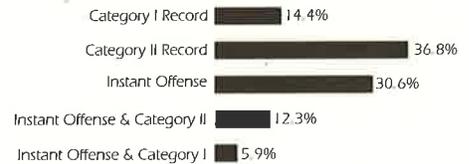
rent offense (Figure 22). Another 37% received an enhancement, despite a current offense that was nonviolent, because of a violent criminal history that was defined as a Category II prior record. The largest midpoint adjustments for prior record, relating to Category I offenders, were applied in only 14% of the enhancement cases. Over 12% of the cases, however, qualified for enhancements for both a current violent offense and a Category II prior record. Only a small minority of cases (6%) were targeted for the most extreme midpoint enhancements triggered by a combination of a current offense of violence and a Category I prior record.

The compliance rate for cases involving midpoint enhancements is 66%, which is significantly lower than the overall compliance rate of 75%. Low compliance in midpoint enhancement

**Figure 21**  
**Application of Midpoint Enhancements**



**Figure 22**  
**Type of Midpoint Enhancement Received**



cases is suppressing the overall compliance rate. When departing from the guidelines in these cases, judges are choosing to mitigate in 76% of the departures. This departure pattern is the reverse of the general departure pattern seen when all cases are examined in total (45% mitigation to 55% aggravation). The truth in sentencing guidelines are designed to provide sentence recommendations for violent offenders that are up to six times longer than the historical time served in prison by these criminals. Given the relatively low compliance rate and overwhelming mitigation pattern, this is evidence that judges feel the midpoint enhancements

may be too great in certain cases, although judges have cited other departure reasons.

Compliance rates across the different types of midpoint enhancements are not consistent (Figure 23). Enhancements for a Category II prior record generate the highest rate of compliance of the midpoint enhancements (72%), and the lowest mitigation rate (22%). The most severe midpoint enhancements, that for a combination of a current violent offense and a Category I prior record, yield the lowest rate of compliance (59%), although compliance in cases receiving a Category I

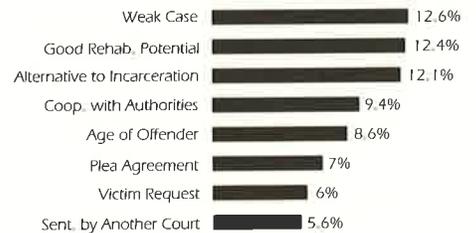
enhancement is almost as low (61%). In each category of midpoint enhancements, the ratio of mitigation to aggravation is at least 3 to 1, except for instant offense enhancements, in which the ratio is 2 to 1.

The tendency for judges to impose sentences below the sentencing guidelines recommendation in midpoint enhancement cases is readily apparent. Analysis of departure reasons in cases involving midpoint enhancements, therefore, is focused on downward departures from the guidelines (Figure 24). Such analysis reveals that the most frequent reason for mitigation in these cases is based on indications by judges that the evidence against the defendant was weak or that a key witness refused to testify (13%). In 79% of cases of where weak evidence is cited, the judge reported that he accepted and sentenced according to a plea agreement.

**Figure 23**  
**Compliance by Type of Midpoint Enhancement**

	Number of Cases	Compliance	Mitigation	Aggravation
None	16,146	77.3%	7.6%	15.1%
Category II Record	1,433	71.5	21.6	6.9
Category I Record	560	61.2	34.3	4.5
Current Offense	1,193	64.7	24.1	11.2
Current Offense & Category II	479	65.1	28.0	6.9
Current Offense & Category I	231	59.3	32.5	8.2

**Figure 24**  
**Most Frequently Cited Reasons for Mitigation in Midpoint Enhancement Cases**



In over 12% of the mitigation cases, the judge sentenced based on the perceived potential for rehabilitation of the offender. Nearly as often, however, judges elected to sentence these offenders to alternative sanctions in lieu of the recommended term of incarceration. In numerous instances involving mitigated departures in midpoint enhancement cases, judges cited the offender's cooperation with authorities (9%), or the offender's youth (9%). The judge, in 7% of the cases, imposed a shorter than recommended sentence based on a plea agreement, and did so in 6% of the cases at the request of the victim.

The midpoint enhancements in the truth in sentencing guidelines are the first normative (prescriptive) adjustments applied to sentencing guidelines in Virginia. Although the initial midpoint enhancements are specified in the Code of Virginia, the Commission can recommend revisions to the enhancements over time. These findings provide early evidence that the guidelines recommendations in enhancement cases are not accepted at the same rate as those without such enhancements. The Commission will continue to study the issue of midpoint enhancements, and will review their application within the truth in sentencing guidelines in a holistic and systematic fashion.

### Time Served by Violent Offenders under Truth in Sentencing

Achieving truth in sentencing, by abolishing parole and restructuring the system of good conduct allowance, was not the only goal of the legislation which passed in 1994. A priority of the legislation was also to ensure that violent felons were targeted for longer lengths of incarceration in prison than they historically had served.

Under the new sanctioning system, truth in sentencing guidelines recommendations for nonviolent offenders with no prior record of violence are tied to historical incarceration time served by these offenders during the period 1988-1992. Consequently, those defined as nonviolent offenders (based on the current offense and prior record) are recommended for incarceration lengths of stay comparable to what they actually served in the past. The legislation, however, statutorily mandates normative (prescriptive) adjustments in the form of midpoint enhancements which increase the guidelines recommendations for offenders convicted of violent crimes or who have a prior felony record of violent offenses (see *Compliance under Midpoint Enhancements* for additional informa-

tion). These midpoint enhancements are designed to provide recommendations for violent offenders which are up to six times longer than the historical time served in prison.

The role of the truth in sentencing guidelines in achieving longer prison stays for violent offenders has been largely successful. For instance, the historical average time served for offenders convicted of first degree murder under the parole system (1988-1992) was less than 12 1/2 years for a "basic case" involving no aggravating circumstances and no prior violent record (Figure 25). Under the truth in sentencing (no parole) system, offenders convicted of first degree murder with no prior record of violence are now receiving, on average, sentences with an expected time to serve of 39 years in prison, or more than three times what they historically served under the parole system. First degree murderers with a Category II prior record (a violent felony which carries a maximum statutory

**Figure 25**  
**Prison Time Served: Parole System vs. Truth in Sentencing (in years)**

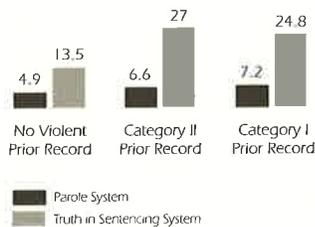


penalty of less than 40 years), who served an average of 14 years under the previous sentencing system, are now receiving terms which will result in an average time served of over 47 years. The most violent offenders, those convicted of first degree murder who have a Category I prior record (a violent felony which carries a maximum statutory penalty of 40 years or more), who historically served an average of less than 15 years, are being sentenced to terms which will produce an average time served of 39 years under truth in sentencing.

A similar effect can be seen when examining prison stays for offenders convicted of second degree murder. Offenders in a "basic case" with no violent prior record historically served less than five years under the parole system, and only 6 1/2 years and 7 years in cases involving a Category II and a Category I violent prior record, respectively (Figure 26). Under the truth in sentencing system,

**Figure 26**  
Prison Time Served: Parole System vs. Truth in Sentencing (in years)

**Second Degree Murder**

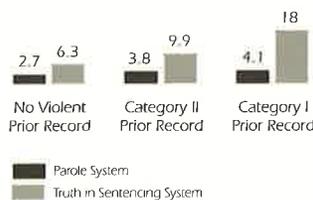


the offenders convicted of second degree murder who have no record of violence are receiving terms which will produce an average time served of over 13 years, which is nearly three times the historical amount. The effect of the new legislation is even more prominent when examining violent recidivists. Under the old law, offenders convicted of second degree murder who had violent criminal histories served an average of six to seven years in prison. Under truth in sentencing, these repeat violent offenders now are the recipients of sanctions that will result in an average time served of between 24 and 27 years.

Similarly, robbers who committed their crimes with firearms, but who had no prior record of violence, spent an average of less than three years in prison under the parole system (Figure 27). Even robbers with the most serious type of violent prior record (Category I) only typically served four years in prison prior to

**Figure 27**  
Prison Time Served: Parole System vs. Truth in Sentencing (in years)

**Robbery with a Firearm**

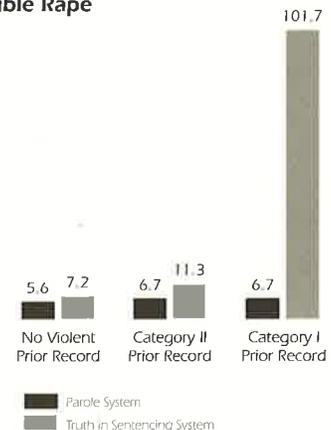


the no-parole legislation. Under truth in sentencing, offenders who commit robbery with a firearm are receiving prison terms that will result in an average time to serve of well over six years, even in cases in which the offender has no prior violent convictions. This is more than double the average time served by these offenders under the previous system. For robbers with a Category I prior record, such as a prior conviction for robbery, who are convicted under the new system, the expected average time served in prison is now 18 years, or more than four times the historical time served for offenders fitting this profile.

Finally, offenders with no prior violent record convicted of forcible rape in a "basic case" scenario under the parole system were released after serving, on average, 5 1/2 years in prison (Figure 28). Having a prior record of violence, however, increased

**Figure 28**  
Prison Time Served: Parole System vs. Truth in Sentencing (in years)

**Forcible Rape**



the rapist's average time served by only one year. Since the implementation of the truth in sentencing (no parole) system, however, rapists with no prior record of violence are being sentenced such that they will serve two years longer, on average, than they did historically. Those rapists with a Category II prior record are serving incarceration terms nearly twice as long as under the previous system. For offenders with a Category I prior record, such as a prior rape, the sentences imposed under truth in sentencing are equivalent to time to be served of over 100 years, effectively a sentence of life in prison.

Thus, despite the fact that there has been a greater tendency on the part of judges to mitigate some of the sentencing recommendations in cases involving midpoint enhancements, there is unequivocal evidence that the sentences being imposed under the new system for violent offenders will produce prison lengths of stay dramatically longer than those historically seen.

### Juries and the Sentencing Guidelines

Virginia is one of only six states that currently use juries to determine sentence length in noncapital offenses. Jury sentences have traditionally not been in compliance with guidelines recommendations. Juries composed of Virginia's citizens typically hand down sentences that are more severe than the sentencing guidelines recommendations. With the conversion to a truth in sentencing system, the sentencing guidelines have been adjusted to often recommend sentences based on historical time actually served and not historical sentences imposed by judges under the system of parole. Many citizens may be unaware of the full impact of the new sentencing system, and juries are not allowed, by law, to receive any information regarding the sentencing guidelines to assist them in their sentencing decisions. It has been speculated that jurors may not be fully aware of the implications of parole abolition and truth in sentencing and may be inflating their sentences with the expectation that only a small percentage will actually be served.

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

Since fiscal year 1994, the overall rate at which cases in the Commonwealth are adjudicated by a jury has been declining (Figure 29). In fiscal year 1994, over 5% of the felony convictions in Virginia's circuit courts were adjudications by juries. During its 1994 legislative session, the General Assembly enacted provisions for a system of bifurcated jury trials which became effective beginning in fiscal year 1995. In bifurcated trials, the jury establishes the guilt or innocence of the defendant in the first phase of the trial, and then, in a second phase, the jury is presented with informa-

**Figure 29**  
**Rate of Jury Trials: Parole System vs. Truth in Sentencing**



tion on the offender's prior record to assist jury members in making a sentencing decision.

During the first year of the bifurcated trial process the overall rate of jury trials dropped by half a percentage point. It should be noted that this figure includes only those cases sentenced under the existing parole system. For any offenses committed on or after January 1, 1995, offenders are not eligible for parole and are subject to the truth in sentencing guidelines. Among the 1995-96 cases subject to truth in sentencing, the overall rate of jury trials sank to just over 2%, or less than half the 1994 rate. Thus, it would appear that the shift to bifurcated trials led to a small decrease in the rate of jury trials. However, the combination of bifurcated trials and abolition of parole has resulted in a dramatic reduction in jury trials. This trend is better understood when reviewing jury trial rate data within specific offense groups.

Focusing on the violent offense groups reveals that the rate of jury trials has decreased across all crime categories except homicide (Figure 30). The jury

**Figure 30**  
**Rate of Jury Trials for Violent Offenses: Parole System vs. Truth in Sentencing**

	Parole		No Parole
	FY 1994	FY 1995	CY 1995-1996
Assault	11.5%	11.0%	5.6%
Homicide	30.1	34.6	34.4
Rape	16.8	13.2	10.9
Robbery	11.9	9.5	7.0
Sexual Assault	3.1	5.6	4.0

trial rate for homicide under no parole is actually higher than in FY 1994. To date under the truth in sentencing system, the Commission has seen an unprecedented proportion of second degree murder cases tried by juries. In all other violent offense groups, though, the rate of jury trials has declined. The majority of these offense groups also saw a decline in the rate of jury trials after the introduction of bifurcated jury trials in which the jury learns of the offender's prior criminal record before sentencing.

Examining the rate of jury trials for the property offense groups uncovers a more prominent trend. Jury trials in property cases, which were typically rare events, have become even rarer (Figure 31). In drug cases,

the largest sentencing guidelines offense group, the jury trial rate has been cut by more than half. In larceny cases, the jury trial rate plummeted from over 4% to 1% under truth in sentencing. Burglary of other structures (nondwellings) demonstrated the largest of such drops in jury trials, from 7% to almost 1%. Three of the property offense groups also exhibited a drop in the rate of jury trials after the introduction of bifurcated trials.

Of the 20,042 truth in sentencing cases under analysis for this report, the Commission has received 444 cases tried by juries. While the compliance rate for cases adjudicated by a judge or resolved by a guilty plea is nearly 76%, the sentences handed down by juries fell into compliance

**Figure 31**  
**Rate of Jury Trials for Property and Drug Offenses: Parole System vs. Truth in Sentencing**

	Parole		No Parole
	FY 1994	FY 1995	CY 1995-1996
Burglary of Dwelling	4.7%	5.5%	2.4%
Burglary of Other Structure	6.8	3.6	1.4
Drugs	3.0	2.4	1.2
Fraud	1.4	1.3	.7
Larceny	4.2	4.4	1.3

with the guidelines in only 48% of the cases they heard (Figure 32). Additionally, the rate of aggravation, or sentencing above the guidelines recommendation, is more than triple that of non-jury cases.

Judges, often reluctant to reduce a sentence imposed by a jury, modified jury sentences only 20% of the time. Of the 89 cases in which the judge modified the jury sentence, nearly half were cases in which the final sentence was still out of compliance with the guidelines recommendation for the case. In 36% of the modifica-

tion cases, judges brought a high jury sentence into compliance with the guidelines recommendation. In 10% of the modifications, both the original jury sentence and the judicially modified sentence fell within the recommended range. Only in 7% of the modifications did the judge lower a jury sentence, which was considered in compliance, to a sentence which fell short of the guidelines recommendation.

In those jury cases in which the final sentence fell short of the

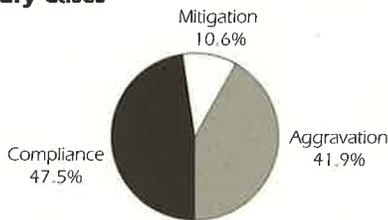
guidelines, it did so by a median value of 12 months (Figure 33). In cases where the ultimate sentence resulted in a sanction more severe than the guidelines recommendation, the sentence exceeded the guidelines maximum recommendation by a median value of 3 1/2 years. In many cases, juries sentenced offenders to terms which far exceeded the guidelines recommendation.

**Figure 33**  
**Median Length of**  
**Durational Departures in Jury Cases**

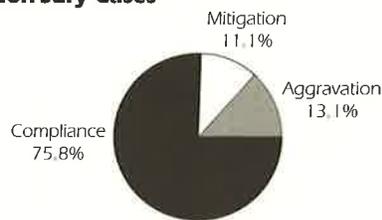


**Figure 32**  
**Sentencing Guidelines Compliance in Jury Cases and Non-Jury Cases**

**Jury Cases**



**Non-Jury Cases**



# Offender Risk Assessment Study

## 3

### Introduction

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

This chapter details work in progress in developing a risk assessment instrument. The final research product will be an additional tool for judges: an instrument specifically designed to assess the risk of recidivism posed by the offender at sentencing. The risk assessment instrument would be integrated into the existing sentencing guidelines system that provides information to a judge prior to each felony sentencing event. The primary measure of risk being assessed is the probability of reconviction for a felony crime within a three year period.

This report is divided into several parts. First, the legislative directive for risk assessment is reviewed. The general nature of risk assessment research is then discussed. Next, the Commission's activities in addressing the legislative directive are detailed. Finally, some preliminary findings regarding offender profiles, recidivism rates, and offender risk classification are presented. The Chapter concludes with a discussion of the implementation and evaluation of a risk assessment instrument in the context of the sentencing guidelines.

## Risk Assessment Legislation

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

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

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

*Apply the risk assessment instrument to offenders convicted of any felony that is not specified in (i) subdivision 1,2,3 of subsection A of 17-237 or (ii) subsection C of 17-237 under the discretionary sentencing guidelines, and shall determine, on the basis of such assessment and with due regard for public safety needs, the feasibility of achieving the goal of placing twenty five percent of such offenders in one of the alternative sanctions listed in subsection 4. If the Commission so determines that achieving the twenty five percent or a higher percent is feasible, it shall incorporate such goal into the discretionary sentencing guidelines, to become effective on January 1, 1996. If the Commission so determines that achieving the goal is not feasible, the Commission shall report the determination to the General Assembly, the Governor and the Chief Justice of the Supreme Court of Virginia on or before December 1, and shall make such recommendations as it deems appropriate.*

The legislation is somewhat ambiguous. Overall, more than 25% of non-violent offenders, the goal specifically stated in the legislation, are given sanctions such as probation that do not require incarceration. The Commission understands that the intent of the legislation is diversion of 25% of nonviolent offenders who otherwise would receive incarceration sentences into alternative means of punishment. This diversion is to be guided through the use of a "risk assessment" instrument.

Diversion of nonviolent offenders from scarce and expensive prison space to less costly alternative punishments can be an appropriate path to more efficient use of correctional resources. However, such diversion to alternative punishments is only truly cost efficient if it does not increase the danger to public safety. Risk assessment is viewed as a necessary component to help maximize the diversion of non-violent offenders from incarceration and, at the same time, to minimize threat to public safety.

## The Nature of Risk Assessment

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

Using risk assessment means developing profiles or composites based on overall group outcomes. Groups that statistically demonstrate a high degree of reoffending will be labeled high risk. Among the many factors being studied, some will prove to be statistically relevant to predicting the likelihood of repeat offending. This methodological approach to studying criminal behavior is not unlike that used in the medical field or insurance industry. In medical studies, cohorts

of individuals are studied in an attempt to identify the correlates of the development or progression of certain diseases. In the insurance industry, certain actuarial risks based on empirical study are calculated and used for determining life and auto insurance premiums. The risk profiles for medical or actuarial purposes, however, do not always fit every individual. For example, some very heavy smokers may not ever develop lung cancer. Similarly, not every offender that fits the lower risk profile will refrain from criminal activity. The goal is to produce an instrument that is broadly accurate and provides useful additional information to decision makers. The standard used to judge risk classification is not perfection, but the degree to which current practice can be improved. The standard, then, by which to judge the relative success of a risk assessment tool is the existing failure rate resulting from our decisions. This criterion, of course, is our existing recidivism rate.

Offender recidivism can be measured in several ways ranging from any new arrest to recommitment in prison. While any type of recidivism represents failure, not all new criminal behavior entails an equal risk to public safety. Reoffending with a misdemeanor crime is less serious than re-offending with a felony. Reoffending with a property felony is less serious than reoffending with a violent felony. As detailed below, the Commission's primary operational definition of reoffending is a subsequent felony conviction. However, the study will also explore the development of risk models which focus on the predicted likelihood of recidivism for a violent crime.

## Activities to Date

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

First, the Subcommittee directed staff to use existing automated information to study recidivism among non-violent offenders. The staff analyzed a random sample of 2,500 incarcerated nonviolent offenders who were released from incarceration between July 1, 1991 and December 31, 1992. A stratified sampling technique was used to increase the chance of including offenders with juvenile criminal records, as juvenile experiences, particularly delinquency, have been shown to be a common precursor to later adult crime. The staff reviewed

these offenders' subsequent records to determine which offenders were reconvicted for a felony by December 31, 1995. Thus, all offenders were followed-up for a three year period. Analysis was undertaken to study how accurately these offenders could be classified regarding likelihood of felony reconviction.

At the same time this automated information was processed, the Commission received a federal grant from the Edward Byrne memorial fund to collect additional data on offenders to improve the offender risk classification. Grant funds were used to hire research assistants to manually gather supplemental information that was theoretically important to assessing risk but was missing from the Commonwealth's existing automated data bases. The specific focus of this intensive data collection effort was information on an individual's experiences during his formative years to include juvenile contacts with the justice system, family life, educational achievement, etc. Additionally, this data collection effort focused on gathering more information on recidivism than that already available to the Commission. This particular

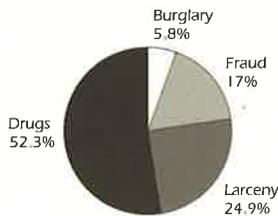
phase of the study has been very labor intensive and has been less productive than originally hoped. Despite visits to local courts where offenders were processed as juveniles, many of the required files could not be located. In other situations, the offender's files were located but contained far less information than desired for our study. Despite these setbacks, the Commission is in the final stages of this phase of the project and will soon add this manually collected information to the larger already automated data set for full analysis.

