VIRGINIA CRIMINAL SENTENCING COMMISSION

2004 ANNUAL REPORT

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Supreme Court of Virginia
Virginia Criminal Sentencing Commission

December 2004

To: The Honorable Leroy Rountree Hassell, Sr., Chief Justice of Virginia
The Honorable Mark R. Warner, Governor of Virginia
The Honorable Members of the General Assembly of Virginia
The Citizens of Virginia

Section 17.1-803 of the *Code of Virginia* requires the Virginia Criminal Sentencing Commission to report annually upon its work and recommendations. Pursuant to this statutory obligation, we respectfully submit for your review the *2004 Annual Report* of the Criminal Sentencing Commission.

This report details the work of the Commission over the past year and outlines the ambitious schedule of activities that lies ahead. The report provides a comprehensive examination of judicial compliance with the felony sentencing guidelines for fiscal year 2004. The Commission's recommendations to the 2005 session of the Virginia General Assembly are also contained in this report.

January 1, 2005, marks the tenth anniversary of the Commission's implementation of Virginia's no-parole, truth-in-sentencing system. At this milestone, the Commission's report takes a close look at the performance of the new sentencing system in meeting specific objectives set forth by its designers.

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

Sincerely,

Robert W. Stewart

Robert W. Stewart
Chairman

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"The judicial department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all."

— *John Marshall*

1 Introduction

Virginia's approach has proven to be one of the most successful and effective avenues for reform.

Overview

January 1, 2005, will mark the tenth anniversary of the abolition of parole and the institution of truth-in-sentencing in the Commonwealth of Virginia. The reform of a decade ago dramatically changed the way felons are sentenced and serve time in Virginia. Of the many approaches to truth-in-sentencing taken by states around the nation, Virginia's approach has proven to be one of the most successful and effective avenues for reform. Other states, and recently other nations, have begun to look to Virginia as a model for change. The new year will also mark the ten-year milestone for the Virginia Criminal Sentencing Commission, which was created to implement and oversee sentencing guidelines compatible with the state's new punishment system for felons.

The Virginia Criminal Sentencing Commission is required by § 17.1-803 of the *Code of Virginia* to report annually to the General Assembly, the Governor and the Chief Justice of the Supreme Court of Virginia. To fulfill its statutory obligation, the Commission respectfully submits this report, the tenth in the series. As in previous years, the report provides detailed analysis of judicial compliance with the discretionary sentencing guidelines. This report also includes a ten-year retrospective of truth-in-sentencing in Virginia, documenting both the successes of Virginia's system and the ongoing work of the Commission. Additionally, the report presents the findings of groundbreaking research conducted by the Commission during the last year. As mandated, the report includes the Commission's recommendations to the 2005 Virginia General Assembly.

The report is organized into six chapters. The remainder of the Introduction chapter gives a general profile of the Commission and an overview of its various activities and projects during 2004. The Guidelines Compliance chapter provides the results of a comprehensive analysis of compliance with the sentencing guidelines during fiscal year (FY) 2004, as well as other related sentencing trend data. A comprehensive review of the First Decade of Truth-in-Sentencing is presented in the chapter that follows. Subsequent chapters detail two of the Commission's most recent analytic projects. A chapter devoted to the Probation Violator Study describes the Commission's efforts to examine this population of offenders. The chapter on Methamphetamine Crime in Virginia examines the impact of this drug, and the criminal justice response, in the Commonwealth. The report's final chapter presents the Commission's recommendations for 2004.

Commission Meetings

The full membership of the Commission met four times during 2004. These meetings, convened in the Supreme Court of Virginia, were held on March 29, June 21, September 13 and November 15. Minutes for each of these meetings are available on the Commission's website (www.vcsc.state.va.us).

Commission Profile

The Virginia Criminal Sentencing Commission is comprised of 17 members as authorized in the *Code of Virginia* § 17.1-802. The Chairman of the Commission is appointed by the Chief Justice of the Supreme Court of Virginia, must not be an active member of the judiciary and must be confirmed by the General Assembly. The Chief Justice also appoints six judges or justices to serve on the Commission. 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. The Governor appoints four members, at least one of whom must be a victim of crime or a representative of a crime victim's organization. The final member is Virginia's Attorney General, who serves by virtue of his office.

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

Monitoring and Oversight

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

The Commission reviews the guidelines worksheets as they are received. Commission staff performs this check to ensure that the guidelines forms are being completed accurately and properly. As a result of the review process, any errors or omissions are detected and resolved.

Once the guidelines worksheets are reviewed and determined to be complete, they are automated and analyzed. The principal analysis performed with the automated guidelines database relates to judicial compliance with sentencing guidelines recommendations. This analysis is conducted and presented to the Commission twice a year. The most recent study of judicial concurrence with the sentencing guidelines is presented in the next chapter.

Training and Education

The Commission continuously offers training and educational opportunities in an effort to promote the accurate completion of sentencing guidelines. Training seminars are designed to appeal to the needs of attorneys for the Commonwealth and probation officers, the two groups authorized by statute to complete the official guidelines for the court. The seminars also provide defense attorneys with a knowledge base to challenge the accuracy of guidelines submitted to the court. Having all sides equally trained in the completion of guidelines worksheets is essential to a system of checks and balances that ensures the accuracy of sentencing guidelines.

In 2004, the Commission provided sentencing guidelines assistance in a variety of forms: training and education seminars, assistance via the "hot line" phone system, and publications and training materials. The Commission offered 65 training seminars in 29 different locations across the Commonwealth, returning to many of these locations multiple times throughout the year. This year the Commission staff offered two training seminars: an introduction for new users of guidelines and a "What's New" course designed to update experienced users on recent changes to the guidelines. Both seminars included a significant component on the probation violation sentencing guidelines that were implemented July 1, 2004.

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

The Commission will continue to place a priority on providing sentencing guidelines training 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 guidelines and the no-parole sentencing system to any interested group or organization. If an individual is interested in training, the user can contact the Commission and place his or her name on a waiting list. Once there is enough interest, a seminar is developed and presented in a locality convenient to the majority of individuals on the list.

In addition to providing training and education programs, the Commission maintains a website and a "hot line" phone system (804-225-4398). By visiting the website, a user can learn about upcoming training sessions, access Commission reports, look up Virginia Crime Codes (VCCs) and utilize on-line versions of the sentencing guidelines forms. The "hot line" phone is staffed from 7:45 a.m. to 5:15 p.m., Monday through Friday, to respond quickly to any questions or concerns regarding the sentencing guidelines. The "hot line" continues to be an important resource for guidelines users around the Commonwealth. As in previous years, the staff of the Commission has responded to thousands of calls through this service during 2004.

The truth-in-sentencing reform, instituted a decade ago, dramatically changed the way felons are sentenced and serve time in Virginia.

Probation Violator Study

Since 1991, Virginia's circuit judges have been provided with historically-based sentencing guidelines grounded in actual judicial sanctioning practices in the Commonwealth. Today, sentencing guidelines apply to nearly all felony offenses. These discretionary guidelines are an important tool available to judges to assist them in formulating sentences for convicted felons. Judges, however, have not had the benefit of guidelines when sentencing probation violators. With the abolition of parole, circuit judges in the Commonwealth now handle the large majority of supervision violation cases, including violations of supervision following release from incarceration that formerly were handled by Virginia's Parole Board as parole violations. In 2003, the General Assembly directed the Commission to develop, with due regard for public safety, discretionary sentencing guidelines for felony offenders who are determined by the court to be in violation of probation supervision but not convicted of a new crime (Chapter 1042 of the 2003 Acts of Assembly). These offenders are often referred to as "technical violators." The directive specified that the guidelines be based on an examination of historical judicial sanctioning patterns in revocation hearings. The mandate also charged the Commission with analyzing recidivism among probation violators not convicted of a new crime and evaluating the feasibility of integrating a risk assessment instrument into the guidelines for these offenders.

In 2003, the Commission embarked upon an extensive data collection effort in order to learn more about Virginia's probation violators. This effort, which included reviewing offenders' probation files and criminal history reports (rap sheets), provided rich detail about violators, their behavior while under supervision and the specific reasons why probation officers brought offenders back to court for revocation hearings. Based on this exhaustive data collection, the Commission developed sentencing guidelines that reflect historical practices in the punishment of violators returned to court for reasons other than a new criminal conviction. In its *2003 Annual Report*, the Commission recommended to the General Assembly that the probation violation guidelines be implemented statewide. The 2004 General Assembly accepted the Commission's recommendation and statewide use began July 1, 2004.

The second phase of this study, analyzing recidivism and evaluating the feasibility of developing a risk assessment tool for violators not convicted of a new crime, was completed this year. The results of the analysis are provided in considerable detail in the chapter of this report dedicated to the Probation Violator Study. The Commission's recommendations for integrating the newly-developed risk assessment tool can be found in the Recommendations chapter.

Methamphetamine Crime in Virginia

Methamphetamine, a derivative of amphetamine, is a potent psychostimulant that affects the central nervous system. A man-made drug (unlike other drugs such as cocaine that are plant derived), methamphetamine can be produced from a few over-the-counter and low-cost ingredients. In the United States, the use of methamphetamine is most prevalent in the West, but is becoming increasingly popular in the Midwest as well. Concern over the potential impact of methamphetamine-related crime in the Commonwealth prompted the 2001 Virginia General Assembly to direct the Commission to examine the state's felony sentencing guidelines for methamphetamine offenses, with specific focus on the quantity of methamphetamine seized in these cases (Chapters 352 and 375 of *The Acts of the Assembly 2001)*.

In its 2001 study, the Commission found that the number of convictions involving methamphetamine, although increasing, represented at that time a small fraction of the drug cases in the state and federal courts in the Commonwealth. The Commission's analysis revealed that sentencing in the state's circuit courts was not strongly linked to the quantity of methamphetamine seized. The Commission carefully considered the sentencing guidelines and existing statutory penalties applicable in methamphetamine cases. With little evidence to suggest that judges were basing sentences on the amount of methamphetamine seized,

the Commission did not recommend any adjustments to Virginia's historically-based sentencing guidelines to account for the quantity of this drug.

Many public officials in Virginia have remained concerned about methamphetamine in the years since the Commission's last study. In response, the Commission this year has conducted a second detailed study on this specific drug. The chapter of this report entitled Methamphetamine Crime in Virginia presents the most recent data available on use of the drug, lab seizures, and arrests and convictions in the state. A summary of legislation targeting methamphetamine manufacture and distribution in other states is also included. In addition, the results of a new analysis comparing quantity and sentencing outcome are provided.

Projecting Prison Bed Space Impact of Proposed Legislation

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

During the 2004 General Assembly session, the Commission prepared 295 separate impact analyses on proposed legislation. These proposals fell into five categories: 1) legislation to increase the felony penalty class of a specific crime; 2) legislation to add a new mandatory minimum penalty for a specific crime; 3) legislation to expand or clarify an existing crime; 4) legislation that would create a new criminal offense; and 5) legislation that would increase the penalty class of a specific crime from a misdemeanor to a felony.

The Commission utilized a 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 a bill was presented to the General Assembly within 48 hours after the Commission was notified of the proposed legislation. When requested, the Commission provided pertinent oral testimony to accompany the impact analysis.

Prison and Jail Population Forecasting

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

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

Application of Virginia Crime Codes (VCCs) in Criminal Justice Databases

In 2002, the General Assembly created § 19.2-390.01 to require criminal justice agencies across the Commonwealth to report and maintain criminal offense information in a standardized manner. The legislation, which became effective October 1, 2004, mandates the use of the Virginia Crime Codes, or VCCs, as the standardized method for recording offenses throughout the state's criminal justice system.