Given that the manual data collection phase consumed more time than initially planned, the Commission instructed staff to proceed with risk assessment model development using available automated data, understanding this work would be considered preliminary. With this caveat in mind, the first phase of the analysis produced a profile of the offender cohort.

## Offender Profile

The legislative directive to the Commission is to develop a risk assessment instrument to be applied to those convicted of nonviolent felonies. Accordingly, the Commission decided that the study sample should include felons who were convicted of either a drug crime, a larceny, a fraud, or certain types of burglary. As illustrated in Figure 34, the primary offense for the majority of offenders in the sample was a drug offense (52%). Larceny offenses comprised a quarter of the cases. The remaining offenders in the study cohort had an instant offense of either fraud or burglary. A decision was made to consider any burglary of a dwelling a violent crime, and those convicted of the remaining non-violent burglary crimes comprised only about six percent of the sample. Since the study was to include only nonviolent offenders, those who had a previous conviction for a violent crime were also eliminated for consideration in the study sample.

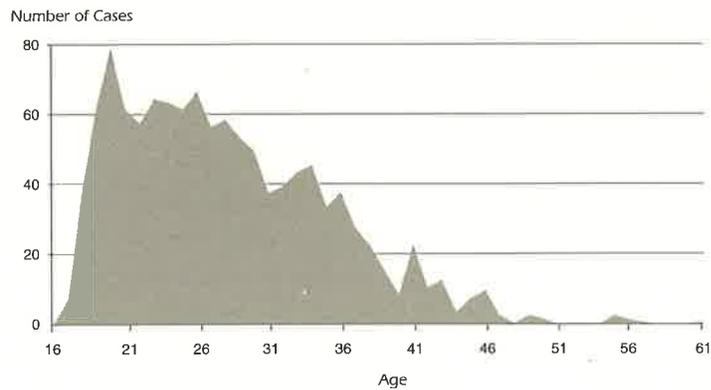
**Figure 34**  
**Risk Assessment Study Cohort**  
**by Original Most Serious Offense**



While the percentage of male offenders in the sample is quite high (82%), females are well represented in this sample of felons due to the focus on nonviolent crimes, particularly fraud. Although the offenders' ages at the time of sentencing to prison range from 16 to 61, the offenders are generally young. Figure 35 shows that the number of offenders in the sample drops off steadily after the peak age of 20. A very small number of juvenile offenders are transferred to circuit court; hence nearly all the offenders in the sample are 18 years or older. Consistent with the average young age of the offenders, the majority (62%) had never been married; only 13% were married.

The offenders in the sample, not unlike other felons, are generally undereducated. The majority of the sampled offenders have not completed high school. Similarly, the employment history of the offenders indicates a pattern of unemployment, and unskilled work for those who do have a job. More than half (55%) of the offenders were unemployed when the instant offense was committed. The majority (54%) of those who were employed were unskilled workers. The employment record of nearly half (47%) the sample offenders was characterized by probation officers as "irregular." In contrast, only about twenty percent were characterized as having a regular job with

**Figure 35**  
**Risk Assessment Study Cohort by Age**



few changes. Another measure of employment status is one's source of subsistence. Either no source of subsistence was cited or the offender's family was listed as the source of subsistence in a large percentage of cases (21%, & 22%, respectively).

About eight in ten offenders were represented by an attorney appointed by the court. This is generally indicative of the offender's income level. Current rules require that an individual offender must have less than \$9,675 annual average funds to qualify for court-appointed counsel.

Multiple indicators of substance abuse suggest a high level of use and abuse among sample offenders, perhaps partially explained by the high percentage of drug offenders in the study sample. As shown in Figure 36, nearly one-third of the sample acknowledged heavy use of illegal drugs. By comparison, only 18% admitted heavy alcohol use.

**Figure 36**

**Risk Assessment Study Cohort  
by Offender Reported Drug Use**



When probation officers were asked to ascertain whether the offender's substance abuse interfered with daily functioning, they indicated that the majority (51%) of offenders were adversely affected by illegal drug use, as compared to about a quarter (27%) affected by alcohol abuse.

The data indicate that many sample offenders had already received some type of treatment. More than a quarter (28%) of the offenders had already undergone some form of drug treatment. Sixteen percent had undergone treatment for alcohol abuse. Having undergone some form of mental health treatment was more common than alcohol treatment (21% compared to 16%).

An examination of whether an offender was convicted in a rural or urban circuit shows that nearly two-thirds of the sample were convicted in urban circuits. This figure is roughly comparable to the state population breakdown (69% urban in 1990). Cases from judicial regions in Tidewater, northern Virginia and central Virginia comprise more than 70% of the sample. This primarily urban area, sometimes termed the "Golden Crescent," stretches from northern Virginia to the south and east.

Most of the offenders in the sample had a criminal record as an adult or juvenile. The percentage of offenders having an adult criminal record was quite high (88%). More than three quarters of the sample cohort had at least one previous misdemeanor conviction and the majority (61%) had been incarcerated before. Nearly one quarter had already been incarcerated in prison prior to the incarceration term which placed them in the study sample.

More than one-third of the offenders (36%) had some type of official juvenile record, most for a delinquency offense. Nearly a quarter of the offenders had been placed on probation as a juvenile at least once. One-tenth had been committed to the state for a delinquency disposition, usually to one of the Commonwealth's institutions for juvenile delinquents. Keeping in mind the limitations of this automated data, it is important to note that juvenile prior record information may be understated by missing or unverified information, especially for offenders over age 25.

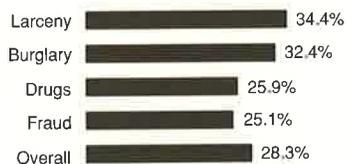
## Recidivism Rate

As discussed earlier, recidivism is defined as conviction for a new felony offense. During the follow-up period, 28% of the offenders were reconvicted. Figure 37 illustrates that larceny and burglary offenders in the sample were reconvicted at a higher rate than drug and fraud offenders. Only about 4% of the offenders were convicted of a subsequent violent felony. The single most common new conviction was for possession of a Schedule I/II drug. The single most common conviction for a violent offense was for robbery.

Those who are reconvicted of a felony appear to reoffend rather quickly after release from prison. In this sample, among those who committed a new crime, three quarters did so within a year and a half of release. Somewhat less than a quarter (22%) of the recidivists committed a new felony less than five months from their prison release.

Figure 37

### Recidivism Rate by Original Most Serious Offense



Examination of those who recidivated revealed some interesting findings. In the recidivist cohort, burglary offenders were most likely to be reconvicted of one or more violent felonies during the follow-up period. Drug offenders who returned to crime were likely to commit another drug offense; 59% of the drug offenders were reconvicted for another drug offense sometime during the follow-up period. By comparison, only 10% each among burglary and fraud offenders who reoffended were later reconvicted of a felony drug offense. Conversely, drug offenders who recidivated were least likely to be reconvicted of a property felony. If they appeared in the recidivist cohort, burglary, fraud and larceny offenders were much more likely to be reconvicted of another felony property crime.

## Offender Risk Classification

Offender probability of being reconvicted for any felony is the primary measure of risk for this research. Attempts to predict violent felony reconviction have to date been unsuccessful, though more work is anticipated. A statistical method known as logistic regression is used to develop recidivism predictions. In the sample, each offender’s probability of reoffending is predicted based on overall group probabilities of reconviction. For example, if the group of offenders with a large number of prior misdemeanor crimes is disproportionately reconvicted, then prior misdemeanors will likely prove statistically significant as a predictor of felony reconviction.

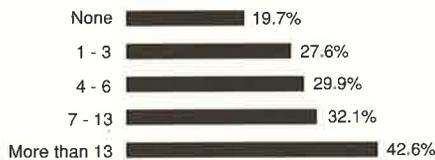
Logistic regression, a sophisticated statistical analysis procedure, was utilized in order to simultaneously examine the relative importance of the many factors that may influence recidivism. Those factors which prove to be most relevant to the likelihood of recidivism are identified as key predictors. Each predictor is given a weight based on its contribution to the probability of recidivism. As a result, the odds that an offender will recidivate can be calculated based on the unique set of case attributes.

While numerous factors were examined to identify what group or individual characteristics were related to reconviction, only certain factors proved important in actually classifying a lower risk group that may prove an acceptable risk for alternative punishments. These factors include:

- fewer counts of the current offense
- absence of legal restraint at time of current offense
- few or no prior adult felony or misdemeanor crimes
- longer time interval since previous offense
- few or no prior juvenile crimes
- being older
- being female
- fewer socioeconomic disadvantages
- completion of high school

For example, a clear relationship between number of criminal (rather than traffic) misdemeanor convictions and recidivism was found. Figure 38 shows that as the number of prior

**Figure 38**  
**Recidivism Rate by Number of Prior Misdemeanor Convictions**



misdemeanor convictions increased, so too did the likelihood of repeat offending. About 20% of those with no previous misdemeanor convictions returned to crime while more than 40% of those with the greatest number of these priors did so.

The analysis also revealed a strong relationship between years of formal education and recidivism. Figure 39 demonstrates that 21% of those with more than a high school education were repeat offenders; those who did not enter high school returned to crime 36% of the time.

Statistical risk assessment must be tested to determine the predictive power of the statistical models. For example, how well do these models help us predict that a convicted felon will commit and be convicted for a new felony? The standard against which this work should be assessed is not perfect prediction, but improvements over existing decisions.

**Figure 39**  
**Recidivism Rate by Education Level**



There are two basic forms of prediction error. First, the model may err with a false reconviction prediction. In this instance, case attributes place the person in the "higher likelihood of reoffending group," but no reconviction was discovered within three years of release. Second, the model may err with a false non-reconviction prediction. In this situation, case attributes place the person in the "lower likelihood of reoffending group," but a reconviction was discovered within three years of release.

In the Commission's view, the different types of prediction error are not considered equally important. An error that results in not incapacitating an offender who subsequently re-offends is considered more serious since it can endanger public safety. Determining which offenders to label as "low" risks is dependent on a policy decision regarding the relative level of risk society will tolerate. The statistical models developed in this research assign to each offender a probability of recidivism. No offender has either a 0% or 100% risk of recidivism.

Choosing a recidivism probability level to define low risk offenders will be guided by the mandate to not endanger public safety. However, it is impossible to select a risk level that will completely eliminate recidivism of offenders labeled as low risks. For example, assume that a decision was made to label as low risk all offenders who had a recidivism probability of less than 20%. Using this definition, the low risk offenders have less than a one in five chance of becoming a recidivist. The odds are such that most of these offenders defined as low risk will not return to crime but a few will do so. The statistical methodology cannot, then, produce a perfect model that eliminates completely all risk.

The Commission believes that it is indeed feasible to develop and implement a risk assessment instrument that is useful in helping to identify relatively good risks for alternative punishments. However, it is too premature to determine if the risk assessment instrument will achieve the goal of placing 25% of the targeted non-violent offenders in the alternative punishment programs.

## Risk Assessment and Sentencing Guidelines

The Virginia Criminal Sentencing Commission has developed a timetable for inclusion of risk assessment into the sentencing guidelines system. At present, offenders are first recommended for incarceration or not, and then if incarceration is recommended, a specific range of time is suggested. The risk assessment instrument would serve as a supplemental tool for judges in nonviolent offender cases where a incarceration sentence is recommended. In those incarceration cases where the risk assessment instrument labels an offender as "low" risk, the judge would have the option within the guidelines of placing the offender in an alternative punishment program such as the Detention Center Incarceration Program. Over the next few months, the Commission anticipates completing model development work for the risk assessment instrument.

Because the Commission believes it is very important to closely monitor the application of the risk assessment instrument as it is introduced as a new component to the guidelines process, a decision has been made to stagger its implementation across the Commonwealth. By late 1997, the Commission envisions implementation in a number of judicial circuits. It is planned that by mid-1999, implementation in all judicial circuits will be achieved.

## Future Directions

While predictions of recidivism risk may be feasible using the above plan, more information needs to be collected on offenders being placed in alternative punishment programs. Specifically, new information must be gathered on each offender's experience within the program setting (e.g., specific substance abuse treatment, vocational training, etc.). It is possible that, for some types of offenders, specific interventions offered within the setting of these programs may have a significant impact on reducing the likelihood of recidivism. Examining the relative effectiveness of these alternative punishments in protecting public safety will require a detailed follow-up analysis of the participants and subsequent identification of those factors which correlate with the probability of success (i.e., not reoffending). Evaluation findings can then serve as a means to revise the risk assessment instrument and, in turn, result in more targeted and reliable diversion recommendations.



# Mandatory Minimum Sentencing Study

## 4

### House Joint Resolution 172

The General Assembly through House Joint Resolution 172 requested that the Virginia Criminal Sentencing Commission study the effects of mandatory minimum felony sentences in Virginia. Specifically, the Commission was asked to identify all existing mandatory minimum sentences for felony offenses, determine any deviations that their use cause from otherwise applicable sentencing guidelines, and identify the number of inmates currently serving such sentences. The study is also to include a projected population of state inmates sentenced under the felony mandatory minimum laws. Finally, the Commission was requested to identify the fiscal impact of the imposition of the mandatory minimum sentences relative to the sentences recommend by the truth in sentencing guidelines. The Commission's findings with regard to House Joint Resolution 172 follow. A complete report with appendices to be published by the Division of Legislative Automated Systems is forthcoming.

### Introduction

Mandatory minimum sentencing laws have existed in Virginia for almost 30 years. An offender charged under a mandatory minimum penalty law has to receive at least a specified minimum sentence which cannot be suspended in whole or part. However, with few exceptions, those sentenced for crimes prior to 1995 under provisions of a mandatory penalty were still parole eligible and able to receive generous good conduct reductions from their sentence. Thus, those sentenced on a mandatory minimum penalty under Virginia's old sentencing structure usually served a fraction of the actual time imposed. Mandatory minimum penalty laws encompass a wide variety of felony offenses, e.g., use of a firearm in the commission of a felony, habitual traffic offender, and offenses pertaining to injury to a law enforcement officer (see Figure 40 for a complete listing).

For those convicted of felony crimes committed on or after January 1, 1995, parole has been abolished and earned sentence credits scaled back to ensure that at least 85% of the imposed term of incarceration is served. Concurrently, new no-parole sentencing guidelines were instituted to accompany the new sentencing system.

These guidelines cover most of the felony offenders sentenced in Virginia (close to 95%). For many offenders, including some with mandatory minimum penalties, these new guidelines reflect the historical time served by similarly situated offenders in Virginia. Virginia's new sentencing system eliminates the former common judicial practice of greatly inflating sentences to account for the sentence reducing effects of parole and generous good time allowances. While in most cases the guidelines have been recalibrated to reflect historical time served, they are superseded or "trumped" in instances involving a mandatory minimum penalty. Consequently, a *sentence imposed* under a mandatory minimum statute remains the same before and after the abolition of parole; however, the *time served* by an offender sentenced under a mandatory minimum statute is likely to be much greater in the no-parole system.

The primary question that this study addresses is: what would be the bed space impact of applying the no-parole sentencing guidelines to offenders who are presently being sentenced under the mandatory minimums? Answering such a question will provide information relevant to the fiscal impact of mandatory minimum statutes.

## Scope of the Study

The focus of the study is on both the impact of the mandatory minimum laws on the Virginia prison system and the identification of any deviations from the guidelines necessitated by the existence of mandatory minimum penalty laws. A complete study of the fiscal impact of mandatory minimum penalty laws should include an examination of both their relative costs and benefits.

## Costs

The primary cost of sentencing under the mandatory minimums in lieu of using the sentencing guidelines is the additional expenditure arising due to the increased period of incarceration of offenders. Such an increase can occur due to an increase in the incarceration rate, or an increase in the length of the sentence imposed.

## Benefits

It is easier to measure the costs of mandatory minimums than the benefits. One of the strongest potential benefits of mandatory minimum statutes concerns its possible deterrent impact. The deterrent effect of mandatory minimums remains controversial in the criminological literature. While there is a strong body of research that argues against the deterrent effects of mandatory minimum laws, the external validity of these studies remains in question. In other words, how generalizable are these findings to Virginia? Ideally, if good reliable data for a time period covering the years prior to and after the enactment of the penalties were available, it would not be difficult to conduct a sound analysis of the deterrent impact of our mandatory sentencing laws. Unfortunately, the emergence of good reliable data on felony convictions in Virginia is a relatively recent phenomenon and the necessary longitudinal information required for such an analysis is lacking. The problem is further compounded by the fact that Virginia has only recently abolished parole. A pertinent question is: are the deterrent effects of mandatory penalties in criminal justice systems without parole different from the deterrent effects of mandatory minimums in systems with parole? This question remains to be addressed in the literature.

Another potential benefit of mandatory minimum penalties is the possibility of a reduction in recidivism (through increased incapacitation) as a result of increased prison length and prison incarceration rate. Other potential benefits of mandatory minimum laws include decreased court expenditures due to the potentially greater likelihood of obtaining guilty pleas as well as to higher arrest clearance rates. It is often asserted by prosecutors that the threat of being charged under provisions of a stiff mandatory minimum penalty is very effective in both eliciting cooperation from defendants in other cases as well as in generating guilty pleas to other charges. Eliciting guilty pleas from defendants without the expense of a trial saves considerable prosecutorial and court resources. Similarly, eliciting defendants to cooperate in the investigation of other pending cases often leads to arrests and convictions in cases that would otherwise have been left unsolved.

A complete study of all the relative costs and benefits of mandatory minimum penalties is, however, beyond the parameters set out in House Joint Resolution 172. Accordingly, the following analysis addresses the specific questions posed by the General Assembly. However, to the degree that there may be a deterrent effect of these mandatory minimum penalties, the projected impact analysis that follows is based on very conservative assumptions (i.e., no deterrent impact).

### **Felony Mandatory Minimum Penalties and Offenders Sentenced under their Provisions**

There are 37 specific Virginia Code sections that prescribe mandatory minimum penalties covering 45 unique felony crimes. The reason that there is not a one-to-one correspondence between Code sections and crimes is that some identical statute numbers apply to more than one specific crime. For example, §18.2-255(A) is the Code section for two offense behaviors: selling a Schedule I/II drug or one ounce or more of marijuana to a minor three years the offender's junior (five year minimum penalty) *and* selling less than one ounce of marijuana to a minor three years the offender's junior (two year minimum penalty). Figure 40 contains a complete listing of all felony crimes in the Code of Virginia that carry a mandatory minimum penalty. The longest standing mandatory minimum felony penalty is that for habitual traffic offenders. This law, which has recently been revised, was initially enacted in 1968. The next oldest felony mandatory minimum penalty is that for use of a firearm in the commission of certain felonies.

This law, which has also undergone revisions, was initially enacted as a mandatory minimum penalty law in 1976. The greatest number of felony mandatory minimums have been enacted during the 1990s and have focused on two types of criminals – drug and sex offenders.

Figure 40 also includes information on the number of offenders who were sentenced under the provisions of each mandatory minimum law during 1995 (most recent data available) as well as the number of inmates serving a prison sentence in part for each of these violations as of June 30, 1996. In total, there were 1,605 offenders in 1995 convicted under provisions of a felony-level mandatory minimum penalty. Based on this conviction data, the most frequently invoked mandatory minimum was that for use of a firearm in the commission of a felony (first offense) with 511 offenders receiving this penalty. Close behind, with 498 sanctioned offenders, were convictions for operating a vehicle after being declared a habitual offender when such driving endangers the life, limb, or property of another. A second or subsequent violation of driving after being declared a habitual offender, regardless of endangerment, was the third most often applied mandatory minimum law with 388 offenders being so convicted.