Specifically, § 19.2-390.01 requires that all charging documents issued by magistrates, and all criminal warrants, criminal indictments, informations and presentments, criminal petitions, misdemeanor summonses, and the dispositional documents from criminal trials involving a jailable offense must include the VCC references for the particular offense or offenses covered. In addition, all reports to the Central Criminal Records Exchange maintained by the Virginia State Police and to any other criminal offense or offender database maintained by the Supreme Court of Virginia, the Department of Corrections, the Department of Juvenile Justice, the Virginia Parole Board, and the Department of Criminal Justice Services must include the VCC references for the particular offense or offenses covered.

The manner in which offense information is recorded on criminal justice databases has important implications for those who rely on such data to

make both individual and system-wide decisions. Because the *Code of Virginia* defines many distinct criminal acts within a single statute, the statute number is an inadequate method to identify the specific offense committed or its statutory seriousness. The inclusion of a narrative offense description usually does not provide enough additional information to match the crime to its specific statutory penalty. These offense descriptions are not standardized across criminal justice data systems, or even within a single agency's data system, and often lack the elements of the crime needed to make critical distinctions between discrete offenses. This method of reporting and recording offense information has been repeatedly criticized by officials who must use criminal history reports and other criminal justice documents to make important decisions.

The Virginia Crime Code (VCC) system is a set of standardized offense codes that accurately identify each unique crime in the *Code of Virginia*. When entered into a database, the statutory reference can be generated, as well as a narrative offense description containing the critical elements of the offense. The VCC system was established in the mid-1980s and, since 1995, has been maintained and updated by the Commission.

Many criminal justice entities in Virginia have used the VCC references for years to record offense information. The Commission has always required VCC references on the sentencing guidelines forms. The Department of Corrections has utilized VCCs for its Pre/Post-Sentence Investigation (PSI) reporting since 1985. The Department of Juvenile Justice began using VCC references in the late 1990s. The Virginia Compensation Board, since 2000, has required sheriff's offices to use the VCCs in the automated reports they submit to request state reimbursement for prisoners housed in local and regional jails. As of October 1, 2004, all remaining entities specified by the legislation were required to adopt the VCC reporting system. Recording offense information in a uniform fashion will greatly improve the efficiency and the quality of criminal justice decision-making in Virginia.

During the year, the Commission worked with the Virginia State Crime Commission to support the transition to statewide utilization of the VCC system. To assist law enforcement and other field personnel, the Commission prepared a booklet listing the most common felony crimes resulting in convictions in the Commonwealth. A second booklet containing the most common misdemeanor crimes was also prepared. The Commission also publishes a VCC reference guide containing the complete list of all VCCs organized alphabetically by crime type, with a second section listing the VCCs

in statute order. The Commission distributed nearly 30,000 booklets containing the most common felony and misdemeanor crimes and nearly 3,000 VCC reference guides to police departments, sheriffs, the Virginia State Police, circuit and general district courts, Commonwealth's attorneys, probation officers, public defenders and private defense attorneys. The complete VCC reference guide is also available on the Commission's website at www.vcsc.state.va.us. The on-line version allows users to search for a particular VCC by entering all or part of a statute or by entering a key word. The Commission will continue to provide assistance to all agencies affected by this legislative mandate.

Sentencing Guidelines Software

The Commission's website (www.vcsc.state.va.us) offers a variety of helpful tools for those who prepare or use Virginia's sentencing guidelines. A visitor to the website can learn about upcoming training sessions, access Commission reports, and look up Virginia Crime Codes (VCCs). In addition, the web-site provides on-line versions of the sentencing guidelines forms. The guidelines forms available on-line allow a user to print blank forms to his or her local printer or to fill in the form's blanks on screen so that the completed form can be printed locally.

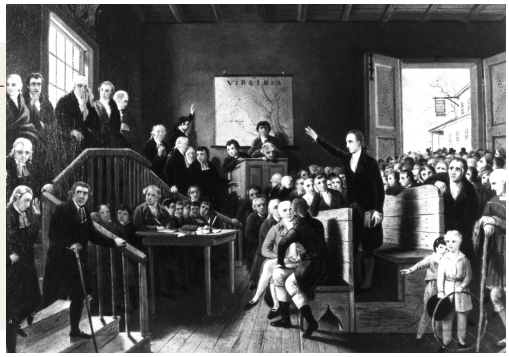
The current system, however, is limited. Users must still select which forms to prepare, determine each score to enter, sum the points, enter the total score, look up the guidelines recommendation corresponding to the total score and insert the guidelines range on the cover sheet of the form. No information is saved or stored by the system once the user prints and exits the on-line screen.

In 2003, the Commission contracted with a software development company, Cross Current Corporation, to enhance and expand the functionality of the current system. The Commission is striving to fully automate the preparation of the sentencing guidelines forms and provide this service on-line to users. The development of sentencing guidelines software is proceeding

in phases. Phase 2 is nearing completion. Phase 2 will provide users with additional features beyond what is currently available through the Commission's website. For example, it will total the scores automatically and fill in the appropriate guidelines sentence range for the case on the cover sheet of the form. It will also allow users to run multiple charging scenarios, save prepared guidelines forms to a local computer, send completed forms to the Commission electronically, and search the guidelines database for previously completed forms for a particular offender. The software will be available through the website to all prosecutors, probation officers, public defenders and defense attorneys who register with the Commission and receive a log-in identification and password. The Commission hopes to pilot test this phase of the software in early 2005 and make it available statewide during the coming year.

Other features will be incorporated into the final phase of the project. For the final phase, the Commission is considering a question-and-answer format to assist users in the preparation of the guidelines. With this format, the user is asked a series of questions about the offender, the conviction offense(s), the circumstances of the case, and the offender's prior criminal record. As the user responds to each question, the software will automatically generate the appropriate guidelines score. This question-response concept is very similar to software applications developed in other fields, such as tax preparation. The final phase is expected to be complete by early 2006.