Figure 40

## Felony Mandatory Minimum Sentencing Laws in Virginia

Offense	Statute	Initial Enactment Date	Mandatory Minimum	1995 Convictions	Inmates as of 6-30-96
<b>ASSAULT</b>					
Unlawful Bodily Injury to Law Enforcement Officer .....	18.2-51.1	1983	1 Year	19	22
Malicious Bodily Injury to Law Enforcement Officer .....	18.2-51.1	1983	2 Years	37	68
<b>DRUGS / FIREARM</b>					
Sell 1 lb. or More Marijuana While Possessing A Firearm .....	18.2-308.4(B)	1993	3 Years	4	3
Sell 1 lb. or More Marijuana While Poss. A Firearm - Subsequent Offense .....	18.2-308.4(B)	1993	5 Years	1	1
Sell Schedule I or II Drug While Possessing A Firearm .....	18.2-308.4(B)	1992	3 Years	11	24
Sell Schedule I or II Drug While Possessing A Firearm - Subsequent Offense .....	18.2-308.4(B)	1992	5 Years	0	2
Sell Etc., Schedule I, II, or 1 oz or More Marijuana to a Minor 3 years his Junior .....	18.2-255(A)	1990	5 Years	4	8
Sell Etc., Less Than 1 oz., Marijuana to Minor 3 Years his Junior .....	18.2-255(A)	1990	2 Years	2	5
<b>DRUG KINGPINS</b>					
Gross \$500,000 or more w/in 12 month period .....	18.2-248 (H)	1992	20 Years	0	0
Heroin - Sell, Distribute, etc., 100 kg or more .....	18.2-248 (H)	1992	20 Years	1	1
Cocaine/Derivatives - Sell, Distribute, etc., 500 kg or more .....	18.2-248 (H)	1992	20 Years	3	1
Crack/Cocaine base - Sell, Distribute, etc., 1.5 kg or more .....	18.2-248 (H)	1992	20 Years	1	0
<b>FIREARM</b>					
Firearm Used In the Commission of a Felony .....	18.2-53.1	1976	3 Years	511	2530
Firearm Used In the Commission of a Felony Subsequent Offense .....	18.2-53.1	1976	5 Years	101	836
Provide more than one Firearm to Ineligible Person Through Purchase or Transportation .....	18.2-308.2:2(M)	1994	5 Years	0	0
Solicit Person to Violate §18.2-308.2:2(M) .....	18.2-308.2:2(N)	1994	5 Years	1	0
<b>HOMICIDE</b>					
Aggravated Involuntary Vehicular Manslaughter .....	18.2-36.1(B)	1994	1 Year	9	0
<b>MISCELLANEOUS</b>					
Shoot/Throw Missile at Police etc., Vehicles with Malice .....	18.2-154	1990	1 Year	2	0
Shoot/Throw Missile at Police etc., Vehicles without Malice .....	18.2-154	1990	1 Year	0	0
Escape From a Correctional Facility .....	53.1-203(1)	1985	1 Year	12	16

Offense	Statute	Initial Enactment Date	Mandatory Minimum	1995 Convictions	Inmates as of 6-30-96
<b>SEXUAL ASSAULT SUBSEQUENT CONVICTIONS §18.2-67.5:2</b>					
Both the instant and prior felonies must be on this list					
Adultery or Fornication with Own Child etc. Age 13 to 17 .....	18.2-366(B)	1995	20 Years	0	0
Adultery or Fornication with Own Child/Grandchild .....	18.2-366(B)	1995	10 Years	0	0
Aggravated Sexual Battery, Victim under Age 13 .....	18.2-67.3(1)	1995	20 Years	0	0
Aggravated Sexual Battery, By Force, Threat, etc. ....	18.2-67.3(2)	1995	20 Years	0	0
Carnal Knowledge, Victim Age 13-15 (Accused over 18) .....	18.2-63	1995	10 Years	0	0
Carnal Knowledge, Consenting Victim Age 13-15 (Accused over 18) .....	18.2-63	1995	5 Years	0	0
Carnal Knowledge, by Person Providing Services Under Purview of Court etc. ....	18.2-64.1	1995	5 Years	0	0
Indecent Liberties with Child .....	18.2-370	1995	5 Years	0	0
Indecent Liberties with Child - Custodian .....	18.2-370.1	1995	5 Years	0	0
Sodomy Family Member to Family Member .....	18.2-361(B)	1995	10 Years	0	0
Sodomy Parent/Grandparent etc. to Child/Grandchild etc. Age 13 to 17 .....	18.2-361(B)	1995	20 Years	0	0
Conspiracy to Commit any Offense Listed Above With 5 Year Maximum .....	18.2-22	1995	5 Years	0	0
Conspiracy to Commit any Offense Listed Above With 10 to 20 Year Maximum .....	18.2-22	1995	10 Years	0	0
<b>SUBSEQUENT VIOLENT FELONY SEXUAL ASSAULT §18.2-67.5:3</b>					
Both the instant and prior felonies must be on this list					
Abduction of Person with the Intent to Defile .....	18.2-48	1995	Life	0	0
Object Sexual Penetration - Victim Under Age of 13 .....	18.2-67.2(1)	1995	Life	0	0
Object Sexual Penetration - By Force, Threat, etc. ....	18.2-67.2(2)	1995	Life	0	0
Rape - Intercourse by Force, Threat or Intimidation .....	18.2-61(i)	1995	Life	0	0
Rape - Intercourse Through Victim's Mental Incapacity .....	18.2-61(ii)	1995	Life	0	0
Rape - Intercourse with Victim Under the Age of 13 .....	18.2-61(iii)	1995	Life	0	0
Sodomy - Victim Under Age 13 .....	18.2-67.1(1)	1995	Life	0	0
Sodomy - By Force, Threat, Mental Incapacity .....	18.2-67.1(2)	1995	Life	0	0
Conspiracy to Commit any Offense Listed Above .....	18.2-22	1995	10 Years	0	0
<b>THIRD CONVICTION FOR A VIOLENT FELONY §19.2-297.1</b>					
Three Strikes .....	19.2-297.1	1994	Life	0	0
<b>TRAFFIC</b>					
Operate Vehicle After Being Declared Habitual Offender - Endangerment .....	46.2-357(B,2)	1968*	12 Months	498	299
Operate Vehicle After Being Declared Habitual Offender - Second Offense .....	46.2-357(B,3)	1968*	12 Months	388	344

\* This law was modified in 1993 to allow an offender convicted of driving after being declared an habitual offender for the first time (no endangerment) to be convicted of a misdemeanor with a mandatory 10 day jail sentence.

The only other mandatory minimum statute applied with frequency was that for a subsequent conviction for using a firearm in the commission of a felony. In 1995, 101 offenders were convicted under this provision.

These four above referenced crimes accounted for 93% of all felony-level mandatory minimum sentencing in 1995. Habitual traffic offenders alone comprised approximately 55% of these convictions. Conversely, a significant number of the mandatory minimum penalty statutes were never or very rarely applied.

The last column of information on Figure 40 contains the number of inmates serving a prison sentence, in whole or part, under the provisions of a mandatory minimum penalty as of June 30, 1996. Because some offenders serving time in prison under a mandatory minimum term are also serving time for other crimes, the numbers here will sometimes exceed those which count the number of offenders convicted under mandatory laws in any given year.

Also, because the length of stay in prison on many of the mandatory terms can exceed one year, offenders sentenced under these provisions will accumulate and sometimes exceed the number sentenced in any given one year period.

By far, the single largest group of offenders serving time in prison for a mandatory minimum penalty are those who used a firearm in the commission of a felony (§18.2-53.1). Over 3,300 inmates were serving a sentence as either a first or subsequent offender under this mandatory provision at the end of fiscal year 1996. There were also 643 inmates serving time for a mandatory term as a habitual traffic offender. In this case, the number of inmates is less than the number sentenced in a year since during fiscal year 1996 many sentenced habitual traffic offenders received a 12 month mandatory minimum term and were still, under the parole system, considered to be local responsible prisoners.

## Estimating the Impact of Mandatory Minimum Penalties

A computer program was developed to estimate the sentence expected under the new no-parole guidelines for all offenders who would be affected under the provisions of mandatory minimum penalties.

In those instances where the mandatory minimum penalty exceeded the maximum time expected under the guidelines, the additional incarceration time was calculated. Those whose sentences were lower than the specified mandatory minimum received an increment to ensure that they received *at least* the mandatory minimum. For example, an offender being sentenced as a habitual traffic offender who receives a maximum guideline recommendation of ten months would have this sentence increased by two months to achieve the threshold of the mandatory minimum term of 12 months. A key assumption in this study is that offenders whose sentences under the sentencing guidelines are already above the mandatory minimums are not affected by the mandatory minimums. For instance, an offender being sentenced for both first degree murder and use of a firearm in the commission of a felony who receives a maximum guideline recommendation of 40 years would not be affected by the three year penalty for the firearm use.

A computer simulation program specially developed by the Commission was applied to forecast the prison population under the above sentencing scenarios. The differences in the estimated prison populations between the scenario where offenders would be sentenced under the no-parole guidelines with no adjustments and the scenario where upward adjustments would be made, provides information to discern the impact of mandatory minimum laws. It is very important to note here that the impact of sentencing under existing mandatory minimum penalties is *already* part of the official state-responsible inmate forecast submitted annually by the Secretary of Public Safety. This inmate forecast is designed to take into account all existing laws and practices. Nonetheless, there is an impact on correctional resources due to the existing mandatory minimum penalties and this analysis identifies that impact relative to sentencing that would otherwise take place under the existing guidelines. Consequently, if any legislative action were taken to repeal all or some of the existing mandatory minimums, the result would be a bed space *savings* over the official prison bed forecast.

As seen in Figure 40, mandatory minimum laws subsume a wide variety of criminal offense behavior. Among the offenses enumerated in Figure 40, there are only five crimes that are not covered under the existing sentencing guidelines. These include aggravated vehicular involuntary manslaughter, escape from a correctional facility, the drug kingpin law, providing or soliciting to provide more than one firearm to an ineligible person through purchase or transportation, and the third conviction for a violent felony (“three strikes”). Since these crimes are not covered by the sentencing guidelines, the above referenced methodology is not able to discern the prison bed space and accompanying fiscal impact of their mandatory minimum provisions. While this is a limitation to the impact analysis, it is not a great one. As can be seen in Figure 40, all of the statutes for non-guidelines crimes are among those with few or no actual convictions. It is therefore likely that the omission from the impact analysis is of little practical consequence.

The following analysis, therefore, focuses on those offenses covered by both the guidelines and mandatory minimum penalties. In order to bring conceptual clarity to the findings, the following discussion focuses on six categories of offenses:

- Injury to law enforcement officer
- Sale of drugs to minors
- Firearm use in felonies
- Sexual assault, subsequent conviction
- Violent sexual assault, subsequent conviction
- Habitual traffic offender

The impact analysis findings are summarized in Figure 41. Included within this table is information on 1) the average sentence adjustment, if necessary, required to adjust the guidelines upward for cases covered by a mandatory minimum, 2) the estimated percentage of new prison admissions accounted for by each type of mandatory minimum, and 3) the estimated number of prison beds needed to house inmates sentenced under each category of mandatory penalty law.

## Impact Analysis

### Injury to Law Enforcement Officer (§18.2-51.1)

There are two variations in this statute with regard to the required mandatory minimum penalty. A malicious bodily injury to a law enforcement officer carries a two year mandatory term while unlawful bodily injury incurs only a one year minimum sentence. The impact analysis reveals that the existence of these specific mandatory minimums increases the average sentence under the guidelines system by approximately two months. This very small upward adjustment implies that most of the offenders sentenced for these crimes are already receiving guidelines sentences that exceed the mandatory minimum term thresholds.

The percentage of total incoming prison admissions affected by this statute is projected to be extremely small – only 0.2%.

The impact of sentencing under these mandatory penalties, in lieu of using existing sentencing guidelines, is an estimated 10 additional prison beds by June of 2001 and 13 new prison beds by June, 2006 (Figure 41). The estimated impact is very minor due to both the small average upward adjustment required in cases where the guidelines maximum does not meet the mandatory minimum and the small percentage of prison admissions affected by those convicted under this law.

### Sale of drugs to minor three years junior (§18.2-255(A))

There are also two distinct variations in penalty structure under this statute. Those convicted of selling a Schedule I/II drug or more than one ounce of marijuana to a minor three years or more the offender's junior are required to receive a minimum term of five years. If the drug sale involves less than one ounce of marijuana, the minimum term is reduced to two years. Imposition of the mandatory minimums increases the average sentence by approximately 28 months over what would be obtained on average with use of the sentencing guidelines. However, only about 0.1% percentage of the incoming prison admissions are estimated to be affected by this statute.

**Figure 41 Mandatory Minimum Penalties Impact Analysis Results**

Statute	Offense	Average Guidelines Sentence Increase Under Mandatory Minimum (in months)	Estimated Percent of New Prison Admissions	Number of Prison Beds		
				June-98	June-01	June-06
§18.2-51.1	Injury to Law Enforcement Officer	1.89	0.2%	0	10	13
§18.2-255(A)	Sale of Drugs to Minor Three Years Junior	27.76	0.1%	0	2	12
§18.2-53.1 & §18.2-308.4(B)	Use of Firearm In the Commission of Certain Felonies	3.13	5.1%	5	58	154
§18.2-67.5:2	Sexual Assault Subsequent Conviction	19.65	0.3%	0	14	30
§18.2-67.5:3	Subsequent Violent Felony Sexual Assault	0.00	0.2%	0	0	0
§46.2-357(B2 & B3)	Habitual Traffic Offender	3.90	7.5%	325	425	572

Thus, despite the relatively large average adjustment required to raise the guidelines sentence to the level of the required minimum penalty, the projected prison bed space impact is extremely low – only two additional beds by June, 2001 and only 12 more beds by June, 2006.

**Use of a firearm in commission of certain felonies (§18.2-53.1 & §18.2-308.4(B))**

§18.2-53.1 provides that the use or threatened use of a firearm in committing or attempting to commit a murder, rape, forcible sodomy, inanimate or animate object sexual penetration, robbery, carjacking, burglary, malicious wounding, malicious bodily injury to a law enforcement officer, aggravated malicious wounding, malicious wounding by mob or abduction shall constitute a distinct felony offense and be punishable by a mandatory minimum term of three years for the first offense and five years for any subsequent violation. §18.2-308.4(B) provides the same mandatory penalty for the use or threatened use or possession of a firearm in committing or attempting to commit the illegal manufacture, sale, distribution, or the possession with intent to do any of the aforementioned acts of a Schedule I/II drug or more than one pound of marijuana.

As seen in Figure 40, the number of offenders convicted under the provisions of §18.2-308.4(B) is small and, accordingly, do not greatly impact the prison forecast. The impact that is found in this area, then, is that which comes from those convicted of §18.2-53.1. The overwhelming majority of offenders convicted under §18.2-53.1 already receive guidelines sentence recommendations that greatly exceed the mandatory minimum penalty. The primary reason for this is the fact that the completed predicate offense will always, by itself, provide a sentence recommendation that either includes or greatly exceeds the mandatory term. However, in circumstances involving offenders convicted of an *attempt* of certain predicate offenses (e.g., burglary, malicious wounding), the guidelines range in certain cases may require an upward adjustment to reach the mandatory term.

Overall, imposition of the mandatory minimums in the above referenced crimes involving firearms increases the average sentence under the guidelines system by approximately three months. A relatively high percentage of incoming prison admissions (5.1%), however, are estimated to be those with a conviction under these statutes (Figure 41). The projected impact of sentencing under these mandatory penalties, in lieu of the guidelines, is 58 additional prison beds by June, 2001 which grows to 154 new prison beds by June, 2006. In spite of the small occasional upward adjustments to the guidelines required in these cases, there is a larger forecast of future prison beds due to the sheer numbers of affected offenders.

### **Sexual Assault Subsequent Conviction (§18.2-67.5:2)**

Any person convicted of a second or subsequent offense under §18.2-67.5:2 (see Figure 40), when such crimes were not part of a common act and when such person was at liberty between each conviction, shall be sentenced to the maximum statutory term. This is the most recently enacted mandatory minimum provision having taken effect in 1995. Consequently, there were no recorded cases in our data bases of convictions under this statute. Nonetheless, an examination of the sexual assault guidelines for repeat sex offenders reveals that the application of this law would result in, on average, an increase in the sentence by approximately 20 months over what would otherwise result from the guidelines. While there have been no recorded convictions yet for this statute, an examination of the criminal records of incoming prison admissions reveals that about 0.3% met the law's criteria.

Without historical data to work with it is more difficult to gauge the future bed space impact of this legislation. To do so will require that certain assumptions be made about the rate of application of the law to eligible cases. It is a well known fact that mandatory minimum penalties are not enforced with 100% certainty. As noted earlier, in some instances a mandatory minimum charge is dropped as a concession for a guilty plea to other charges or in return for assistance in the prosecution of other defendants. Estimating the future application of this statute is especially difficult because our examination of the prosecution of felony sex offenses indicates a relatively high percentage of negotiated plea agreements. Sex offenses are among the hardest of cases to successfully prosecute and certain concessions are sometimes made to ensure a felony conviction with accompanying prison time. Since there is only one other mandatory minimum penalty which addresses sex offenders (§18.2-53.1), it was decided to examine the rate of application of this statute to eligible cases and to then assume the same rate of application for the subsequent sexual assault cases.

This methodology led to the assumption that §18.2-67.5:2 would be applied in approximately 50% of the eligible cases.

Using this assumption about the rate of future application of the law, the impact of sentencing under these mandatory penalties, in lieu of using existing sentencing guidelines, is an estimated 14 additional prison beds by June, 2001 and 30 new prison beds by June, 2006 (Figure 41). Therefore, despite the relative stiffness of this particular mandatory penalty, the impact is negligible for two primary reasons: 1) the small number of new prison inmates who fit the law's criteria, and 2) the fact that the guidelines already include a sentence enhancement for violent recidivism such that the added increment in punishment due to the mandatory term is not high.

**Subsequent Violent Felony Sexual Assault (§18.2-67.5:3)**

Any person convicted of a second or subsequent offense under §18.2-67.5:3 (see Figure 40), when such crimes were not part of a common act and when such person was at liberty between each conviction, shall be sentenced to the maximum statutory term. The same limitations described above regarding lack of historical data apply here as well. Nonetheless, it is much easier to make a forecast of future impact for this particular statute. The reason for this is the fact that offenders who fit the criteria for the application of this law are estimated to receive, on average, sentences of approximately 40 years in prison even without the mandatory term. The mandatory minimum penalty in these cases is life. Whether sentenced under the guidelines or the mandatory minimum penalty, the repeat violent sex offender will be incarcerated for a very long time - certainly throughout the entire period of the forecast horizon. Thus, this particular mandatory penalty will have no impact on future required prison beds in the next ten years (Figure 41). Also, since an examination of the profiles of incoming prison admissions reveals that only 0.21% of inmates are likely eligible for this mandatory sanction, and these offenders are already serving very long terms, the long-term bed space impact (i.e., beyond 2006) will be small.

**Habitual Traffic Offenders (§46.2-357(B2 & B3))**

Under §46.2-357(B2), anyone who operates a vehicle after being declared a habitual traffic offender and such driving endangers the life, limb, or property of another, shall receive a mandatory minimum term of at least 12 months confinement. The same mandatory penalty is provided for by §46.2-357(B3) for any second or subsequent violation of driving after being declared a habitual traffic offender, regardless of degree of endangerment. Among all the mandatory minimum terms, the impact analysis demonstrates that these particular statutes have the single largest impact on prison bed space needs. Imposition of this mandatory minimum penalty increases the average sentence by approximately four months over what would be otherwise expected with use of the guidelines. While this particular average upward adjustment is comparatively small, it is estimated that the habitual traffic offender law affects 7.5% of new prison admissions (Figure 41).

Additionally, a legislative change in the definition of a state responsible inmate plays a role in the impact of this mandatory minimum. Under the old parole system, a habitual traffic offender who received a mandatory minimum of 12 months was considered a local responsible inmate and served the sentence in a local jail. New legislation adopted in conjunction with the shift to truth in sentencing revised the definition of a state responsible term to any sentence of greater than six months. Consequently, the habitual traffic offenders sentenced under this mandatory minimum term, who formerly were considered local inmates, are now state inmates.

Our analysis reveals that the projected prison bed space impact of the felony habitual offender statute is singularly large - an additional 425 prison beds by June, 2001 and 572 new prison beds by June, 2006. Among the 572 additional prison beds required in the future, 316 of these are accounted for by the shift in the definition of a state responsible inmate.

## Total Prison Bed Space Impact

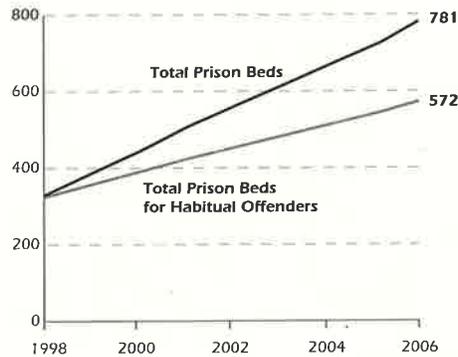
Taken together, the cumulative impact of sentencing under existing felony mandatory minimum penalties, in lieu of using the no-parole sentencing guidelines, is 509 additional prison beds by June, 2001, increasing to 781 new required prison beds by June, 2006 (Figure 42). The most dominant influence on this bed space forecast is that produced by those convicted under the felony habitual traffic offender statutes. Approximately three-quarters of the future prison beds required to house inmates serving time for a mandatory minimum penalty will be those occupied by habitual traffic offenders.

Again, it is important to note that the official state responsible inmate forecast annually developed in a process overseen by the Secretary of Public Safety already takes into account the effect of these mandatory minimum penalties. Thus, any future decision to either reduce these mandatory penalties or to eliminate one or more of them altogether would result in a *downward* adjustment to the already approved inmate forecast for the next five and ten years.

## Fiscal Impact of Mandatory Minimum Penalties

Using the methodology for estimating the fiscal impact of legislation on correctional prison bed space enumerated in §30.19-1:4.B, which assumes an annual average fixed and variable operating cost per inmate of \$17,900, an impact of \$13.9 million will be incurred by the year 2006 due to sentencing under existing felony mandatory minimum laws.