By statute, the truth-in-sentencing guidelines process is mandatory. Compliance with the guidelines remains discretionary; however, a judge must state in writing the reason for any departure from the guidelines.



2 Guidelines Compliance

In the Commonwealth, judicial compliance with the truth-in-sentencing guidelines is voluntary.

Introduction

On January 1, 2005, Virginia's truth-in-sentencing system will reach its ten-year anniversary. Effective for any felony committed on or after January 1, 1995, the practice of discretionary parole release from prison was abolished, and the existing system of awarding inmates sentence credits for good behavior was eliminated. Under Virginia's truth-in-sentencing laws, convicted felons must serve at least 85% of the pronounced sentence, and they may earn, at most, 15% in earned sentence credit regardless of whether their sentence is served in a state facility or a local jail. The Commission was established to develop and administer guidelines to provide Virginia's judiciary with sentencing recommendations in felony cases under the new truth-in-sentencing laws. Under the current no-parole system, guidelines recommendations for nonviolent offenders with no prior record of violence are tied to the amount of time they served during a period prior to the abolition of parole. In contrast, offenders convicted of violent crimes and those with prior convictions for violent felonies are subject to guidelines recommendations up to six times longer than the historical time served in prison by similar offenders. In more than 200,000 felony cases sentenced under truth-in-sentencing laws, judges have agreed with guidelines recommendations in more than three out of every four cases.

The Commission's last annual report presented an analysis of cases sentenced during fiscal year (FY) 2003. This report will focus on cases sentenced from the most recent year of available data, FY2004 (July 1, 2003, through June 30, 2004). Compliance is examined in a variety of ways in this report, and variations in data over the years are highlighted throughout.

Compliance Defined

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

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

Compliance by rounding provides for a modest rounding allowance in instances when the active sentence handed down by a judge or jury is very close to the range recommended by the guidelines. For example, a judge would be considered in compliance with the guidelines if he sentenced an offender to a two-year sentence based on a guidelines recommendation that goes up to 1 year 11 months. In general, the Commission allows for rounding of a sentence that is within 5% of the guidelines recommendation.

Time served compliance is intended to accommodate judicial discretion and the complexity of the criminal justice system at the local level. A judge may sentence an offender to the amount of incarceration time served in a local jail awaiting trial and sentencing when the guidelines call for a short jail term. Even though the judge does not sentence an offender to post-sentence incarceration time, the Commission typically considers this type of case to be in compliance. Conversely, a judge who sentences an offender to time served when the guidelines call for probation is also regarded as being in compliance with the guidelines because the offender was not ordered to serve any incarceration time after sentencing.

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

Overall Compliance with the Sentencing Guidelines

The overall compliance rate summarizes the extent to which Virginia's judges concur with recommendations provided by the sentencing guidelines, both in type of disposition and in length of incarceration. Between FY1995 and FY1998, the overall compliance rate hovered around 75%, increased steadily between FY1999 and FY2001, and then decreased slightly in FY2002. Over the past two fiscal years the compliance rate has been increasing once again. For FY2004, the compliance rate was its highest ever, at 80.7% (Figure 1).

In addition to compliance, the Commission also studies departures from the guidelines. The rate at which judges sentence offenders to sanctions more severe than the guidelines recommendation, known as the "aggravation" rate, was 9.7% for FY2004. The "mitigation" rate, or the rate at which judges sentence offenders to sanctions considered less severe than the guidelines recommendation, was 9.6% for the fiscal year. Of the FY2004 departures, 50% were cases of aggravation while 50% were cases of mitigation.

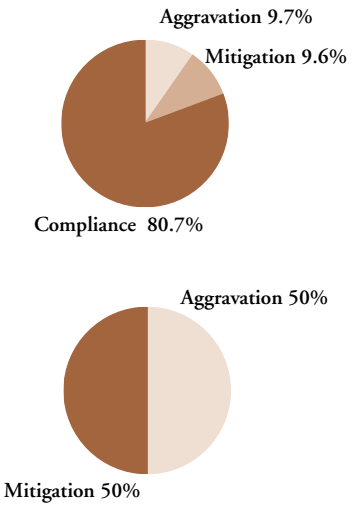
Dispositional Compliance

Since the inception of truth-in-sentencing in 1995, the correspondence between dispositions recommended by the guidelines and the actual dispositions imposed in Virginia's circuit courts has been quite high. Figure 2 illustrates judicial concurrence in FY2004 with the type of disposition recommended by the guidelines. For instance, of all felony offenders recommended for more than six months of incarceration during FY2004, judges sentenced 87% to terms in excess of six months. Some offenders recommended for incarceration of more than six months received a shorter term of incarceration (one day to six months), but fewer received probation with no active incarceration.

Judges have also typically agreed with guidelines recommendations for shorter terms of incarceration. In FY2004, 80% of offenders received a sentence resulting in confinement of six months or less when such a penalty was recommended. In some cases, judges felt probation to be a more appropriate sanction than the recommended jail term, and in other cases offenders recommended for short-term incarceration received a sentence of more than six months. Finally, 75% of offenders whose guidelines recommendation called for no incarceration were given probation and no post-dispositional confinement. Some offenders with a "no incarceration" recommendation received a short jail term,

Figure 1

Overall Guidelines Compliance and Direction of Departures, FY2004



but rarely did offenders recommended for no incarceration receive jail or prison terms of more than six months.

Since July 1, 1997, sentences to the state's Boot Camp, Detention Center and Diversion Center programs have been defined as incarceration sanctions for the purposes of the sentencing guidelines. The state's Boot Camp program was discontinued in 2002 while the Detention and Diversion Center programs continue to be defined as "probation" programs in their enactment clauses in the *Code of Virginia*, the Commission recognizes that the programs are more restrictive than probation supervision in the community. The Commission, therefore, defines them as incarceration terms under the sentencing guidelines. The Detention and Diversion Center programs are counted as six months of confinement. In the previous discussion of recommended and actual dispositions, imposition of one of these programs is categorized as incarceration of six months or less.

Figure 2

Recommended Dispositions and Actual Dispositions, FY2004

	Actual Disposition		
Recommended Disposition	Probation	Incarceration 1 day - 6 mos	Incarceration > 6 mos
Probation	74.6%	21.2%	4.2%
Incarceration 1 day - 6 months	9.1	79.7	11.2
Incarceration > 6 months	5.3	7.7	87.0

Durational Compliance

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

Durational compliance among FY2004 cases was approximately 80%, indicating that judges, more often than not, agree with the length of incarceration recommended by the guidelines in jail and prison cases (Figure 3). For FY2004 cases not in durational compliance, mitigations were slightly more prevalent (53%) than aggravations (47%).

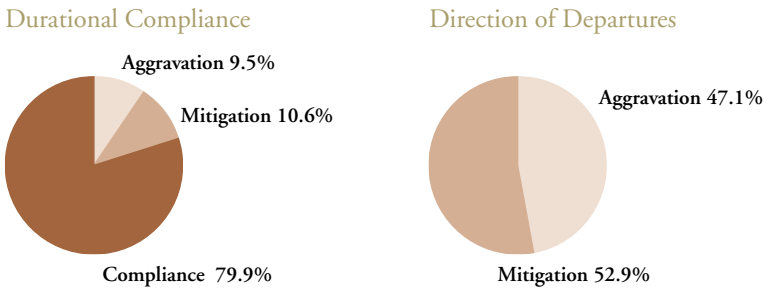
For cases recommended for incarceration of more than six months, the sentence length recommendation derived from the guidelines (known as the midpoint) is accompanied by a high-end and low-end recommendation. The sentence ranges recommended by the guidelines are relatively broad, allowing judges to utilize their discretion in sentencing offenders to different incarceration terms while still remaining in compliance with the guidelines. Among FY2004 cases receiving incarceration in excess of six months that were in durational compliance,

16% were sentenced to prison terms equivalent to the midpoint recommendation (Figure 4). For cases in which the judge sentenced the offender to a term of incarceration within the guidelines recommended range, nearly two-thirds (63%) were given a sentence below the recommended midpoint. Only 21% of the cases receiving incarceration over six months that were in durational compliance with the guidelines were sentenced above the midpoint recommendation. This pattern of sentencing within the range has been consistent since the truth-in-sentencing guidelines took effect in 1995, indicating that judges, overall, have favored the lower portion of the recommended range.

Offenders receiving more than six months of incarceration, but less than the recommended time, were given "effective" sentences (sentences less any suspended time) short of the guidelines range by a median value of nine months (Figure 5). For offenders receiving longer than recommended incarceration sentences, the effective sentence exceeded the guidelines range by a median value of nine months. Thus, durational departures from the guidelines are typically less than one year above or below the recommended range, suggesting that disagreement with the guidelines recommendation is, in most cases, not extreme.

Figure 3

Durational Compliance and Direction of Departures, FY2004



Analysis includes only cases recommended for and receiving an active term of incarceration

Figure 4

Distribution of Sentences within Guidelines Range, FY2004

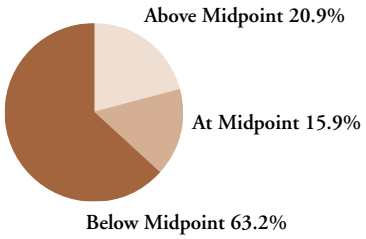


Figure 5

Median Length of Durational Departures, FY2004

Reasons for Departure from the Guidelines

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

In FY2004, 9.6% of guideline cases sentenced received sanctions that fell below the guidelines recommendation. An analysis of the 21,716 sentencing guidelines cases reveals that 2% of the time, judges sentence below the guidelines recommendation and a departure reason cannot be discerned from a review of the submitted guidelines form. Another 2% cite the involvement of a plea agreement as the reason for a mitigating departure (Figure 6).

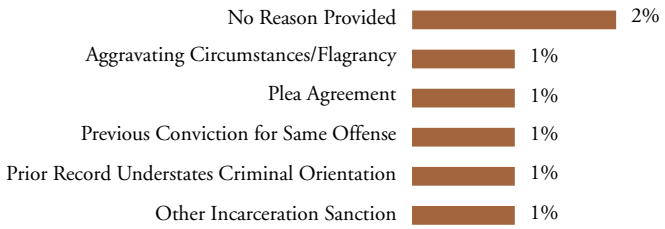
With regard to other mitigated sentences, an offender's potential for rehabilitation was indicated, in conjunction with the use of an alternative sanction, in 1% of the guideline cases. The use of an alternative sanction, such as Detention or Diversion Center, was cited as a mitigating reason in 1% of guideline cases. Judges also referred to the offender's cooperation with authorities, such as aiding in the apprehension or prosecution of others, as well as minimal circumstances surrounding the case. Although other reasons for mitigation were reported to the Commission in FY2004, only the most frequently cited reasons are discussed here.

Figure 6

Most Frequently Cited Reasons for Mitigation,* FY2004

Figure 7

Most Frequently Cited Reasons for Aggravation,* FY2004



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

Judges sentenced 9.7% of the FY2004 cases to terms more severe than the sentencing guidelines recommendation, resulting in "aggravation" sentences. In examining the 21,716 sentencing guideline cases, the Commission found that 2% of the time an upward departure rationale could not be discerned from a review of the submitted guidelines form. (Figure 7). The most commonly cited reason, however, relates to the flagrancy of the offense (1%). These felony cases often involve complex sets of events or extreme circumstances for which judges feel a harsher than recommended sentence should be imposed. In 1% of guideline cases, a plea agreement which called for a tougher sanction than that recommended by guidelines was listed as the reason for an upward departure.