**Figure 42**  
**Forecast of Required Prison Beds Due to Mandatory Minimum Penalties**  
**June 1998 - June 2006**



# Juvenile Sentencing Study

## 5

### Juvenile Sentencing Study

During the 1996 session of the General Assembly, the legislature passed House Joint Resolution 131 which requests the Virginia Criminal Sentencing Commission to study sentencing of juveniles. Specifically, the resolution instructs the Commission to examine juvenile sentencing by the circuit courts when sentencing juveniles as adults and by the juvenile courts when sentencing serious juvenile offenders and delinquents.

Complicating the issue of studying juvenile sentencing practices 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 its adult felon population, the same cannot be said for the population of offenders processed in the juvenile justice system. Given the lack of a reliable and comprehensive data

system in the juvenile justice system, as well as the very recent changes to the juvenile laws, the Commission believes that the prudent course of action would be to first put in place an information system to support this inquiry.

In discussing the most appropriate manner in which to complete this study, the Commission chose to employ a methodology which mirrors that previously used by the judiciary to study adult sentencing practices. Approximately twelve years ago, the judiciary decided to undertake a comprehensive examination of adult felony sentencing practices. Unfortunately, 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 for all felony conviction cases.

This system was seen as critical to ensuring that policy makers in the future could be guided by sound and reliable information on matters related to our felon population.

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

The existence of this information system has 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. In recognition that its members do not include individuals with much expertise in the area of the juvenile justice system, the Commission voted to create a Juvenile Sentencing Study Advisory Committee to oversee the creation of the new data system as well as the subsequent analysis and interpretation of the collected information.

The Commission elected one of its members, Mark C. Christie, Chairman of this advisory committee. The full membership of this advisory committee is as follows:

**Mark C. Christie** (Chairman)  
Counselor to the Governor  
Governor's Office

**Ron Batliner**  
Deputy Director  
Department of Juvenile Justice

**Gloria Blankenship**  
Clerk, General District & JDR  
Powhatan

**Dave Burnett**  
Probation Officer  
Pearisburg

**Fran Ecker**  
Manager, Juvenile Services Unit  
Dept. of Criminal Justice Services

**Dr. Don Faggiani**  
Senior Research Associate  
Dept. of Criminal Justice Services

**James M. Hingeley, Jr.**  
Public Defender  
Lynchburg

**Susan Laughrun**  
Probation Supervisor  
Hampton

**Judge Harrison May**  
Staunton Juvenile Court

**Judge Byron Milbourne**  
Accomack Juvenile Court

**Linda Nablo**  
Action Alliance for Virginia's  
Children & Youth

**Nancy Ross**  
Executive Director  
Virginia Commission on Youth

**Wayne Turnage**  
Joint Legislative Audit &  
Review Commission

**Beverly Vaughan**  
Clerk, Chesterfield Juvenile &  
Domestic Relations Court

**Neil S. Vener**  
Commonwealth's Attorney  
Campbell County

The advisory committee has met and organized and has discussed the pros and cons of developing and implementing the type of data system requested by the Commission. The scope of the data collection (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 are among the issues being discussed. With regard to the last issue, the advisory committee has endorsed the Commission's proposal to prepare and submit a grant request for federal funds to the Department of Criminal Justice Services. The requested funds would be used to support all aspects of designing, implementing, and maintaining this data system. The Commission is currently in the process of securing these funds.

While no time table for implementation of the data system has been agreed upon, it is hoped that the system could be in place in 1997. The subsequent analysis of the collected information will proceed as soon as a sufficient number of cases are gathered on the juvenile population affected by the new data system. It is, however, not likely that the Commission will be in a position to report findings on a juvenile sentencing study until the 1998 Annual Report.



# Recommendations of the Commission

## 6

### The Development of Commission Recommendations

§17-238 of the Code of Virginia requires that the Commission present any adopted modifications to the sentencing guidelines in the Annual Report and that, unless otherwise provided by law, the changes become effective on the following July 1.

Recognizing that a great deal of thought and research formed the basis for the existing guidelines adopted by the General Assembly and given the relatively small number of violent offender cases, the Commission has intentionally approached the issue of modifications with prudent caution. In approaching the issue of whether the sentencing guidelines require specific modifications, the Commission chose to be guided by three types of information: focused compliance analysis, user input, and interstate comparative analysis. Any conclusions drawn from these separate inquiries were not reached independently of the other sources. Using this approach, the Commission was able to determine if corroborative evidence of the need for guidelines modification existed across diverse types of information sources.

### Focused Compliance Analysis

Chapter Two of this report is dedicated to the examination of compliance with the truth in sentencing guidelines. While the overall compliance rate exceeds 75%, compliance rates for certain offense groups and several specific crimes are markedly lower. To better understand the underlying patterns of compliance and departures, the Commission focused its attention on those crimes for which compliance and departures appeared inconsistent or out of line with overall trends. Such analysis pinpoints specific areas where the guidelines may need adjustment on the assumption that a very low compliance rate implies that these guidelines are out of synch with judicial thinking. The opinions of the judiciary as expressed in patterns of compliance and departures, and in written departure reasons, are very important in directing the Commission's attention to potential areas of the guidelines that may require amendment.

Although the Commission performed a detailed study of an array of crimes, the Commission feels that there is not enough experiential data for many of the offenses, particularly the violent offenses, to justify making recommendations for large-scale revisions at this time. The Commission will continue to study the many aspects of compliance in an integrated and holistic fashion.

While the Commission declines to make any recommendations for large-scale revisions to the guidelines, there are recommendations presented in this section involving narrowly defined adjustments to the guidelines for specific crimes. These adopted recommendations are derived primarily through compliance analysis and efforts by the Commission to integrate judicial sentencing practice at the lower and upper boundaries of the recommended ranges. The other adopted recommendations presented here were derived primarily through input and feedback from criminal justice professionals around the Commonwealth.

### **User Input**

Counting judges, prosecutors, public defenders, defense attorneys, and probation officers, there are approximately 2,000 criminal justice system professionals using the sentencing guidelines system on a routine basis. Whether communicated in a phone call to our hot line, a formal letter, or in person at a regional training seminar, these guideline users provide the Commission with valuable input and suggestions for improving the guidelines system. All of the recommendations generated through this process are presented to the Commission for their deliberation.

Over the past year, a number of concerns were expressed by justice system professionals over guidelines recommendations for particular offense scenarios which were perceived to be either too harsh or too lenient. These expressions of concern served as another "pointer" to be used by the Commission in identifying the need for further analysis on these offenses. In addition, concerns were voiced over the sometimes inconsistent fashion in which similar or identical case factors were scored across the different guidelines forms. These particular suggestions will result in significant improvements in both the consistency and parsimony of the guidelines forms and manual. It is expected that a new manual with accompanying forms will be published and distributed during 1997.

### **Inter-State Comparative Analysis**

Judicial departure reasons and other user input, then, provide the Commission with valuable direction in identifying areas where the guidelines are perceived to be either too harsh or too lenient. In this type of assessment process, there is another type of information to draw upon in helping to assess the need for revisions. That information is provided by conducting a comparative analysis of how Virginia's guidelines compare to those operating in other states. The focus here was to compare sentencing guidelines recommendations for certain case circumstances across different state guidelines systems. The case scenarios selected are those identified as "problematic" due to either a relatively low compliance rate or input from guidelines users.

The value of this comparative analysis is dependent upon making sure that the comparisons are valid. Some states have guidelines which recommend very long terms but offenders there may be eligible for parole after serving only a small portion of the sentence. To ensure valid comparisons, the comparative analysis focused on only other truth in sentencing systems. The sites selected for this comparative analysis are Delaware, Florida, Kansas, North Carolina, Washington, and the federal government.

The definition of “truth” in truth in sentencing systems, however, has proven to be somewhat variable. With just two exceptions, the sites chosen for this comparison all require felons to serve at least 85% of the imposed sentence. Washington State requires that only violent offenders serve 85% of their terms and Delaware requires all incarcerated felons to serve a minimum of 75%. Thus, no sentences are provided for Washington State in the non-violent offense scenarios. Figures are provided for Delaware in all scenarios with the understanding that their offenders may serve somewhat less time on their sentences than those in the other sites. Despite these caveats, it is noteworthy to observe that this analysis would not have been possible just a few years ago but now is feasible due to a growing number of states which have adopted a sentencing scheme similar to that in Virginia.

On the following pages, Figure 43 presents ten specific offense scenarios and their respective sentencing guidelines recommendations by site. The scenarios are as follows: (1) possession of  $\frac{1}{2}$  gram of cocaine, (2) sale of 1 gram of cocaine, (3) unarmed robbery, (4) armed robbery, (5) malicious wounding, (6) second degree murder, (7) involuntary vehicular manslaughter and driving under the influence, (8) forcible rape, (9) aggravated sexual battery, victim under age 13, and (10) rape, victim under age 13. For each scenario, a table shows the guidelines recommendation for an offender without a prior record, with a prior malicious wounding conviction, and with a prior armed robbery conviction.

**All of the guidelines recommendations in this comparative analysis are presented in months.** Furthermore, the term “probation” subsumes all community-based correctional programs. The term “intermediate” includes all type of punishment programs that are considered to be more harsh than probation but less restrictive than traditional incarceration.

Figure 43

**Offense Scenario 1: Possession of 1/2 gram of cocaine**

For the possession of 1/2 gram of cocaine by a first-time offender, half of the guidelines in the comparison sites explicitly recommend probation or other non-prison sanction, and all provide range recommendations which include a sanc-

tion of probation. While Virginia guidelines recommend no traditional incarceration for all three categories of prior record, this is consistent with that found in the other two southeastern states—

Florida and North Carolina. The enhancements to the guidelines recommendations for drug users with a prior record are relatively minor across the remaining sites, with the exception of Kansas.

Possession of 1/2 gram of cocaine	VIRGINIA	Delaware	Florida	Kansas	North Carolina	Wash.	Federal System
No Prior Record	prob./alt.sanc.	probation	non-prison	prob. to 12	probation	n/a	0 to 6
Prior Malicious Injury	prob./alt.sanc.	up to 6	non-prison	23 to 26	probation	n/a	1 to 7
Prior Robbery	prob./alt.sanc.	up to 6	non-prison to 17	23 to 26	intermediate	n/a	1 to 7

**Offense Scenario 2: Sale of one gram of cocaine**

For a first offender convicted of selling one gram of cocaine, only Florida and North Carolina do not recommend active incarceration. Guidelines in Virginia, Kansas and the federal system all recommend comparable prison time. While most states do not incorporate drug quantity into the scoring of guidelines, Florida, North Carolina and the federal

guidelines provide increased penalty recommendations for large drug quantities exceeding certain thresholds. In these sites, one gram of cocaine does not constitute the established thresholds for large quantities.

In these drug sale cases involving an offender with a prior record of violence,

guidelines in Virginia and Delaware recommend substantially longer prison sentences than the guidelines in the other sites. In fact, in drug sale cases for offenders with a prior conviction for robbery, the minimum guideline term in Virginia actually exceeds the maximum guideline sentence in all other sites except for Delaware.

Sale of one gram of cocaine	VIRGINIA	Delaware	Florida	Kansas	North Carolina	Wash.	Federal System
No Prior Record	7 to 16	up to 30	non-prison	14 to 16	probation to 10	n/a	10 to 16
Prior Malicious Injury	26 to 49	up to 60	non-prison to 18	32 to 36	intermediate to 12	n/a	12 to 18
Prior Robbery	50 to 82	up to 60	non-prison to 29	32 to 36	intermediate to 15	n/a	12 to 18

**Offense Scenario 3: Unarmed robbery, no victim injury**

For offenders convicted of unarmed robbery, regardless of the prior record, the sentencing recommendations across these sites range from intermediate sanctions to periods of active incarceration. Although somewhat lower than the federal system, Virginia's recommendation for first-time felons convicted of unarmed robbery is on par with Florida and Kansas, and higher than that in Delaware, North Carolina, and Washington. For

unarmed robbers with a prior conviction for malicious injury, Virginia's guidelines provide an upper range recommendation which extends beyond all others. In fact, in cases of second-time robbers, no other guidelines among the comparison sites approaches the sentence length recommendation in Virginia. Indeed, the minimum guideline term for these robbery recidivists easily exceeds the maximum term recommended in these other sites.

The compliance rate for robbery offenses persistently falls below the overall compliance rate and this, in large part, is due to judges mitigating the guidelines recommendation. This offense scenario comparison demonstrates that Virginia's guidelines are the most severe among the comparison sites, particularly for offenders with prior violent records.

<b>Unarmed robbery, no victim injury</b>	<b>VIRGINIA</b>	<b>Delaware</b>	<b>Florida</b>	<b>Kansas</b>	<b>North Carolina</b>	<b>Wash.</b>	<b>Federal System</b>
No Prior Record	<b>16 to 37</b>	up to 15	21 to 35	31 to 34	intermediate to 20	3 to 9	41 to 51
Prior Malicious Injury	<b>40 to 78</b>	up to 60	32 to 53	50 to 55	intermediate to 24	12 to 14	46 to 57
Prior Robbery	<b>76 to 116</b>	up to 60	38 to 64	50 to 55	intermediate to 24	12 to 14	46 to 57

**Offense Scenario 4: Armed robbery, no victim injury**

For a first-time offender convicted of armed robbery, active incarceration is recommended by all of the sites studied. The sentence recommendation in Virginia for these offenders is comparable to Florida and the federal system, and is

exceeded only by North Carolina and Washington. While enhancements to the guidelines recommendation for robbers with prior violent convictions are significant in most sites, the net effect is greatest in Virginia's system. For example, the

maximum term specified in Virginia's guidelines for an armed robber with a prior robbery conviction is approximately 50% higher than the next highest guideline sentence in the comparison sites.

<b>Armed robbery, no victim injury</b>	<b>VIRGINIA</b>	<b>Delaware</b>	<b>Florida</b>	<b>Kansas</b>	<b>North Carolina</b>	<b>Wash.</b>	<b>Federal System</b>
No Prior Record	<b>40 to 78</b>	24 mandatory	47 to 79	46 to 51	38 to 105	91 to 101	63 to 78
Prior Malicious Injury	<b>100 to 157</b>	24 to 120	59 to 98	74 to 83	61 to 164	101 to 114	70 to 87
Prior Robbery	<b>152 to 239</b>	24 to 120	65 to 109	74 to 83	61 to 164	101 to 114	70 to 87

**Offense Scenario 5: Malicious wounding with physical injury to the victim**

With the exception of North Carolina, all sites recommend active incarceration for a first offender convicted of this assault. Virginia's guideline sentence for first offenders closely parallels that of Florida's

and the federal government, but is dwarfed, as are all other sites, by the long sentence recommended in Washington. With the exception of Washing-

ton, Virginia's guidelines recommend much more severe penalties across all types of prior record categories than the other sites surveyed.

<b>Malicious wounding, victim injury</b>	<b>VIRGINIA</b>	<b>Delaware</b>	<b>Florida</b>	<b>Kansas</b>	<b>North Carolina</b>	<b>Wash.</b>	<b>Federal System</b>
No Prior Record	<b>21 to 56</b>	up to 24	24 to 40	11 to 13	intermediate to 47	117 to 159	41 to 51
Prior Malicious Injury	<b>43 to 96</b>	up to 48	35 to 58	22 to 26	intermediate to 53	147 to 183	46 to 57
Prior Robbery	<b>62 to 139</b>	up to 48	41 to 69	22 to 26	20 to 60	147 to 183	46 to 57

**Offense Scenario 6: Second degree murder**

For an offender convicted of second degree murder who has no prior record, all of the sites recommend long active terms of incarceration. The maximum term recommended in Virginia's guidelines for these first offenders is similar to that in the federal system and Washing-

ton State. While the guidelines in Florida and North Carolina exceed those in Virginia for the first offender, the impact of violent recidivism on sentence recommendations is greatest in the Commonwealth. For a second degree murderer with a prior robbery conviction, Virginia's

guideline maximum of approximately 38 years is only paralleled by the Florida maximum recommendation of life. While Kansas recommends life sentences for all categories of second degree murderers, these sentences are all parole eligible.

<b>Second degree murder</b>	<b>VIRGINIA</b>	<b>Delaware</b>	<b>Florida</b>	<b>Kansas</b>	<b>North Carolina</b>	<b>Wash.</b>	<b>Federal System</b>
No Prior Record	<b>78 to 173</b>	120 mandatory	246 to 410	Life w/parole	94 to 245	147 to 188	135 to 168
Prior Malicious Injury	<b>181 to 303</b>	120 mandatory	256 to life	Life w/parole	114 to 294	168 to 216	151 to 188
Prior Robbery	<b>257 to 459</b>	120 mandatory	263 to life	Life w/parole	132 to 341	168 to 216	151 to 188

**Offense Scenario 7: Involuntary vehicular manslaughter and driving under the influence (DUI)**

By far, Florida's guidelines recommend the longest term of incarceration for these offenders regardless of their prior record. Virginia's recommendation for the first offender is consistent with those found in other sites, including Delaware where a two year mandatory penalty is applicable.

For offenders convicted of involuntary vehicular manslaughter, the enhancements to the guidelines recommendations based on prior record are relatively minor across the sites with the exception of Virginia. With the exception of Florida, in cases of an offender convicted of

involuntary vehicular manslaughter with a serious violent prior conviction (robbery), the maximum term recommended in the Commonwealth's guidelines is more than double that of the other truth in sentencing sites.

<b>Involuntary vehicular manslaughter and DUI</b>	<b>VIRGINIA</b>	<b>Delaware</b>	<b>Florida</b>	<b>Kansas</b>	<b>North Carolina</b>	<b>Wash.</b>	<b>Federal System</b>
No Prior Record	<b>10 to 34</b>	24 mandatory	125 to 208	31 to 34	intermediate to 24	31 to 41	15 to 21
Prior Malicious Injury	<b>24 to 65</b>	24 to 30	135 to 225	50 to 55	intermediate to 29	36 to 48	18 to 24
Prior Robbery	<b>46 to 117</b>	24 to 30	142 to 236	50 to 55	intermediate to 32	36 to 48	18 to 24

**Offense Scenario 8: Forcible rape, no weapon or physical victim injury, victim age 13 or older**

Guidelines in Kansas and Virginia easily recommend the longest term of incarceration for these rapists, regardless of their prior record. In cases involving prior violent offenses, these two sites recommend sentence lengths which dwarf those recommended in the other guidelines systems. The enhancements to the

guidelines recommendations for rapists with a prior violent record are relatively minor across the sites with the exception of Kansas and Virginia. For these rapists with a prior conviction for a very serious violent crime (robbery), the maximum term recommended in Virginia of approximately 41 years incarceration is two and

a half times greater than the maximum guidelines term in Florida and North Carolina (15 years) and five times greater than that recommended in the federal system. As seen earlier in Chapter Two, the guidelines compliance pattern in rape cases is characterized by a very high rate of mitigated departures.

<b>Forcible rape, no weapon or victim injury</b>	<b>VIRGINIA</b>	<b>Delaware</b>	<b>Florida</b>	<b>Kansas</b>	<b>North Carolina</b>	<b>Wash.</b>	<b>Federal System</b>
No Prior Record	<b>86 to 186</b>	120 mandatory	95 to 158	184 to 206	44 to 120	51 to 68	70 to 87
Prior Malicious Injury	<b>151 to 325</b>	120 mandatory	105 to 175	300 to 334	60 to 159	62 to 82	78 to 97
Prior Robbery	<b>275 to 486</b>	120 mandatory	112 to 186	300 to 334	70 to 183	62 to 82	78 to 97

**Offense Scenario 9: Aggravated sexual battery, victim under age 13**

For first offenders, the guidelines recommendations range from probation up to lengthy prison sanctions. Virginia is the only site which recommends probation or an alternative sanction for all three categories of prior record. North Carolina's

guidelines, however, do allow for the use of intermediate sanctions in these cases, and Delaware's guidelines call for incarceration of no more than 12 months. All other sites recommend at least a two year prison sentence for this offense. It is

possible that for this particular offense some of the dramatic differences in sentence recommendations across the sites could be related to variations in the legal definition of this crime.

<b>Aggravated sexual battery, victim under age 13</b>	<b>VIRGINIA</b>	<b>Delaware</b>	<b>Florida</b>	<b>Kansas</b>	<b>North Carolina</b>	<b>Wash.</b>	<b>Federal System</b>
No Prior Record	<b>prob./alt.sanc.</b>	up to 6	51 to 85	46 to 81	intermediate to 24	51 to 68	27 to 33
Prior Malicious Injury	<b>prob./alt.sanc.</b>	up to 12	62 to 103	74 to 83	intermediate to 29	62 to 82	30 to 37
Prior Robbery	<b>prob./alt.sanc.</b>	up to 12	82 to 136	74 to 83	intermediate to 32	62 to 82	30 to 37

**Offense Scenario 10: Forcible rape, victim under age 13**

With the exception of Delaware, guideline recommendations in the comparison sites for raping a child under thirteen years of age all recommend lengthy

periods of incarceration. Florida treats this crime as a capital offense, thus sentencing guidelines are not applicable. While the Virginia guidelines recommen-

dation for a first offender tends to be on the low side, the Commonwealth's recommendations for these rapists with a violent record are among the toughest.