Judges also cited the offender's prior convictions for the same or a similar offense (1%) as a reason for harsher sanctions. In 1% of the FY2004 cases, judges cited the defendant's prior record as the reason for upward departure. For another 1% of guideline cases, judges sentenced the offender to Detention or Diversion Center rather than a straight probation period recommended by the guidelines. Many other reasons were cited by judges to explain aggravation sentences but with much less frequency than the reasons discussed here.

Appendices 1 and 2 contain detailed summaries of the reasons for departure from guidelines recommendations for each of the 14 guidelines offense groups.

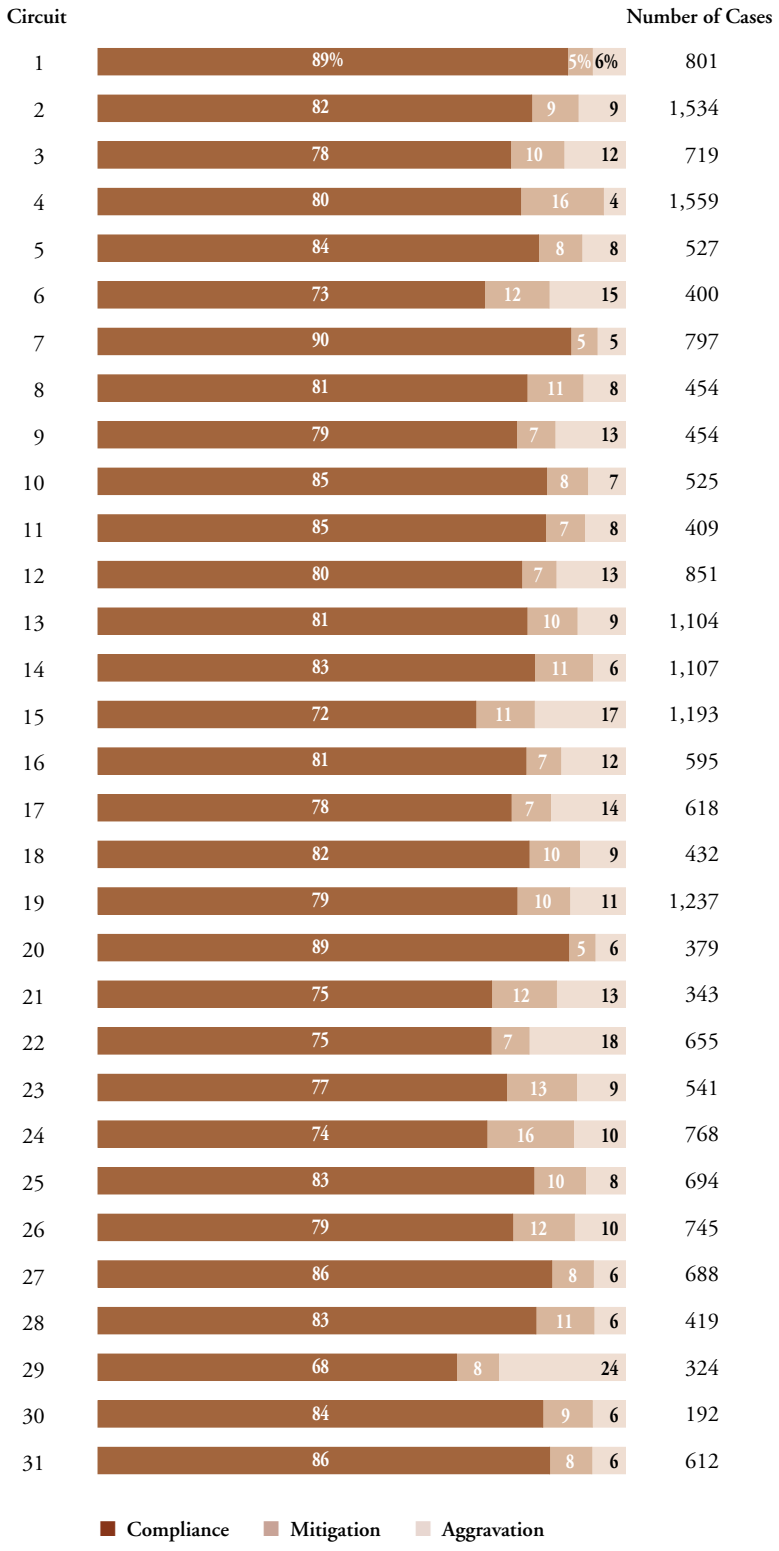
Compliance by Circuit

Compliance rates and departure patterns vary somewhat across Virginia's 31 judicial circuits. These patterns are shown in Figure 8. The map and accompanying table on the following pages identify the location of each judicial circuit in the Commonwealth.

In FY2004, nearly two-thirds (61%) of the state's 31 circuits exhibited compliance rates at or above 80%, while just over one-third (35%) reported compliance rates between 70% and 79%. Only one circuit had a compliance rate below 70%. There are likely many reasons for the variations in compliance across circuits. Certain jurisdictions may see atypical cases not reflected in statewide averages. In addition, the availability of alternative or community-based programs currently differs from locality to locality. The degree to which judges agree with guidelines recommendations does not seem to be primarily related to geography. The circuits with the lowest compliance rates are scattered across the state, and both high and low compliance circuits can be found in close geographic proximity.

Figure 8

Compliance by Circuit, FY2004



In FY2004, the highest rates of judicial agreement with the sentencing guidelines, at 89% or higher, were found in Newport News (Circuit 7), the Loudoun County area (Circuit 20) and Chesapeake (Circuit 1). The lowest compliance rates among judicial circuits in FY2004 were reported in Circuit 29 (Buchanan, Dickenson, Russell and Tazewell counties), Circuit 15 (Fredericksburg, Stafford, Hanover, King George, Caroline, Essex, etc.), and Circuit 6 (Brunswick, Greensville, Hopewell, Prince George, Surry and Sussex).