<b>Forcible rape, victim under age 13</b>	<b>VIRGINIA</b>	<b>Delaware</b>	<b>Florida</b>	<b>Kansas</b>	<b>North Carolina</b>	<b>Wash.</b>	<b>Federal System</b>
No Prior Record	<b>49 to 140</b>	up to 30	capital offense	184 to 206	144 to 369	78 to 102	135 to 168
Prior Malicious Injury	<b>116 to 250</b>	up to 60	capital offense	300 to 334	173 to 441	95 to 125	151 to 188
Prior Robbery	<b>174 to 374</b>	up to 60	capital offense	300 to 334	202 to 513	95 to 125	151 to 188

**Comparative Analysis Summary**

This analysis of how Virginia's guidelines compare to that of other truth in sentencing systems has focused on particular offense scenarios which have been identified as "problematic" due to either a relatively low compliance rate or input from guidelines users. While the comparisons do not yield answers on the appropriateness of the Commonwealth's guideline recommendations, they do provide the Commission with further information and an additional perspective on the relative harshness or leniency of our system. This information is merged with all the other input the Commission receives to help guide the revision process.

The results of this comparative analysis do illustrate that, at least as far as the other truth in sentencing sites are concerned, Virginia's guidelines are either consistent with or much harsher than the other guidelines systems. There should be no question that the guidelines in Virginia embody a primary intent of the no parole legislation which is to ensure long incapacitation of repeat violent offenders. The lone exception to this conclusion are the guidelines for aggravated sexual battery. Virginia's guidelines for aggravated sexual battery do appear to be somewhat out of synch with those in the other sites. This comparative evidence dovetails with other evidence that shows a heavy pattern of aggravated departures from these particular guidelines.

The drug sentencing guidelines are one area where some criticism has been leveled concerning their perceived leniency. Again, with regard to the other no-parole sites studied, Virginia's recommendations for first-time drug offenders are parallel to those found elsewhere. For drug offenders with any history of violent crime, Virginia's guidelines are either as harsh or harsher than those in these other places. While these findings do not, in and of themselves, rebut the claim of leniency, they do provide the Commission with some broader perspective in which to judge their relevancy.

## Recommendations Relating to Drug Offenses

### ▼ Recommendation 1

*The sentencing guidelines for drug offenses should be amended such that the midpoint recommendations for convictions under §18.2-248(c) of the Code of Virginia are to be increased by three years in cases involving 28.35 grams (1 ounce) up to 226.7 grams of cocaine and by five years in cases involving 226.8 grams (1/2 pound) or more of cocaine. Furthermore, the guidelines recommendation for cases involving offenders with no prior felony record selling 1 gram of cocaine or less should be modified such that these offenders are recommended for a prison sentence of at least seven to 16 months or, at the judge's discretion, placement in the Detention Center Incarceration Program.*

Since the inception of the truth in sentencing guidelines, the Commission has received feedback from judges, prosecutors and other criminal justice professionals expressing some concern about the sentencing guidelines for drug offenses.

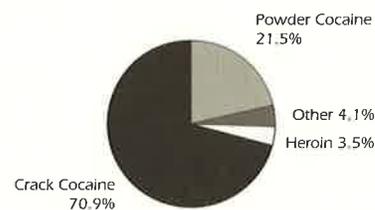
Specifically, concern has been voiced that the guidelines fail to explicitly account for the quantity of drug in the offense. Indeed, the guidelines recommendation is not affected by drug quantity, regardless of how much of the drug is seized, nor is the recommendation specific to the type of drug for cases involving Schedule I/II drugs. Critics argue that drug sales which involve larger amounts deserve longer prison term recommendations and the guidelines should be modified in some fashion to accommodate this concern. Also, the most often cited reason by judges for imposing a term above the guidelines recommendation is the quantity of the drug. Responding to the input of guidelines users, the Commission has pursued the study of drug quantity and its impact on sentencing.

Virginia is fortunate in having the only statewide data base in the nation that provides detailed information on drug type and quantity in felony conviction cases. The most recent time period for which complete data is available is fiscal year (FY) 1995. In FY1995, there were 2,351 conviction cases for the sale, distribution, manufacture, or possession with intent to sell a Schedule I/II drug under §18.2-248(c) of the Code of Virginia (Figure 44). Among these cases, over 92% involved cocaine. In fact, three out of every four cocaine cases were linked to crack cocaine.

**Figure 44**

#### Convictions for the Sale of a Schedule I/II Drug by Type of Drug FY1995

Number of cases = 2,351



Data Source: Pre-/Post-Sentence Investigation Data Base

Accordingly, the following analysis focuses specifically on cases of the sale, distribution, or manufacture of cocaine, or the possession with intent to commit such an act, hereafter referred to simply as the sale of cocaine.

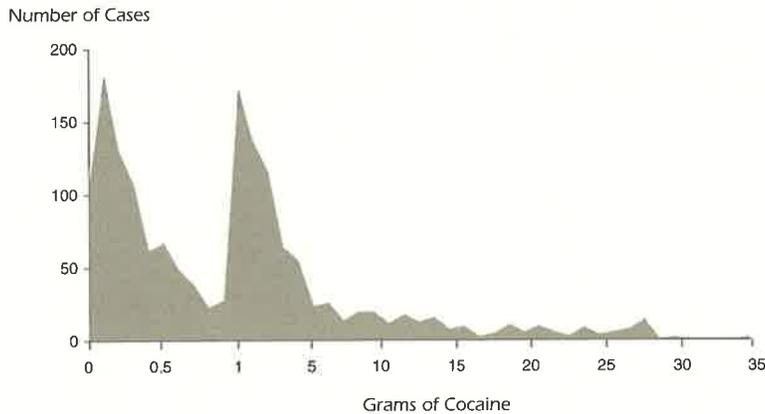
A detailed analysis of cocaine sale cases reveals that the great majority involve relatively small amounts of the drug (Figure 45). Among cocaine sales, half of cases in FY1995 involved a gram or less. In one-third of the cases, less than 1/2 gram of cocaine

was seized. In all, 75% of cocaine sales involved seven grams of the drug or less. The upper 10% of cocaine sales included amounts exceeding 56.7 grams.

The fact that most of the drug sales involve small quantities is a function of the manner in which cocaine is packaged and marketed on the street. A great deal of crack cocaine sales involve single dosage units in plastic vials or baggies weighing between 0.1 and 0.5 gram a piece and afford-

ably priced between \$5 and \$20 (Cocaine and Federal Sentencing Policy, U. S. Sentencing Commission, February 1995). A gram of crack cocaine sold on the streets costs between \$50 and \$150 (based on Federal Drug Enforcement Agency estimate). Thus the vast majority of drug sale convictions in our circuit courts involve street-level amounts measured in grams, or tenths of grams, rather than in kilograms or pounds.

**Figure 45**  
**Convictions for the Sale of Cocaine by Quantity Seized**  
**FY1995**



Data Source: Pre-/Post-Sentence Investigation Data Base

In studying the relationship between the quantity of cocaine sold and the severity of the sentence imposed, the data are not conclusive. The rate at which judges sentence cocaine traffickers to prison at increasing levels of drug quantity does not demonstrate a consistent pattern of higher incarceration rates for larger drug quantities (Figure 46). For offenders convicted of the sale of cocaine who were sentenced to prison, the level of drug quantity had no bearing on the median sentence imposed among

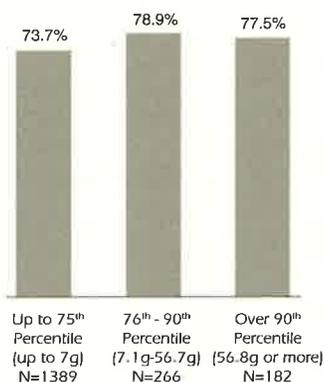
FY1995 cases of parole eligible offenders (Figure 47). For offenders sentenced to prison under the truth in sentencing (no parole) system, drug quantity seems only to be related to a longer median sentence among cases exceeding 56.7 grams (Figure 48).

and those involving larger amounts. Based on the data, there is no strong empirical evidence to justify modification of the drug sentencing guidelines to explicitly consider drug quantity. However, there may be other compelling reasons to factor drug quantity considerations into the sentencing guidelines system.

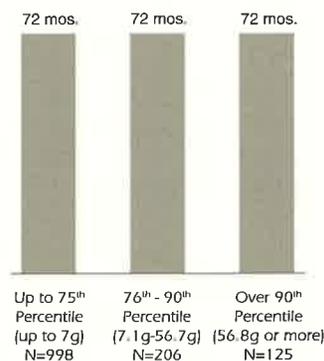
As demonstrated below, the relationship between the quantity of cocaine sold and the severity of the sentence imposed reveals no significant differences in prison terms between cases characterized with smaller quantities

The U. S. Sentencing Commission and the states of Florida and North Carolina already incorporate drug quantity into their sentencing guide-

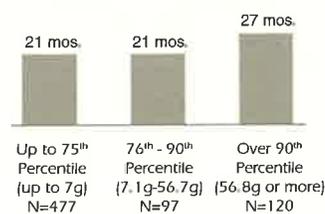
**Figure 46**  
**Prison Incarceration Rate in Sale of Cocaine Cases by Drug Quantity FY1995**



**Figure 47**  
**Median Prison Sentence in Sale of Cocaine Cases by Drug Quantity FY1995 Parole Eligible Cases**



**Figure 48**  
**Median Prison Sentence in Sale of Cocaine Cases by Drug Quantity CY1995-96 No Parole Cases**



Note: Results are based on cases in which both drug type and drug quantity were reported. N is equal to the number of cases  
 Data Source: Pre-/Post-Sentence Investigation Data Base

lines. In the Federal Sentencing Guidelines, a very complex system is used to calculate numerous levels of offense seriousness based on the specific type of drug and its quantity. Both Florida and North Carolina more generally incorporate drug quantity into their state's sentencing guidelines by explicitly weighting the quantity of drug seized and providing enhanced sentence recommendations for cases involving quantities which exceed certain thresholds. Each state has established several levels of enhancements for large quantities of cocaine. Offenders who sell more than 28 grams but less than 200 grams of cocaine are recommended for longer sentences than offenders selling smaller quantities. Those trafficking in 200 grams or more but less than 400 grams are recommended for even longer prison terms.

After listening to the concerns raised by judges and prosecutors on this matter and after review of the approaches taken by other states, the Commission proposes a tiered system of enhancements to target the cocaine sales cases with the largest quantities

for substantially longer sentence recommendations. The recommended guidelines revisions apply *only* to cocaine cases since they represent almost all of the Schedule I and II drug sale convictions. Drug sales involving unusually large amounts of drugs such as heroin, PCP, and LSD are extremely rare.

Although the proposed enhancements for drug quantity are not purely grounded in a historical analysis of data, the Commission believes that it is appropriate that the guidelines recommend longer terms for those involved with unusually large amounts of cocaine. The historical data analysis did prove to be very useful in determining appropriate thresholds of cocaine quantity which would trigger the enhancements.

As noted below, half of the cocaine sales cases in Virginia involve one gram or less. In its examination of cocaine quantity, the Commission first decided to exclude the drug sales involving these very minor amounts. Next, the Commission defined unusually "large" amounts of cocaine in a relative sense by earmarking those cases falling in the uppermost quadrant of the remaining drug quantity amounts. Examining only those cases which exceed one gram, the upper 25% were associated with 28.35 grams (one ounce) or more, while the uppermost 10% of the cases were linked to at least 226.8 grams ( $\frac{1}{2}$  pound) (Figure 49).

**Figure 49**  
**Quantity of Cocaine Sale Cases Involving More than 1 Gram FY1995**

Percentile	Quantity (in grams)
5th	1.58
10th	2.00
15th	2.00
20th	2.59
25th	3.00
30th	3.00
35th	4.00
40th	5.00
45th	5.23
50th	7.00
55th	10.00
60th	12.19
65th	16.00
70th	23.00
75th	28.35
80th	56.70
85th	116.00
90th	226.80
95th	997.00

The Commission's proposal targets these two thresholds of drug quantity, which together will impact the uppermost 13% of cocaine sales cases in Virginia.

The Commission proposes enhancements to the drug sentencing guidelines which would increase the midpoint recommendation by three years in cases of cocaine sales involving 28.35 grams (one ounce) up to 226.7 grams. The midpoint recommendation would be increased by five years in cocaine sales cases in which 226.8 grams (1/2 pound) or more was seized. This proposal would be implemented by adding a factor to be scored on the prison length work sheet of the drug guidelines. The factor would add 36 or 60 points to the work sheet total in cases exceeding the specified thresholds, 28.35 grams (1 ounce) and 226.8 grams (1/2 pound), respectively.

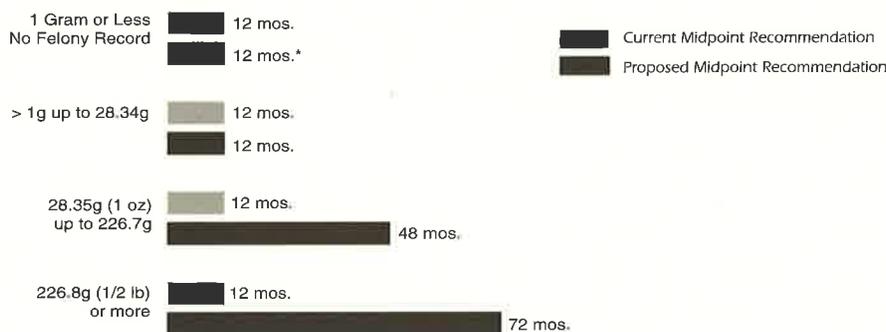
The Commission also proposes modifying the guidelines recommendation for offenders convicted of selling smaller quantities of cocaine (i.e., one gram or less) who have no prior felony record. Currently, the sentencing guidelines recommend a prison term of seven to 16 months for a case with these characteristics. The Commission would like to expand the sentencing recommendation in these cases to also provide the option of placement in the Commonwealth's new Detention Center Incarceration Program. The Detention Center Incarceration Program requires secure confinement of four to six months, which is *in addition* to time already served in jail prior to sentencing and time served during the program's evaluation period, which can take up to 60 days. The Detention Center Incarceration

Program also features a mandatory 20 week substance abuse treatment component.

It is the belief of the Commission that this proposed revision does not represent less punishment for these first time drug offenders. In many cases, whether the offender is placed in prison according to the recommended guideline term or placed in the Detention Center, the ultimate length of stay in a secure facility is likely to be comparable. In addition, it is hoped that the unique treatment options being offered within this new punishment program may actually reduce the recidivism rate of these offenders.

The Commission's recommendation is summarized in Figure 50 below.

**Figure 50**  
**Commission Recommendation for Modifications to Drug Offense Guidelines based on Quantity of Cocaine**



\* or Detention Center Incarceration

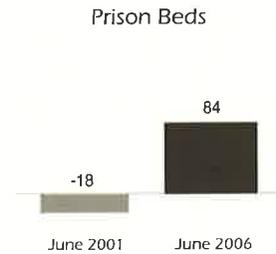
**Prison Bed Space Impact**

Forecasting the future additional prison beds required under this proposal requires an assumption regarding how often a judge would comply with these revised sentencing recommendations. In making these estimations, the Commission decided to be guided by conservative assumptions. With regard to the suggested enhancements for the drug sales involving larger quantities, it is assumed that the sentences will fall within the new ranges 100% of the time. Given the fact that drug quantity is the most frequently cited reason for sentencing above the drug guidelines, this assumption, while conservative, may not be unreasonable. For first-time drug offenders selling one gram or less, the Commission agreed to an assumption that approximately half of these cases would receive, in addition to any pre-trial and evaluation period incarceration, a term in the Detention Center Incarceration Program. This assumption was derived by examining the existing compliance rate for *all* drug sale cases which documents that a quarter are already receiving non-prison sentences. Among all drug sellers being sentenced within the existing guidelines, it was further reasoned that about half of the first-time offenders would receive a sanction that included Detention Center Incarceration.

Applying these assumptions in the computer simulation model used by the Commission to forecast prison bed space needs, the combined impact of the two components in this proposal is expected to be minimal (Figure 51). In essence, the proposed sentence enhancements for large quantity cocaine cases produce a demand for increased prison bed space that is offset by the reduced demand for prison beds resulting from the proposed sentence recommendation for first-time drug offenders selling very small amounts of cocaine. While the latter proposal enacted alone would *decrease* prison bed space demand by approximately 1,000 beds by the year 2006, the former proposal implemented alone would *increase* the prison beds needed by about the same amount. Taken together, concurrent implementation of both components of this proposal would result in an estimated savings of 18 prison beds by the year 2001 and require an additional 84 prison beds by 2006.

It should be noted here, however, that the prison bed space savings projected to accrue from the use of Detention Center Incarceration for low level first-time cocaine sellers is somewhat misleading. Despite the fact that the Detention Center Incarceration sanction involves locking up an offender in a secure and guarded facility, it is considered to be a "probation" sentence in the Code of Virginia (§19.2-316.2). Nonetheless, implementation of this revision to the guidelines will be dependent upon the Commonwealth funding and building enough Detention Centers to house the projected numbers of drug offenders.

**Figure 51**  
**Projected Prison Bed Space Impact of the Commission Recommendation for Drug Cases**



## Recommendations Relating to Mandatory Minimum Penalties

### ▼ Recommendation 2

§46.2-357(B2 and B3) of the Code of Virginia relating to felony habitual traffic offenses should be amended such that punishment for violation of these Sections may be either a minimum 12 month incarceration sentence or, at the judge's discretion, placement in a Detention Center Incarceration, Diversion Center Incarceration, or Boot Camp Incarceration Program.

In Chapter Four of this report, the Commission reported its findings regarding the effects of mandatory minimum felony sentences in Virginia. Mandatory minimum penalties for habitual traffic offenses have existed in some form since 1968. Currently, offenders who are caught operating a motor vehicle more than once after being declared a habitual traffic offender, or offenders who operate a motor vehicle after being declared a habitual traffic offender in a manner endangering others, must receive at least a 12 month incarceration sentence which cannot be sus-

pending in whole or in part. With few exceptions, those sentenced for crimes prior to the abolition of parole, served only one-fourth to one-half of the sentence imposed. Those convicted of felony crimes occurring on or after January 1, 1995, after the abolition of parole must now serve at least 85% of whatever sentence is ultimately imposed, or at least 10 1/2 months of a 12 month sentence. Consequently, a sentence imposed under a mandatory minimum statute remains the same before and after the abolition of parole; however, the time actually served by an offender sentenced under a mandatory minimum law is likely to be much greater in the no-parole system.

The study of mandatory minimum penalty laws conducted by the Commission revealed that sentencing habitual traffic offenders based on the current mandatory minimum statute instead of the otherwise applicable sentencing guidelines is projected to require an additional 425 prison beds by 2001, reaching 572 beds by June 2006 (see Chapter Four - *Mandatory Minimum Sentencing Study*).

Prison beds for habitual traffic offenders will represent 73% of all the beds required to house offenders sentenced under mandatory minimums instead of the guidelines. The official prison forecast already takes into account the effect of the current mandatory minimum penalty laws; thus, any decision to offer alternative punishments for these offenders would result in a *downward* adjustment to the inmate forecast over the next decade.

Under our current sentencing system, most of the habitual traffic offenders will receive one year mandatory sentences and serve out most of this term idly. While the incarceration period may be adequate in terms of addressing the need to punish these offenders, this sanction does very little to deal with what, for many of these people, is the underlying problem - substance abuse. The Commission believes that while it is important to continue to ensure tough sanctions for these offenders it is also important to address the opportunity to reduce the likelihood of their recidivism. Thus, what is needed are additional sentencing options which guarantee adequate incarceration time but, at the same time, offer substance abuse treatment. It is the Commission's belief that some of the habitual traffic offenders could benefit greatly from placement in one of the new alternative sanction programs established by the General Assembly.

The Commission does not recommend repeal of the existing mandatory minimum penalties for felony habitual traffic offenders. However, the Commission does recommend that the Code of Virginia be amended to provide judges an additional option in sentencing felony habitual traffic offenders: prison incarceration of at least 12 months or, at the judge's discretion, placement in a Detention Center Incarceration, Diversion Center Incarceration, or Boot Camp Incarceration program. Offenders who do not successfully complete the specified program would be returned to the judge for re-sentencing and imposition of a state prison sentence that includes the mandatory minimum terms set out in the Code.

The Detention Center Incarceration and Boot Camp Incarceration programs require that a judge impose a state prison sentence, which is then suspended upon the condition that the offender complete the specified program. The Diversion Center Incarceration program is not yet operational, but will function under similar parameters. Both the Detention Center and Boot Camp require a term of confinement, three to six months, to be followed by probation supervision in the community. This period of confinement is comparable to the time historically served by felony habitual traffic offenders prior to the inception of truth in sentencing. Thus, in terms of actual confinement time, this proposal does not represent a moderation in punishment over that which existed prior to the abolition of parole. Also, to the degree that the substance abuse component of these programs is effective, those offenders receiving this punishment will be less likely to become recidivists.

### **Prison Bed Space Impact**

Because the Code of Virginia considers a sentence to the Detention Center Incarceration, Diversion Center Incarceration, and Boot Camp programs as "probation," any use of these punishments, in lieu of a prison term, would constitute a *savings* in the projected prison bed space needs. Calculating the impact of this recommendation on future prison bed space requires assumptions about the frequency with which this additional sentencing option would be used by judges. Assuming that judges chose to utilize one of the above referenced alternative sanctions in half of the felony habitual traffic sentencings, the prison bed space savings would reach 485 by the year 2006. But as noted earlier in the recommendation for low level drug sellers, implementation of this revision would require an adequate supply of bed space in the alternative punishment programs.

## Recommendations Relating to the Use of Discretionary Sentencing Guidelines

### ▼ Recommendation 3

§19.2-298.01 of the Code of Virginia relating to use of discretionary sentencing guidelines should be amended to define the alternative incarceration sanctions authorized by §19.2-316.1 (Boot Camp Incarceration Program), §19.2-316.2 (Detention Center Incarceration Program), and §19.2-316.3 (Diversion Center Incarceration Program) as incarceration terms rather than probation.

An important component of the truth in sentencing legislation passed in 1994 was the creation of new punishment options for the sentencing of convicted felons. While the legislation established a new sentencing guidelines system that prescribed very long prison terms for violent offenders, the law also created the Detention Center and Diversion Center Incarceration Programs for non-violent criminals.

It was hoped that some non-violent offenders could safely be directed into these punishment programs, thus freeing up expensive prison bed space for violent offenders, who under the new law, would be spending significantly more time incarcerated. In order to maximize the benefit of these new sanction programs, however, it is important that offenders receiving these sentences are those who otherwise would have been sent to prison. Unfortunately, evaluations of similar initiatives elsewhere reveals that alternative sanctions are very often applied to those who would otherwise have been placed on probation (i.e., "net widening"). One of the reasons cited for this finding is the perception on the part of judges that some alternative sanctions represent a punishment comparable to probation.

The Commission believes that it is in the best interests of the citizens of the Commonwealth to promote the appropriate use of all available sanction options established by the General Assembly. The Commission further believes that defining the use of these programs as "probation" presents a perception problem that may result in their under-utilization by judges.

In truth, all of the alternative sanctions referenced above involve incarceration in a secure facility and, when teamed with their treatment programs, may represent more of a punitive sanction than an otherwise traditional length of incarceration. It is critically important that the components of these punishment programs be presented to our citizens in an honest and accurate fashion. To label these programs as "probation" is inconsistent with the reality of the punishment.

To ensure that the sentencing judge retains control over the sanctioning of offenders placed in these punishment programs, it is important that they still continue to be defined as "probation" in their enactment clauses. However, for purposes of applying the discretionary sentencing guidelines, the Commission believes that explicit language should be added to the Code which, within the confines of the guidelines, considers these programs to be incarceration.

## Recommendations Relating to Sexual Assault Offenses

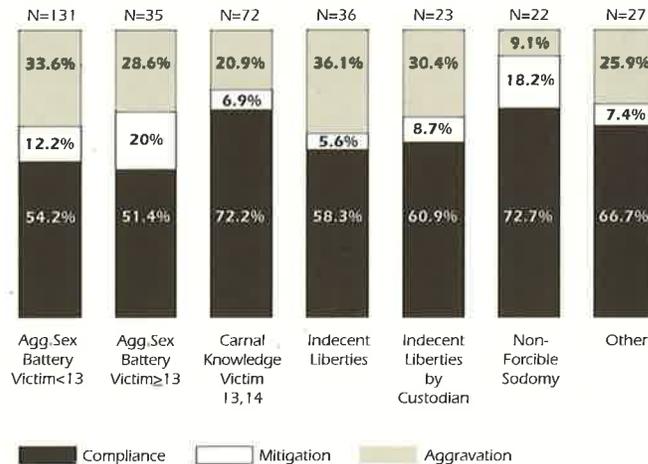
### ▼ Recommendation 4

The sentencing guidelines for sexual assault offenses should be amended by adding a factor to Sections A and B to increase the total work sheet score in cases involving victims who are under the age of 13 at the time of the offense. Specifically, scores on Sections A and B are to be increased by 5 and 3 points, respectively, in cases involving young victims. Such modification significantly increases the likelihood that sexual assault offenses involving victims under 13 will be recommended by the guidelines for prison incarceration, and, in the cases which will not result in a prison recommendation, this modification ensures these offenders will be recommended to serve a jail term. These recommendations do not apply to the guidelines for rape, forcible sodomy and object penetration.

As reported in Chapter Two, the compliance rate for the sexual assault offense group (61%) is the lowest of all offense groups, with the exception of kidnapping and rape. In 28% of the sexual assault cases, the judge elected to impose a sentence more severe than that recommended by the guidelines. Examining the compliance figures for the specific crimes covered by the sexual assault guidelines reveals that the compliance rates are especially low for aggravated sexual battery and indecent liberties offenses (Figure 52). Furthermore, the comparative analysis of guidelines sentences in no-parole sites presented earlier demonstrates that Virginia’s recommendations for certain aggravated sexual batteries were relatively lenient.

Detailed analysis of sexual assault cases has revealed that two-thirds of the sexual assault cases represent crimes committed against victims who were under the age of 13 at the time of the offense. The current guidelines do not incorporate victim age into the guidelines computations. For offenders with no prior record and cases which do not involve additional offenses, the sexual assault guidelines recommend a suspended prison sentence and a term of active probation in nearly all cases, regardless of the age of the victim. Actual case analysis shows that 43% of the sexual assault cases involving a victim less than 13 were recommended for a non-incarceration sanction.

**Figure 52**  
Sentencing Guidelines Compliance in Sexual Assault Cases by Crime Type



Only 39% were recommended for a prison term. (Figure 53). Judges responded, however, by sentencing 58% of offenders who committed sexual assault offenses against the very young to prison, and only 20% to a suspended term with probation.

The Commission recommends that the sexual assault guidelines be modified to consider victim age. Adding such a factor to Section A (Prison In/Out Decision work sheet) to augment the total score by five points in cases involving a victim under the age of 13 at the time of the offense increases the likelihood that those offenders will be recommended for prison incarceration. Cases of aggravated sexual battery and indecent liberties would be the most widely affected by this change. With this modification, aggravated sexual battery offenses involving a victim younger than 13 will be recommended for prison in nearly all instances. Indecent liberties cases involving a victim younger than 13

will be recommended for prison in instances involving threatened or emotional injury and nearly all offenders with a prior felony will be recommended for prison, even if victim injury is not scored.

Section C (prison length work sheet) will remain unchanged. Offenders recommended for prison for aggravated sexual battery crimes receive a base recommendation of one year and eight months to four years and seven months. Cases involving injury, or additional or prior record offenses, are recommended for additional time. Cases of indecent liberties receive a base recommendation of seven to 14 months in prison.

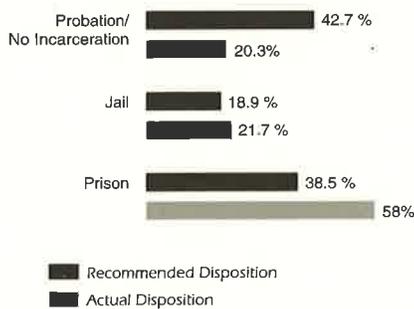
Furthermore, the Commission recommends that a factor for victim age be added to Section B (probation/jail decision) to ensure that the cases not recommended for prison but involving a victim younger than 13 are recommended to serve jail time. For instance, aggravated sexual

battery cases would be recommended for three to six months in jail, while indecent liberties cases would be recommended for a jail sentence of up to three months, or three to six months if the offender has any additional or prior record felony offenses to be scored.

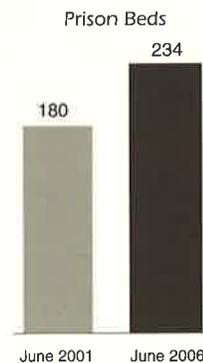
**Prison Bed Space Impact**

Because this proposed revision would affect some sex offenders who currently are not incarcerated, this modification of the guidelines would have an impact on the Commonwealth's future prison bed space needs. Assuming full judicial compliance with these revised recommendations, the Commission projects that an additional 180 prison beds will be required by June 2001 and a total of an additional 234 beds will be needed by June 2006 (Figure 54).

**Figure 53**  
Recommended and Actual Dispositions in Sexual Assault Cases Involving Victims under the Age of 13



**Figure 54**  
Projected Prison Bed Space Impact of the Commission Recommendation for Sexual Assault Cases



## Recommendations Relating to Sentencing Guidelines Ranges

### ▼ Recommendation 5

*The prison sentence length range table for the assault offense group should be amended between the scores of 28 and 53 such that a widely used sentence for a relatively common offense scenario, which is equivalent to the low end of the recommended sentencing range rounded down to the next whole year, will fall into compliance with the sentencing guidelines.*

Virginia's truth in sentencing guidelines are designed to provide sentence recommendations which increase gradually as the point total on the guidelines work sheet increases. Most often the sentencing recommendations which result are not computed in whole years, but are a combination of years and months.

The Commission recognizes that judges typically prefer to sentence in round, whole years. The Commission defines compliance with the sentencing guidelines in such a way as to provide for a modest rounding allowance. In general, the Commission considers rounding of a sentence that is within 5% of the guidelines recommendation to be in compliance.

Even with this allowance for rounding, sentences which are based on the low end or the high end of the range recommended by the guidelines, but rounded to a whole year, often fall out of compliance with the guidelines. While from a strict statistical perspective these sentences fall outside the guidelines, from a substantive perspective (i.e., judge's perspective) the sentences are considered within the recommended term.

Among the cases received to date, the Commission has found that certain case scenarios or circumstances are relatively common, and, therefore, particular guidelines work sheet scores are observed routinely. If a common score carries a recommended range which judges may be likely to round to the nearest whole year when they impose a sentence, these cases may fall out of compliance on a regular basis, even though the judge feels that he or she is following the guidelines recommendation.

Specifically, a malicious injury (malicious wounding) with knife or firearm, resulting in serious physical injury to the victim (at least a one night stay in the hospital), committed by an offender with no prior criminal record represents a common assault scenario; over 14% of the malicious injury cases fit this profile. This case scenario receives a prison length work sheet score of 48, which currently carries a sentence recommendation of two years and three months to five years and ten months (Figure 55).

Analysis reveals, however, that in one out of every eight cases of malicious injury recommended for this prison term, the judge elected to sentence at the low end of the recommended range, rounded the low end of the range recommendation down to the nearest whole year, and imposed a sentence of two years. This sentence, however, exceeds the rounding allowance established by the Commission and is not considered to be in compliance with the guidelines.

The Commission, therefore, proposes that the prison sentence length range table, which provides the recommended sentencing range for each work sheet score, be amended as highlighted in the table in Figure 55. For the basic malicious injury scenario described, this adjustment accommodates a two year sentence within the range recommended by the guidelines. The range recommendations surrounding the targeted

Figure 55

## Recommended Amendments to the Assault Prison Sentence Length Range Table

## Current Range

Score	Sentence Range Midpoint	Sentence Range
28	2 yr. 4 mo.	1 yr. 3 mo. - 3 yr. 6 mo.
29	2 yr. 5 mo.	1 yr. 4 mo. - 3 yr. 8 mo.
30	2 yr. 6 mo.	1 yr. 6 mo. - 3 yr. 9 mo.
31	2 yr. 7 mo.	1 yr. 6 mo. - 3 yr. 10 mo.
32	2 yr. 8 mo.	1 yr. 6 mo. - 3 yr. 11 mo.
33	2 yr. 9 mo.	1 yr. 7 mo. - 4 yr. 1 mo.
34	2 yr. 10 mo.	1 yr. 8 mo. - 4 yr. 2 mo.
35	2 yr. 11 mo.	1 yr. 8 mo. - 4 yr. 4 mo.
36	3 yr. 0 mo.	1 yr. 8 mo. - 4 yr. 5 mo.
37	3 yr. 1 mo.	1 yr. 9 mo. - 4 yr. 7 mo.
38	3 yr. 2 mo.	1 yr. 9 mo. - 4 yr. 8 mo.
39	3 yr. 3 mo.	1 yr. 9 mo. - 4 yr. 9 mo.
40	3 yr. 4 mo.	1 yr. 10 mo. - 4 yr. 11 mo.
41	3 yr. 5 mo.	1 yr. 10 mo. - 5 yr. 0 mo.
42	3 yr. 6 mo.	1 yr. 11 mo. - 5 yr. 2 mo.
43	3 yr. 7 mo.	1 yr. 11 mo. - 5 yr. 3 mo.
44	3 yr. 8 mo.	2 yr. 0 mo. - 5 yr. 5 mo.
45	3 yr. 9 mo.	2 yr. 1 mo. - 5 yr. 7 mo.
46	3 yr. 10 mo.	2 yr. 2 mo. - 5 yr. 9 mo.
47	3 yr. 11 mo.	2 yr. 2 mo. - 5 yr. 10 mo.
48	4 yr. 0 mo.	2 yr. 3 mo. - 5 yr. 10 mo.
49	4 yr. 1 mo.	2 yr. 3 mo. - 5 yr. 11 mo.
50	4 yr. 2 mo.	2 yr. 4 mo. - 5 yr. 11 mo.
51	4 yr. 3 mo.	2 yr. 4 mo. - 6 yr. 0 mo.
52	4 yr. 4 mo.	2 yr. 5 mo. - 6 yr. 0 mo.
53	4 yr. 5 mo.	2 yr. 5 mo. - 6 yr. 1 mo.

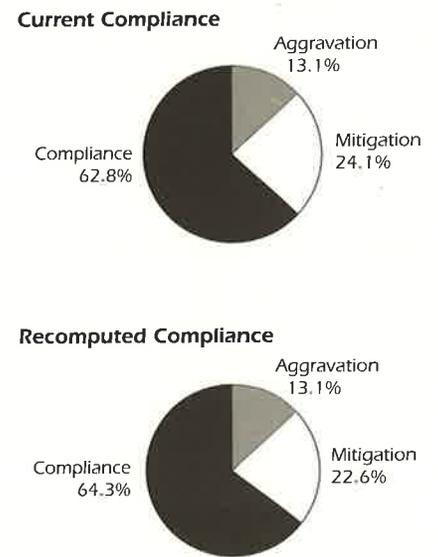
**Proposed Range**

Score	Sentence Range Midpoint	Sentence Range
28	2 yr. 4 mo.	1 yr. 2 mo. - 3 yr. 6 mo.
29	2 yr. 5 mo.	1 yr. 3 mo. - 3 yr. 8 mo.
30	2 yr. 6 mo.	1 yr. 4 mo. - 3 yr. 9 mo.
31	2 yr. 7 mo.	1 yr. 5 mo. - 3 yr. 10 mo.
32	2 yr. 8 mo.	1 yr. 5 mo. - 3 yr. 11 mo.
33	2 yr. 9 mo.	1 yr. 6 mo. - 4 yr. 1 mo.
34	2 yr. 10 mo.	1 yr. 6 mo. - 4 yr. 2 mo.
35	2 yr. 11 mo.	1 yr. 7 mo. - 4 yr. 4 mo.
36	3 yr. 0 mo.	1 yr. 7 mo. - 4 yr. 5 mo.
37	3 yr. 1 mo.	1 yr. 8 mo. - 4 yr. 7 mo.
38	3 yr. 2 mo.	1 yr. 8 mo. - 4 yr. 8 mo.
39	3 yr. 3 mo.	1 yr. 9 mo. - 4 yr. 9 mo.
40	3 yr. 4 mo.	1 yr. 9 mo. - 4 yr. 11 mo.
41	3 yr. 5 mo.	1 yr. 9 mo. - 5 yr. 0 mo.
42	3 yr. 6 mo.	1 yr. 10 mo. - 5 yr. 2 mo.
43	3 yr. 7 mo.	1 yr. 10 mo. - 5 yr. 3 mo.
44	3 yr. 8 mo.	1 yr. 10 mo. - 5 yr. 5 mo.
45	3 yr. 9 mo.	1 yr. 11 mo. - 5 yr. 7 mo.
46	3 yr. 10 mo.	1 yr. 11 mo. - 5 yr. 9 mo.
47	3 yr. 11 mo.	2 yr. 0 mo. - 5 yr. 10 mo.
48	4 yr. 0 mo.	2 yr. 0 mo. - 5 yr. 10 mo.
49	4 yr. 1 mo.	2 yr. 1 mo. - 5 yr. 11 mo.
50	4 yr. 2 mo.	2 yr. 2 mo. - 5 yr. 11 mo.
51	4 yr. 3 mo.	2 yr. 3 mo. - 6 yr. 0 mo.
52	4 yr. 4 mo.	2 yr. 4 mo. - 6 yr. 0 mo.
53	4 yr. 5 mo.	2 yr. 4 mo. - 6 yr. 1 mo.

score are also revised in order that the transition between recommendations remains smooth and gradual as the work sheet score increases.

The proposed amendment would have the effect of bringing statistical guidelines compliance closer to substantive compliance among the malicious injury cases. (Figure 56). While compliance based on the current range table is less than 63%, compliance based on the proposed range table increases to over 64%. Although the increase in the compliance rate is moderate, the Commission feels that the change accommodates those judges who feel that they are following the guidelines when they impose a sentence of two years in these malicious injury cases based on a low sentence recommendation of two years and three months.

**Figure 56**  
**Recomputed Sentencing Guidelines Compliance in Malicious Injury Cases**



### ▼ Recommendation 6

*The prison sentence length range table for the homicide offense group should be amended between the scores of 19 and 26, and also between the scores of 46 and 56, such that widely used sentences for two relatively common offense scenarios, which result from rounding the high end of the recommended sentencing range up to the next whole year, will fall into compliance with the sentencing guidelines.*

The discussion of rounding in common offense scenarios illustrated above also is applicable to two scenarios in the homicide offense group. An offender who is convicted of involuntary vehicular manslaughter and an additional offense which carries a maximum penalty of one year, such as driving under the influence of alcohol or drugs (DUI), receives a score of 20 on the prison sentence length work sheet. Over one-fourth of the cases recommended for a prison term for involuntary vehicular manslaughter received this score. For the score of 20, the guidelines recommend a sentence of a minimum of ten months to a maximum of two years and ten months. Upon reviewing such a recommendation, a judge who elects to sentence at the high end of the range is likely to round the recommendation to the nearest whole year, and impose a sentence of three years. Because a three year sentence exceeds the rounding allowance for the given recommendation, the sentence would be considered a departure from the guidelines. By amend-

ing the prison length range table as shown in Figure 57, these cases would now fall into compliance, because a three year sentence is within the rounding allowance of the new high sentence recommendation for this score (two years and 11 months).

The most common scenario for voluntary manslaughter involves no additional offenses but a prior record offense carrying a maximum penalty of five years (e.g., a prior unlawful injury). This voluntary manslaughter scenario receives a score of 50, which

**Figure 57**

#### **Recommended Amendments to the Homicide Prison Sentence Length Range Table**

##### **Current Range**

<b>Score</b>	<b>Sentence Range Midpoint</b>	<b>Sentence Range</b>
19	1 yr. 7 mo.	0 yr. 10 mo. - 2 yr. 9 mo.
20	1 yr. 8 mo.	0 yr. 10 mo. - 2 yr. 10 mo.
21	1 yr. 9 mo.	0 yr. 11 mo. - 2 yr. 10 mo.
22	1 yr. 10 mo.	0 yr. 11 mo. - 2 yr. 10 mo.
23	1 yr. 11 mo.	1 yr. 0 mo. - 2 yr. 11 mo.
24	2 yr. 0 mo.	1 yr. 0 mo. - 3 yr. 0 mo.
25	2 yr. 1 mo.	1 yr. 1 mo. - 3 yr. 1 mo.
26	2 yr. 2 mo.	1 yr. 2 mo. - 3 yr. 2 mo.
46	3 yr. 10 mo.	2 yr. 1 mo. - 5 yr. 5 mo.
47	3 yr. 11 mo.	2 yr. 1 mo. - 5 yr. 6 mo.
48	4 yr. 0 mo.	2 yr. 1 mo. - 5 yr. 6 mo.
49	4 yr. 1 mo.	2 yr. 2 mo. - 5 yr. 7 mo.
50	4 yr. 2 mo.	2 yr. 2 mo. - 5 yr. 7 mo.
51	4 yr. 3 mo.	2 yr. 3 mo. - 5 yr. 8 mo.
52	4 yr. 4 mo.	2 yr. 3 mo. - 5 yr. 8 mo.
53	4 yr. 5 mo.	2 yr. 4 mo. - 5 yr. 9 mo.
54	4 yr. 6 mo.	2 yr. 4 mo. - 5 yr. 10 mo.
55	4 yr. 7 mo.	2 yr. 5 mo. - 5 yr. 11 mo.
56	4 yr. 8 mo.	2 yr. 5 mo. - 6 yr. 1 mo.

is observed in one out of every five voluntary manslaughter cases recommended for prison by the guidelines. The sentence recommendation for this score ranges from a minimum of two years and two months to a maximum of five years and seven months.

A judge who wishes to sentence an offender fitting this profile at the high end of the recommended range is likely to round the high sentence recommendation up to six years. Such a sentence falls outside the boundaries of the rounding allow-

ance established by the Commission. Amending the prison length range table as shown in Figure 57 increases the high sentence recommendation to five years and ten months for a work sheet score of 50. With this adjustment, cases sentenced to six years fall within 5% of the new high sentence recommendation and would now be considered in compliance with the guidelines. The high sentence recommendation should not be increased to a full six years, because the Commission feels it is important to maintain the smooth transition across sentence range recommendations as the point total on the prison length work sheet increases. The proposed adjustment both accommodates judicial sentencing for these cases of voluntary manslaughter and allows for graduated sentence recommendations.