In FY2004, some of the highest mitigation rates were found in the Lynchburg area (Circuit 24) and Norfolk (Circuit 4). Each of these circuits had a mitigation rate around 16% during the fiscal year. With regard to high mitigation rates, it would be too simplistic to assume that this reflects areas with lenient sentencing habits. Intermediate punishment programs are not uniformly available throughout the Commonwealth, and those jurisdictions with better access to these sentencing options may be using them as intended by the General Assembly. These sentences generally would appear as mitigations from the guide-lines. Inspecting aggravation rates reveals that Circuit 29 (Buchanan County area) had the highest aggravation rate at 24%, followed by Circuit 22 (Danville) at 18%, and Circuit 15 (Fredericksburg, Stafford, Hanover, King George, Caroline, Essex, etc.) at 17%. Thus, lower compliance rates in these circuits are due primarily to high aggravation rates.

Appendices 3 and 4 present compliance figures for judicial circuits by each of the 14 sentencing guidelines offense groups.

One of the goals of the reform was to reduce the gap between the sentence given in the courtroom and the time actually served by a convicted felon. Today, under the truth-in-sentencing system, each inmate is required to serve at least 85% of his sentence.

Virginia Localities and Judicial Circuits

Accomack 2
Albemarle 16
Alexandria 18
Alleghany 25
Amelia 11
Amherst 24
Appomattox 10
Arlington 17
Augusta 25

Bath 25
Bedford City 24
Bedford County 24
Bland 27
Botetourt 25
Bristol 28
Brunswick 6
Buchanan 29
Buckingham 10
Buena Vista 25

Campbell 24
Caroline 15
Carroll 27
Charles City 9
Charlotte 10
Charlottesville 16
Chesapeake 1
Chesterfield 12
Clarke 26
Colonial Heights 12
Covington 25
Craig 25
Culpeper 16
Cumberland 10

Danville 22
Dickenson 29
Dinwiddie 11

Emporia 6
Essex 15

Fairfax City 19
Fairfax County 19
Falls Church 17
Fauquier 20
Floyd 27
Fluvanna 16
Franklin City 5
Franklin County 22
Frederick 26
Fredericksburg 15

Galax 27
Giles 27
Gloucester 9
Goochland 16
Grayson 27
Greene 16
Greensville 6

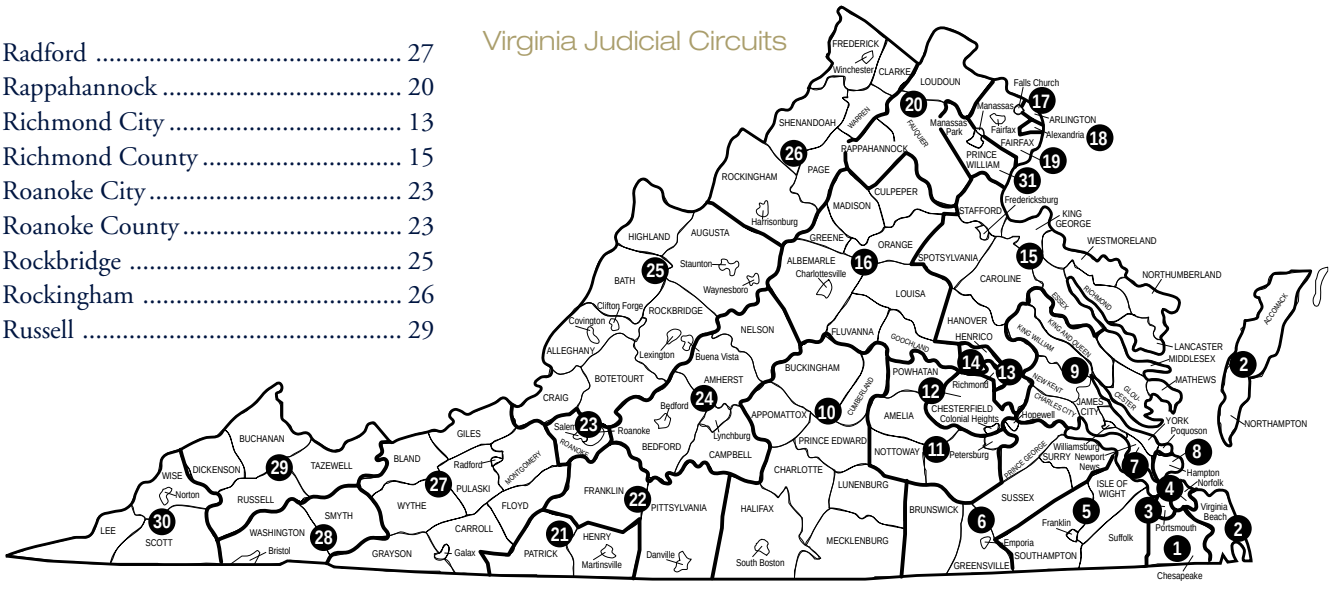
Halifax 10
Hampton 8
Hanover 15
Harrisonburg 26
Henrico 14
Henry 21
Highland 25
Hopewell 6

Isle of Wight 5

James City 9

King and Queen 9
King George 15
King William 9

Lancaster 15
Lee 30
Lexington 25
Loudoun 20
Louisa 16
Lunenburg 10
Lynchburg 24



Compliance by Sentencing Guidelines Offense Group

In FY2004, as in previous years, variation exists in judicial agreement with the guidelines, as well as in judicial tendencies toward departure, when comparing the 14 offense groups (Figure 9). For FY2004, compliance rates ranged from a high of 86% in the fraud offense group to a low of 62% in robbery cases. In general, property and drug offenses exhibit rates of compliance higher than the violent offense categories. The violent offense groups (assault, rape, sexual assault, robbery, homicide and kidnapping) had compliance rates at or below 75% whereas many of the property and drug offense categories had compliance rates above 82%.