Proposed Range		Sentence Range	
Score	Sentence Range Midpoint		
19	1 yr. 7 mo.	0 yr. 10 mo.	- 2 yr. 10 mo.
20	1 yr. 8 mo.	0 yr. 10 mo.	- 2 yr. 11 mo.
21	1 yr. 9 mo.	0 yr. 11 mo.	- 2 yr. 11 mo.
22	1 yr. 10 mo.	0 yr. 11 mo.	- 3 yr. 0 mo.
23	1 yr. 11 mo.	1 yr. 0 mo.	- 3 yr. 0 mo.
24	2 yr. 0 mo.	1 yr. 0 mo.	- 3 yr. 1 mo.
25	2 yr. 1 mo.	1 yr. 1 mo.	- 3 yr. 2 mo.
26	2 yr. 2 mo.	1 yr. 2 mo.	- 3 yr. 3 mo.
46	3 yr. 10 mo.	2 yr. 1 mo.	- 5 yr. 6 mo.
47	3 yr. 11 mo.	2 yr. 1 mo.	- 5 yr. 7 mo.
48	4 yr. 0 mo.	2 yr. 1 mo.	- 5 yr. 8 mo.
49	4 yr. 1 mo.	2 yr. 2 mo.	- 5 yr. 9 mo.
50	4 yr. 2 mo.	2 yr. 2 mo.	- 5 yr. 10 mo.
51	4 yr. 3 mo.	2 yr. 3 mo.	- 5 yr. 10 mo.
52	4 yr. 4 mo.	2 yr. 3 mo.	- 5 yr. 11 mo.
53	4 yr. 5 mo.	2 yr. 4 mo.	- 5 yr. 11 mo.
54	4 yr. 6 mo.	2 yr. 4 mo.	- 6 yr. 0 mo.
55	4 yr. 7 mo.	2 yr. 5 mo.	- 6 yr. 1 mo.
56	4 yr. 8 mo.	2 yr. 5 mo.	- 6 yr. 2 mo.

The proposed amendment would have the effect of increasing compliance among the involuntary vehicular manslaughter and voluntary manslaughter cases received to date (Figure 58). Because the Commission has not received large numbers of these cases, small adjustments in the prison sentence recommendations can have a significant impact on compliance figures. For involuntary vehicular manslaughter, cases which were originally defined as an aggravation of the guidelines recommenda-

tion would fall into compliance based on the proposed changes to the prison sentence length range table, causing the compliance rate to jump to 57% from 52%. Likewise, compliance rates for voluntary manslaughter would increase three percentage points to 60%.

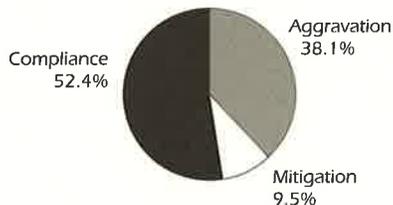
The proposed amendments to the prison sentence length range table for the homicide offense group accommodate current, and likely future, judicial sentencing in the cases of

involuntary vehicular manslaughter and voluntary manslaughter in which the judge feels that he is following the guidelines recommendation by imposing a sentence equivalent to the high sentence recommendation rounded up to the next whole year. The Commission recommends integrating judicial sentencing behavior in these cases into the category of compliance.

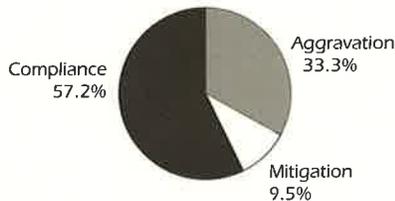
**Figure 58**  
**Recomputed Sentencing Guidelines Compliance in Involuntary Vehicular Manslaughter and Voluntary Manslaughter Cases**

Involuntary Vehicular Manslaughter

**Current Compliance**

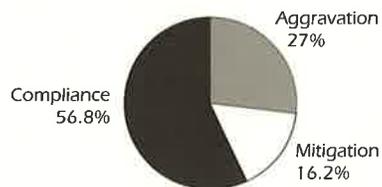


**Recomputed Compliance**

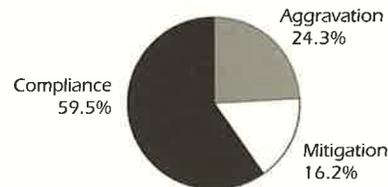


Voluntary Manslaughter

**Current Compliance**



**Recomputed Compliance**



▼ **Recommendation 7**

*The prison sentence length range table for the miscellaneous offense group should be amended between the scores of 7 and 11 such that the mandatory minimum penalty of 12 months which must be imposed for convictions under the habitual traffic statute of the Code of Virginia is encompassed within the range recommended by the guidelines, while also providing a range recommendation which allows for the imposition of further penalties of up to two months for additional offenses in these cases.*

§46.2-357(B) of the Code of Virginia establishes mandatory minimum penalties for felony level habitual traffic offenses which cannot be suspended in whole or in part. For the affected felony habitual traffic offenses, this mandatory minimum penalty is incarceration of at least 12 months. The felony habitual traffic offenses are covered by the truth in sentencing guidelines on the miscellaneous offense work sheets.

Because of the conversion to truth in sentencing and the corresponding transformation of the sentencing guidelines for nonviolent offenses to reflect historical time served, the truth in sentencing guidelines often recommend incarceration for habitual traffic offenders that is less than the mandatory minimum law requires, especially if the offender has little or no prior criminal record. In cases where the guidelines recommendation falls below a mandatory minimum penalty, the sentencing guidelines manual instructs users to replace any part of the sentencing guidelines recommendation (the low, the midpoint, or the high) that falls below the mandatory minimum with the mandatory minimum. Nonetheless, the Commission receives a significant numbers of calls on its

“hot line” telephone involving questions relating to habitual traffic offenses and the mandatory minimum penalty. In addition, the Commission receives many work sheets for this offense in which the user has not converted a guideline recommendation which falls short of the mandatory minimum to the mandatory penalty. Upon review of the work sheets prepared incorrectly, the guidelines appear to be in conflict with the minimum penalty required by law.

To clear up confusion and what appears at first glance to be a contradiction with the law, the Commission recommends amending the prison length range table as shown in Figure 59. Based on this revision, all recommendations at the lowest work sheet scores encompass a 12 month sentence. In fact, the high sentence recommendation has been set at 14 months. The Commission has found that many of the habitual traffic convictions are accompanied by convictions for driving under the influence of alcohol or drugs (DUI), hit and run, or disregarding a police command to stop. In these circumstances, judges often elect to impose sentences for these additional offenses which the offender must serve consecutively after serving his time

for the habitual traffic conviction. Many of the DUI convictions also carry mandatory minimum penalties from two to thirty days. To accommodate judicial sentencing preferences to sentence habitual traffic

offenders to consecutive penalties for multiple offenses, the Commission recommends revising the prison length range table to recommend ranges of seven months to 14 months for work sheet scores up to 12.

**Figure 59**

**Recommended Amendments to the Miscellaneous Prison Sentence Length Range Table**

**Current Range**

Score	Sentence Range Midpoint	Sentence Range
Up to 7	0 yr. 7 mo.	0 yr. 7 mo. - 0 yr. 10 mo.
8	0 yr. 8 mo.	0 yr. 7 mo. - 0 yr. 11 mo.
9	0 yr. 9 mo.	0 yr. 7 mo. - 0 yr. 11 mo.
10	0 yr. 10 mo.	0 yr. 7 mo. - 1 yr. 0 mo.
11	0 yr. 11 mo.	0 yr. 7 mo. - 1 yr. 1 mo.
12	1 yr. 0 mo.	0 yr. 7 mo. - 1 yr. 2 mo.
13	1 yr. 1 mo.	0 yr. 7 mo. - 1 yr. 3 mo.
14	1 yr. 2 mo.	0 yr. 7 mo. - 1 yr. 4 mo.

**Proposed Range**

Score	Sentence Range Midpoint	Sentence Range
Up to 7	0 yr. 7 mo.	0 yr. 7 mo. - 1 yr. 2 mo.
8	0 yr. 8 mo.	0 yr. 7 mo. - 1 yr. 2 mo.
9	0 yr. 9 mo.	0 yr. 7 mo. - 1 yr. 2 mo.
10	0 yr. 10 mo.	0 yr. 7 mo. - 1 yr. 2 mo.
11	0 yr. 11 mo.	0 yr. 7 mo. - 1 yr. 2 mo.
12	1 yr. 0 mo.	0 yr. 7 mo. - 1 yr. 2 mo.
13	1 yr. 1 mo.	0 yr. 7 mo. - 1 yr. 3 mo.
14	1 yr. 2 mo.	0 yr. 7 mo. - 1 yr. 4 mo.

Among the cases the Commission has received, many habitual offender cases previously reported as aggravations of the sentencing guidelines would fall into the new ranges recommended by the Commission. Compliance for habitual traffic offenses involving endangerment to others would increase from 73% to 78%, while compliance for the felony habitual traffic offense without endangerment would increase from 77% to 79%. The rate of aggravation would decrease substantially (Figure 60). The amendments to the prison length range table and resulting increases in compliance

rates for these offenses impose no additional prison bed space requirements for the Commonwealth. The range recommendations simply

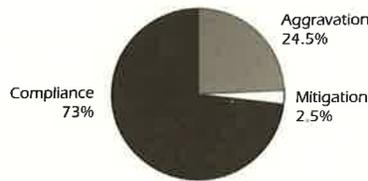
better represent the types of habitual traffic cases seen by Virginia's judges and better accommodate judicial sentencing for these cases.

**Figure 60**

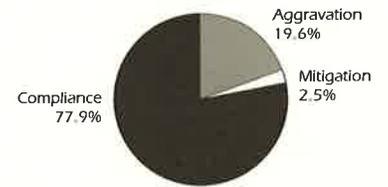
**Recomputed Sentencing Guidelines Compliance in Habitual Offender Cases**

Habitual Offender with Endangerment to Others

**Current Compliance**

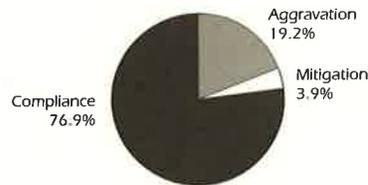


**Recomputed Compliance**

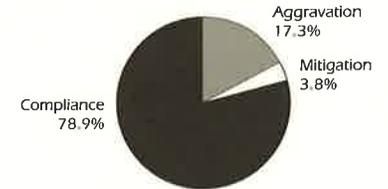


Habitual Offender (Subsequent Conviction), No Endangerment

**Current Compliance**



**Recomputed Compliance**





# Future Plans

## 7

### **Implementation, Integration and Evaluation of Risk Assessment Instrument**

As discussed in Chapter Three, the Commission is required under §17-235 of the Code of Virginia to develop and implement a risk assessment instrument to be incorporated into the sentencing guidelines for use in determining appropriate candidates for alternative sanctions. The data collection phase of the project is nearly complete and preliminary analysis has been conducted (see Chapter Three- *Risk Assessment Report*). The Commission has developed a timetable for inclusion of risk assessment into the sentencing guidelines system.

By mid-1997, risk assessment analysis should be complete, to be followed by development of the risk classification instrument. The instrument will be integrated into the guidelines in the form of an additional work sheet. The new work sheet would be completed in nonviolent felony cases in which the current guidelines system recommends incarceration and would serve as an additional tool to assist judges in identifying candidates for alternative sanctions – those offenders who are likely to pose minimal risk to public safety.

Because the Commission believes it is very important to closely monitor the application of the risk assessment instrument as it is introduced, a decision has been made to stagger its implementation across the Commonwealth. The risk assessment instrument will be introduced in a group of judicial circuits in late 1997. By July 1, 1998, another series of circuits should begin utilizing the instrument. Implementation for the remaining judicial circuits should be achieved by July 1, 1999.

The Commission will monitor the performance of the risk assessment instrument closely. Not only will data be collected on the success of the instrument in predicting recidivism, but information will also be gathered on offenders' experiences in alternative punishment programs. For instance, the Commission would like to obtain data regarding offenders who receive substance abuse treatment, vocational training, educational instruction and other services. It is possible that some types of offenders will respond more successfully to specific interventions offered by these programs, and, in some cases, this may have a significant impact on reducing the likelihood of recidivism. Examining the relative effectiveness of these alternative punishments in protecting public safety will require a detailed follow-up analysis of the participants and subsequent identification of those factors which correlate with the probability of success. Evaluation findings can then serve as a means to revise the risk assessment instrument and, in turn, result in more targeted and reliable diversion recommendations.

### **Efficiency Improvements in Data Automation**

During 1997, the Commission will implement new procedures for the automation of sentencing guidelines information which will modernize and improve the efficiency of this process. Currently, the Commission employs data entry personnel to manually key the sentencing guidelines information into a computer data base. In 1996, the Commission purchased sophisticated scanning equipment. Under the new automation process, the guidelines documents will be sent through a scanner and a visual image of the forms will be stored in an archive. In addition, special computer software will enable Commission staff to review the scanned forms for accuracy before saving the information directly to the sentencing guidelines data base. Overall, automation through scanning will require far less time than the current manual entry process and will allow for more timely analysis of sentencing information.

The Commission is currently designing scannable versions of the sentencing guidelines forms. In late 1997, the scannable forms will be pilot tested in a few judicial circuits. During the period of pilot testing, guidelines cases from the pilot circuits will also be manually entered into the main data base in order to ensure continuity of accurate data. By the beginning of 1998, the Commission hopes to have all circuits in the Commonwealth using scannable guidelines forms.

### **Reanalysis of Sentencing Guidelines Data under Truth in Sentencing**

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

The Commission developed the truth in sentencing guidelines after analyzing 105,624 cases sentenced between 1988 and 1992, and prison time

served data for over 28,000 cases. The Commission has performed detailed studies of compliance under the 20,042 truth in sentencing guidelines cases received through October 22, 1996. The Commission feels that there is not yet enough experiential data for many of the offenses, particularly violent offenses, to conduct a full scale reanalysis for the purposes of making recommendations for revisions to the guidelines.

Late in 1997, the Commission intends to take another look at this issue and assess if, at that time, there are enough truth in sentencing cases of both violent and nonviolent offenses to conduct a thorough reanalysis of the sentencing data under the no parole system.

### **Internet Web Site**

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



# Appendices

## 8

## Appendix 1

### Judicial Reasons for Departure from Sentencing Guidelines

### Recommendations for Property, Drug and Miscellaneous Offenses

Reasons for MITIGATION	Burglary of Dwelling	Burglary of Other Structure	Drugs	Fraud	Larceny	Misc
No reason given	7.4%	6.3%	8.4%	6.9%	11.9%	9.8%
Minimal property or monetary loss	0.5	2.1	0.1	3.0	7.0	0
Minimal circumstances/facts of the case	2.7	4.2	2.2	4.2	2.7	18.2
Small amount of drugs involved in the case	0.0	0	3.5	0.3	0	3.8
Offender and victims are related or friends	4.8	0	0	3.0	0.6	0.8
Little or no injury/offender did not intend to harm; victim requested lenient sentence	3.7	1.1	0	2.7	0.9	2.3
Offender has no prior record	1.6	4.2	2.2	2.4	0	0
Offender has minimal prior record	3.7	3.2	4.0	2.7	2.4	9.8
Offender's criminal record overstates his degree of criminal orientation	1.1	0	1.4	1.8	0.9	3.8
Offender cooperated with authorities	8.5	14.7	10.9	9.6	6.4	12.9
Offender is mentally or physically impaired	2.1	6.3	3.5	4.5	3.0	3.0
Offender has emotional or psychiatric problems	1.1	2.1	0.3	3.0	1.2	1.5
Offender has drug or alcohol problems	3.7	4.2	2.1	3.0	3.0	2.3
Offender has good potential for rehabilitation	11.7	14.7	13.7	28.3	21.6	8.3
Offender needs court order treatment or drug counseling	1.6	5.3	1.1	0.6	0.9	1.5
Age of Offender	11.2	11.6	5.0	2.1	3.4	4.5
Multiple charges are being treated as one criminal event	0.5	0	0.1	2.7	0.3	0
Sentence recommend by Commonwealth Attorney or probation officer	2.1	5.3	2.2	5.4	3.7	1.5
Weak evidence or weak case	10.1	6.3	3.8	5.4	11.3	8.3
Plea agreement	8.5	5.3	8.6	7.5	10.1	8.3
Sentencing Consistency with co-defendant or with similar cases in the jurisdiction	1.6	2.1	1.1	2.4	2.4	1.5
Offender already sentenced by another court or in previous proceeding for other offenses	6.9	4.2	2.9	10.2	6.4	4.5
Offender will likely have his probation revoked	2.7	3.2	0.8	2.7	2.7	2.3
Offender is sentenced to an alternative punishment to incarceration	23.9	17.9	36.7	9.6	11.9	5.3
Guidelines recommendation is too harsh	0.5	3.2	1.0	3.0	1.5	1.5
Judge rounded guidelines minimum to nearest whole year	1.6	1.1	0.8	1.2	1.2	0.8
Other reasons for mitigation	4.1	4.2	7.5	9.9	11.6	5.4

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

### Recommendations for Property, Drug and Miscellaneous Offenses

Reasons for AGGRAVATION	Burglary of Dwelling	Burglary of Other Structure	Drugs	Fraud	Larceny	Misc
No reason given	0.8%	5.4%	6.2%	3.9%	8.3%	7.6%
Extreme property or monetary loss	4.0	5.4	0	4.6	7.1	0
The offense involved a high degree of planning	0.8	3.2	0.2	4.6	4.9	0
Aggravating circumstances/flagrancy of offense	25.4	19.4	3.4	6.5	13.9	11.4
Offender used a weapon in commission of the offense	0.8	1.1	1.6	0	1.0	2.8
The offender was the leader in the offense	1.6	1.1	0.1	0.7	0.8	0
Offender's true offense behavior was more serious than offenses at conviction	5.6	2.2	5.1	9.2	4.5	6.9
Extraordinary amount of drugs or purity of drugs involved in the case	0	0	12.0	0	0	0
Aggravating circumstances relating to sale of drugs	0	0	2.1	0	0	0
Offender immersed in drug culture	0	0	4.1	0	0	0
Victim injury	3.2	1.1	0.3	0	2.0	1.7
Previous punishment of offender has been ineffective	4.8	3.2	3.8	2.6	3.7	1.4
Offender was under some form of legal restraint at time of offense	4.0	7.5	4.9	1.3	6.1	1.7
Offender's criminal record understates the degree of his criminal orientation	13.5	14.0	13.0	18.3	16.1	14.8
Offender has previous conviction(s) or other charges for the same type of offense	4.0	7.5	17.0	7.8	9.6	26.6
Offender failed to cooperate with authorities	0.8	4.3	4.0	3.9	5.1	7.9
Offender has drug or alcohol problems	0.8	2.2	2.9	2.0	1.4	3.4
Offender has poor rehabilitation potential	4.8	2.2	2.4	3.9	2.9	6.2
Offender shows no remorse	4.8	3.2	0.9	3.3	2.4	0.3
Jury sentence	7.9	6.5	3.6	4.6	3.7	4.8
Plea agreement	14.3	10.8	8.6	16.3	8.4	3.8
Community sentiment	1.6	0	2.1	0	0.6	1.0
Sentencing consistency with codefendant or with other similar cases in the jurisdiction	7.9	5.4	12.0	5.2	3.5	0.7
Judge wanted to teach offender a lesson	2.4	2.2	0.9	0	1.6	0.3
Guidelines recommendation is too low	10.3	8.6	8.0	6.5	9.0	9.3
Mandatory minimum penalty is required in the case	0	0	1.0	0	0.2	6.2
Other reasons for aggravation	14.4	11.0	11.9	13.2	10.7	14.4

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

### Recommendations for Offenses Against the Person

Reasons for MITIGATION	Assault	Homicide	Kidnapping	Robbery	Rape	Sexual Assault
No reason given	5.6%	0%	0%	7.7%	7.7%	5.3%
Minimal circumstances/facts of the case	8.5	12.5	0	7.1	5.8	7.9
Offender was not the leader or active participant in offense	2.8	4.2	0	8.4	0	0
Offender and victim are related or friends	9.9	8.3	16.7	1.9	9.6	2.6
Little or no victim injury/offender did not intend to harm; victim requested lenient sentence	20.4	4.2	41.7	3.2	19.2	10.5
Victim was a willing participant or provoked the offense	6.3	0	0	0	11.5	7.9
Offender has no prior record	4.9	4.2	0	3.2	1.9	2.6
Offender has minimal prior criminal record	1.4	4.2	0	2.6	3.8	5.3
Offender's criminal record overstates his degree of criminal orientation	0.7	0	8.3	1.9	1.9	0
Offender cooperated with authorities or aided law enforcement	3.5	4.2	8.3	12.9	5.8	0
Offender has emotional or psychiatric problems	1.4	0	0	1.3	1.9	0
Offender is mentally or physically impaired	4.2	0	8.3	2.6	0	0
Offender has drug or alcohol problems	4.9	4.2	0	3.9	7.7	5.3
Offender has good potential for rehabilitation	16.9	12.5	8.3	9.7	13.5	5.3
Offender shows remorse	4.2	12.5	0	3.9	5.8	0
Age of offender	5.6	12.5	0	18.1	9.6	5.3
Offender plead guilty rather than go to trial	0.7	0	0	1.3	1.9	0
Jury sentence	0	16.7	0	3.2	7.7	0
Sentence was recommended by Commonwealth's attorney or probation officer	4.2	4.2	8.3	4.5	0	5.3
Weak evidence or weak case against the offender	17.6	12.5	8.3	11.6	30.8	23.7
Plea agreement	3.5	12.5	8.3	5.2	1.9	23.7
Sentencing consistency with codefendant or with other similar cases in the jurisdiction	4.2	0	0	0.6	5.8	0
Offender already sentenced by another court or in previous proceeding for other offenses	2.1	0	8.3	6.5	5.8	2.6
Offender is sentenced to an alternative punishment to incarceration	5.6	16.7	0	9.0	0	2.6
Guidelines recommendation is too harsh	0	0	0	0.6	1.9	5.3
Other reasons for mitigation	6.3	0	33.3	4.7	3.8	2.6

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

**Appendix 2**

**Judicial Reasons for Departure  
from Sentencing Guidelines**

**Recommendations for Offenses Against the Person**

Reasons for AGGRAVATION	Assault	Homicide	Kidnapping	Robbery	Rape	Sexual Assault
No reason given	3.5%	7.0%	0%	7.3%	0%	2.0%
The offense involved a high degree of planning	0.9	0	0	1.8	9.1	2.0
Aggravating circumstances/flagrancy of offense	17.5	20.9	42.9	21.8	36.4	22.4
Offender used a weapon in commission of the offense	2.6	0	0	5.5	0	0
Offender's true offense behavior was more serious than offenses at conviction	8.8	4.7	7.1	2.7	0	10.2
Offender is related to or is the caretaker of the victim	0	0	0	0	0	9.2
Offense was an unprovoked attack	2.6	0	0	1.8	0	0
Offender knew of victim's vulnerability	5.3	4.7	14.3	7.3	18.2	17.3
Victim injury	3.5	0	0	10.0	9.1	10.2
Extreme violence or severe victim injury	38.6	7.0	0	17.3	0	1.0
Previous punishment of offender has been ineffective	0	0	7.1	0	0	1.0
Offender was under some form of legal restraint at time of offense	2.6	0	0	2.7	0	0
Offender has a serious juvenile record	1.8	0	0	0	0	0
Offender's record understates the degree of his criminal orientation	7.9	9.3	7.1	5.5	18.2	5.1
Offender has previous conviction(s) or other charges for the same offense	5.3	0	0	1.8	9.1	6.1
Offender failed to cooperate with authorities	2.6	0	0	0	0	3.1
Offender has drug or alcohol problems	0	11.6	7.1	0.9	0	2.0
Offender has poor rehabilitation potential	7.0	4.7	14.3	5.5	0	4.1
Offender shows no remorse	5.3	14.0	0	5.5	27.3	7.1
Jury sentence	11.4	41.9	28.6	16.4	18.2	7.1
Plea agreement	3.5	0	0	1.8	0	6.1
Guidelines recommendation is too low	10.5	4.7	0	15.5	9.1	15.3
Mandatory minimum penalty is required in the case	3.5	0	0	6.4	0	0
Other reasons for aggravation	6.3	7.0	7.1	11.7	18.2	13.1

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

### Appendix 3 Sentencing Guidelines Compliance by Judicial Circuit for Property,

◆ **Burglary of Dwelling**

◆ **Burglary of Other Structure**

◆ **Drugs**

Circuit	Compliance	Mitigation	Aggravation	# of Cases	Circuit	Compliance	Mitigation	Aggravation	# of Cases	Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	47.6%	9.5%	42.9%	21	1	100%	0%	0%	8	1	67%	6.6%	26.4%	182
2	76.8	14.3	8.9	112	2	85.1	2.1	12.8	47	2	79.8	8.8	11.4	475
3	72.7	25	2.3	44	3	77.8	16.7	5.5	18	3	84.9	10.5	4.6	344
4	76.1	16.4	7.5	67	4	67.5	20.9	11.6	43	4	75.2	11	13.8	636
5	78.3	8.7	13	23	5	75	8.3	16.7	12	5	79.5	6.4	14.1	220
6	83.3	11.1	5.6	18	6	66.7	16.7	16.6	18	6	64.7	15.5	19.8	116
7	72.5	17.2	10.3	29	7	64.8	17.6	17.6	17	7	88.9	2.7	8.4	594
8	83.3	11.1	5.6	18	8	100	0	0	11	8	86.7	5.7	7.6	105
9	52.4	28.6	19	21	9	85.8	7.1	7.1	14	9	60.6	8.8	30.6	147
10	72.4	20.7	6.9	29	10	69.2	23.1	7.7	13	10	73.8	17.5	8.7	160
11	86.7	6.7	6.6	15	11	85.7	14.3	0	14	11	81.5	10	8.5	189
12	65.6	24.1	10.3	29	12	58.4	20.8	20.8	24	12	70.5	6.4	23.1	173
13	64.2	17	18.8	53	13	55.4	14.2	30.4	56	13	62.6	11	26.4	808
14	78.1	12.5	9.4	32	14	87.5	12.5	0	24	14	77.9	7.5	14.6	267
15	56.5	18.9	24.6	69	15	68.8	12.4	18.8	32	15	59.2	12.5	28.3	304
16	64.3	19	16.7	42	16	79.2	16.7	4.1	24	16	79.1	6.1	14.8	148
17	55	30	15	20	17	73.3	6.7	20	15	17	78.6	7.3	14.1	205
18	58.9	23.5	17.6	17	18	50	22.2	27.8	18	18	70.5	18.9	10.6	227
19	68.7	19.4	11.9	67	19	73.4	13.3	13.3	30	19	77.9	11.7	10.4	411
20	84.6	7.7	7.7	13	20	86.4	13.6	0	22	20	79.1	7.5	13.4	67
21	73.3	20	6.7	15	21	95.2	0	4.8	21	21	82.2	8.9	8.9	90
22	71.9	12.5	15.6	32	22	69.7	6.1	24.2	33	22	59.9	3.6	36.5	197
23	71.8	23.1	5.1	39	23	88.2	0	11.8	17	23	61.7	17.9	20.4	240
24	54.1	24.3	21.6	37	24	72.1	11.6	16.3	43	24	59.8	10.8	29.4	306
25	87.8	7.3	4.9	41	25	85.2	14.8	0	27	25	79.5	13.7	6.8	117
26	67.6	26.5	5.9	34	26	73.3	20	6.7	30	26	65.3	14.7	20	150
27	77.8	17.8	4.4	45	27	44.5	44.4	11.1	18	27	87.2	5.7	7.1	70
28	66.7	26.7	6.6	15	28	72.7	9.1	18.2	11	28	64.3	19	16.7	42
29	33.3	22.2	44.5	9	29	50	27.8	22.2	18	29	61.5	10.3	28.2	39
30	62.5	12.5	25	8	30	60	20	20	5	30	71.5	7.1	21.4	14
31	72.8	24.2	3	33	31	81.8	9.1	9.1	11	31	87.9	7.4	4.7	256
<b>Total</b>	<b>70%</b>	<b>18%</b>	<b>12%</b>	<b>1048</b>	<b>Total</b>	<b>72.9%</b>	<b>13.7%</b>	<b>13.4%</b>	<b>694</b>	<b>Total</b>	<b>73.8%</b>	<b>9.8%</b>	<b>16.4%</b>	<b>7299</b>

## Drug, and Miscellaneous Offenses

◆ Fraud					◆ Larceny					◆ Miscellaneous				
Circuit	Compliance	Mitigation	Aggravation	# of Cases	Circuit	Compliance	Mitigation	Aggravation	# of Cases	Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	76.7%	9.3%	14%	43	1	79.2%	5.4%	15.4%	168	1	91.7%	4.2%	4.1%	24
2	77.7	13.8	8.5	130	2	88.1	4.8	7.1	421	2	72.6	11.3	16.1	124
3	83.9	12.9	3.2	31	3	80	14.5	5.5	110	3	85	5	10	20
4	83	14.7	2.3	218	4	83	10.6	6.4	498	4	80.4	10.7	8.9	56
5	81.4	14	4.6	43	5	92.8	4	3.2	124	5	68.9	6.8	24.3	74
6	75	21.4	3.6	28	6	86.6	1.9	11.5	52	6	68.4	5.3	26.3	19
7	89.1	7.8	3.1	64	7	94.9	1.7	3.4	117	7	85.7	2.9	11.4	70
8	83.8	16.2	0	37	8	91.4	4.3	4.3	92	8	92.3	0	7.7	26
9	77.5	10	12.5	40	9	85.9	3.8	10.3	78	9	81.5	3.7	14.8	27
10	88.3	7.8	3.9	51	10	93.2	5.1	1.7	59	10	60.3	19	20.7	58
11	85.8	7.1	7.1	28	11	82.8	6.9	10.3	29	11	65.5	13.8	20.7	29
12	81	9.5	9.5	84	12	71	5.4	23.6	148	12	65.4	3.8	30.8	26
13	70.1	15.7	14.2	134	13	77.4	4.7	17.9	234	13	68.1	11.6	20.3	69
14	79.3	9.4	11.3	106	14	77.4	7	15.6	256	14	70	12.5	17.5	40
15	75	13	12	92	15	78.6	6.4	15	187	15	76.9	7.7	15.4	78
16	73	21.6	5.4	74	16	85.3	8	6.7	75	16	77.8	1.6	20.6	63
17	83	13.4	3.6	112	17	83.4	5	11.6	258	17	50	0	50	20
18	51	27.5	21.5	51	18	77	9.4	13.6	191	18	90	0	10	10
19	85.9	8.8	5.3	226	19	81.5	4.9	13.6	308	19	80	3	17	100
20	87	13	0	69	20	83.3	6.3	10.4	96	20	73	16.2	10.8	37
21	76.9	23.1	0	39	21	83.6	11.5	4.9	122	21	81	6.9	12.1	58
22	76.1	10.9	13	46	22	67.6	2.6	29.8	114	22	82.1	5.1	12.8	78
23	74.5	22.4	3.1	98	23	70.8	14.6	14.6	198	23	62.5	13.4	24.1	112
24	69	29.1	1.9	103	24	82.3	10.9	6.8	192	24	75.5	6.5	17.8	107
25	88.9	9.5	1.6	126	25	85.9	6	8.1	149	25	84	10.7	5.3	75
26	75	15.9	9.1	88	26	82.3	9.7	8	124	26	64.7	5.9	29.4	85
27	81.1	15.1	3.8	53	27	90.4	9.6	0	52	27	76.3	13.6	10.1	59
28	71.8	15.4	12.8	39	28	87.5	5	7.5	40	28	83.4	3.3	13.3	30
29	72.7	9.1	18.2	11	29	61.1	0	38.9	36	29	65.3	4.3	30.4	23
30	76.9	23.1	0	13	30	72.7	9.1	18.2	22	30	79.2	0	20.8	24
31	81.1	10.3	8.6	58	31	92	6.3	1.7	112	31	76.6	8.5	14.9	47
<b>Total</b>	<b>79.2%</b>	<b>14.2%</b>	<b>6.6%</b>	<b>2335</b>	<b>Total</b>	<b>82%</b>	<b>7.1%</b>	<b>10.9%</b>	<b>4662</b>	<b>Total</b>	<b>74.6%</b>	<b>8%</b>	<b>17.4%</b>	<b>1668</b>

## Appendix 4 Sentencing Guidelines Compliance by Judicial Circuit for Offenses

◆ Assault					◆ Kidnap					◆ Homicide				
Circuit	Compliance	Mitigation	Aggravation	# of Cases	Circuit	Compliance	Mitigation	Aggravation	# of Cases	Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	68.7%	25%	6.3%	16	1	100%	0%	0%	1	1	100%	0%	0%	2
2	71.4	4.1	24.5	49	2	37.5	12.5	50	8	2	75	8.3	16.7	12
3	75.8	12.1	12.1	33	3	50	50	0	2	3	76.9	7.7	15.4	13
4	53.9	25.6	20.5	39	4	60	20	20	5	4	52	20	28	25
5	77.5	12.5	10	40	5	50	0	50	4	5	60	20	20	5
6	75.7	15.2	9.1	33	6	66.7	0	33.3	3	6	100	0	0	1
7	77.8	13.9	8.3	36	7	100	0	0	3	7	71.4	14.3	14.3	7
8	76.9	15.4	7.7	13	8	100	0	0	2	8	100	0	0	3
9	60	15	25	20	9	33.3	66.7	0	3	9	33.4	33.3	33.3	3
10	75.7	21.6	2.7	37	10	100	0	0	1	10	85.7	14.3	0	7
11	68.2	18.2	13.6	22	11	100	0	0	1	11	100	0	0	3
12	75	0	25	8	12	100	0	0	1	12	75	25	0	4
13	73.8	10.8	15.4	65	13	0	0	0	0	13	64	8	28	25
14	66.7	25	8.3	24	14	100	0	0	2	14	81.8	9.1	9.1	11
15	80.6	8.3	11.1	36	15	75	25	0	4	15	20	20	60	5
16	71.4	4.8	23.8	21	16	0	0	0	0	16	80	20	0	5
17	78.9	15.8	5.3	19	17	100	0	0	1	17	75	25	0	4
18	33.4	33.3	33.3	18	18	0	0	0	0	18	50	50	0	2
19	57.1	7.1	35.8	28	19	60	20	20	5	19	54.5	0	45.5	11
20	52.9	35.3	11.8	17	20	0	100	0	1	20	0	0	100	2
21	75	20.8	4.2	24	21	100	0	0	1	21	66.7	33.3	0	3
22	65.2	8.7	26.1	23	22	100	0	0	1	22	100	0	0	4
23	53	38.2	8.8	34	23	25	37.5	37.5	8	23	58.3	25	16.7	12
24	67.9	17.9	14.2	28	24	0	0	100	2	24	80	0	20	5
25	70	25	5	20	25	50	50	0	2	25	100	0	0	5
26	70	20	10	20	26	0	0	0	0	26	55.6	0	44.4	9
27	50	38.9	11.1	18	27	0	0	0	0	27	90	0	10	10
28	60	20	20	10	28	0	0	0	0	28	50	0	50	4
29	50	33.3	16.7	12	29	0	0	0	0	29	100	0	0	1
30	77.8	11.1	11.1	9	30	0	0	0	0	30	100	0	0	4
31	66.7	24.2	9.1	33	31	100	0	0	3	31	75	12.5	12.5	8
<b>Total</b>	<b>68.2%</b>	<b>17.6%</b>	<b>14.2%</b>	<b>805</b>	<b>Total</b>	<b>59.4%</b>	<b>18.7%</b>	<b>21.9%</b>	<b>64</b>	<b>Total</b>	<b>68.8%</b>	<b>11.2%</b>	<b>20%</b>	<b>215</b>

## Against the Person

### ◆ Robbery

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	70%	20%	10%	10
2	72	18.3	9.7	93
3	66.7	27.3	6	33
4	60	23.5	16.5	85
5	83.3	16.7	0	12
6	66.7	8.3	25	12
7	68.3	16.7	15	60
8	74.3	17.1	8.6	35
9	58.4	33.3	8.3	12
10	44.5	22.2	33.3	9
11	82.4	11.8	5.8	17
12	100	0	0	7
13	57.8	18.3	23.9	71
14	78.3	13	8.7	23
15	55.6	33.3	11.1	18
16	53	17.6	29.4	17
17	50	23.1	26.9	26
18	51.7	34.5	13.8	29
19	76.1	17.4	6.5	46
20	71.4	14.3	14.3	7
21	81.8	18.2	0	11
22	65	15	20	20
23	71	25.8	3.2	31
24	50	19.2	30.8	26
25	70	30	0	10
26	83.3	0	16.7	6
27	100	0	0	3
28	50	33.3	16.7	6
29	0	0	100	2
30	40	0	60	5
31	41.2	41.2	17.6	17

Total 65.1% 20.4% 14.5% 759

### ◆ Rape

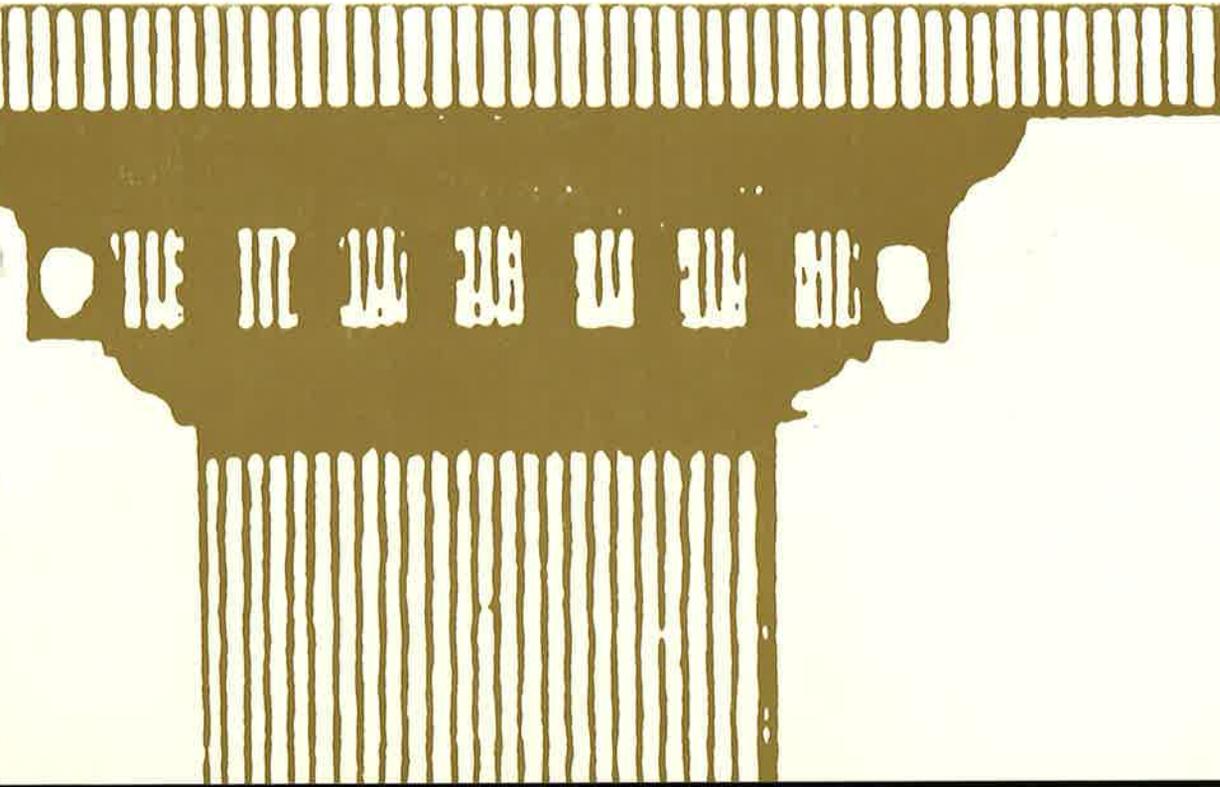
Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	0%	0%	0%	0
2	70.6	23.5	5.9	17
3	100	0	0	3
4	55.6	33.3	11.1	18
5	50	50	0	2
6	100	0	0	1
7	66.7	33.3	0	9
8	33.3	66.7	0	6
9	60	0	40	5
10	66.7	33.3	0	6
11	0	100	0	1
12	66.7	33.3	0	3
13	61.5	15.4	23.1	13
14	40	60	0	5
15	37.5	62.5	0	8
16	75	25	0	4
17	33.4	33.3	33.3	3
18	25	75	0	4
19	55.6	44.4	0	9
20	0	100	0	1
21	50	0	50	2
22	75	25	0	4
23	0	80	20	5
24	0	100	0	1
25	57.1	42.9	0	7
26	83.3	16.7	0	6
27	100	0	0	2
28	100	0	0	1
29	100	0	0	1
30	0	0	0	0
31	0	0	0	0

Total 57.1% 35.4% 7.5% 147

### ◆ Sexual Assault

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	85.7%	0%	14.3%	7
2	69.2	7.7	23.1	26
3	80	10	10	10
4	68.4	15.8	15.8	19
5	54.5	9.1	36.4	11
6	66.7	0	33.3	6
7	76.9	0	23.1	13
8	100	0	0	6
9	83.3	0	16.7	6
10	80	0	20	5
11	50	37.5	12.5	8
12	45.5	18.2	36.3	11
13	47.1	23.5	29.4	17
14	75	12.5	12.5	16
15	60.9	13	26.1	23
16	80	0	20	5
17	44.4	0	55.6	9
18	40	20	40	10
19	50	0	50	20
20	60	0	40	5
21	66.7	0	33.3	3
22	20	0	80	5
23	16.7	50	33.3	6
24	53	17.6	29.4	17
25	63.6	9.1	27.3	22
26	54.2	0	45.8	24
27	64.3	35.7	0	14
28	60	40	0	5
29	100	0	0	2
30	25	0	75	4
31	63.6	0	36.4	11

Total 60.7% 11% 28.3% 346



Sentencing Guidelines Hotline  
For information  
Call 804 225-4398