Judicial concurrence with guidelines recommendations increased for ten of the fourteen offense groups during the fiscal year. The largest increase in compliance is evident for the kidnapping offense group, driven primarily by the small number of cases. Four of the fourteen offense groups had lower compliance rates than the previous fiscal year. The largest decrease in compliance (-5%) occurred on the Rape worksheet, due to an increase in the mitigation rate. Compliance on the Miscellaneous worksheet decreased by 3%, due primarily to an increase in the aggravation rate.

Since 1995, departure patterns have differed across offense groups, and FY2004 was no exception. Among the

Figure 9

Guidelines Compliance by Offense, FY2004

Offense	Compliance	Mitigation	Aggravation	Number of Cases
Assault	75.4%	12.7%	11.9%	1,291
Burg./Other Structure	73.9	14.5	11.6	536
Burglary/Dwelling	66.9	16.6	16.5	812
Drug/Other	82.8	7.3	9.9	765
Drug/Schedule I/II	82.2	7.8	10.0	6,540
Fraud	85.9	10.5	3.6	2,620
Kidnapping	69.5	10.5	20.0	95
Larceny	83.9	7.6	8.5	4,796
Miscellaneous	73.2	9.6	17.2	552
Murder/Homicide	66.7	15.9	17.4	252
Rape	66.1	29.2	4.7	233
Robbery	61.8	27.3	10.9	714
Sexual Assault	74.3	12.5	13.2	413
Traffic	84.8	4.4	10.8	2,087

property crimes, fraud cases showed a marked mitigation pattern. With respect to violent crime groups, both rape and robbery departures showed tendencies toward sentences that fell below the guidelines recommendation, with over one-quarter of cases resulting in mitigation sentences. This mitigation pattern has been consistent with both rape and robbery offenses since the abolition of parole in 1995. The most frequently cited mitigation reasons provided by judges in rape cases include the refusal of victims and witnesses to testify, the involvement of a plea agreement, and the defendant's potential for rehabilitation. The most frequently cited mitigation reasons provided by judges in robbery cases include the defendant's cooperation with law enforcement, the involvement of a plea agreement, and the use of sanctions other than jail or prison.

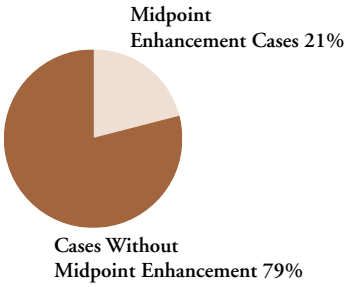
In FY2004, the groups with the highest aggravation rates were Kidnapping (20%), Murder/Homicide (17%), and Miscellaneous (17%). Because Kidnapping offenses are uncommon, the aggravation rate can be affected by a relatively small number of cases. In Murder/Homicide cases, the influence of jury trials and the extreme case circumstances have historically contributed to high aggravation rates.

Compliance under Midpoint Enhancements

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

Figure 10

Application of Midpoint Enhancements, FY2004



less than 40 years, whereas a "Category I" prior record includes at least one violent felony conviction with a statutory maximum penalty of 40 years or more.

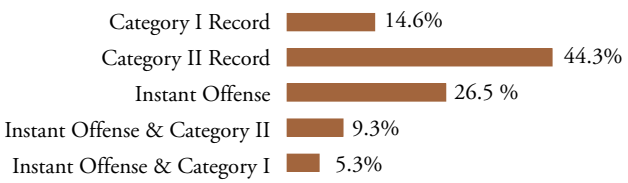
Because midpoint enhancements are designed to target only violent offenders for longer sentences, enhancements do not affect the sentence recommendation for the majority of guidelines cases. Among the FY2004 cases, 79% of the cases did not involve midpoint enhancements of any kind (Figure 10). Only 21% of the cases qualified for a midpoint enhancement because of a current or prior conviction for a felony defined as violent under § 17.1-805. The proportion of cases receiving midpoint enhancements has not fluctuated greatly since the institution of truth-in-sentencing guidelines in 1995. It has remained between 19% and 21% over the last eight years.

Of the FY2004 cases in which midpoint enhancements applied, the most common midpoint enhancement was that for a Category II prior record. Approximately 44% of the midpoint enhancements were of this type, applicable to offenders with a nonviolent instant offense but a violent prior record defined as Category II (Figure 11). In FY2004, another 15% of midpoint enhancements were attributable to offenders with a more serious Category I prior record. Cases of offenders with a violent instant offense but no prior record of violence represented 27% of the midpoint enhancements in FY2004. The most substantial midpoint enhancements target offenders with a combination of instant and prior violent offenses. About 9% qualified for enhancements for both a current violent offense and a Category II prior record. Only a small percentage of cases (5%) were targeted for the most extreme midpoint enhancements triggered by a combination of a current violent offense and a Category I prior record.

Since the inception of the truth-in-sentencing guidelines, judges have departed from the sentencing guidelines more often in midpoint enhancement cases than in cases without enhancements. In FY2004, compliance was 70% when enhancements applied, significantly lower than compliance in all other cases (84%). Thus, compliance

Figure 11

Type of Midpoint Enhancement Received, FY2004

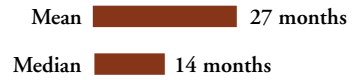


in midpoint enhancement cases is suppressing the overall compliance rate. When departing from enhanced guidelines recommendations, judges are choosing to mitigate in three out of every four departures.

Among FY2004 midpoint enhancement cases resulting in incarceration, judges departed from the low end of the guidelines range by an average of just over two years (Figure 12). The median mitigation departure (the middle value, where half are lower and half are higher) was 14 months.

Figure 12

Length of Mitigation Departures in Midpoint Enhancement Cases, FY2004



Compliance, while generally lower in midpoint enhancement cases than in other cases, varies across the different types and combinations of midpoint enhancements (Figure 13). In FY2004, as in previous years, enhancements for a Category II prior record generated the highest rate of compliance of all midpoint enhancements (75%). Compliance in cases receiving enhancements for a Category I prior record was significantly lower (65%). Compliance for enhancement cases involving a current violent offense was 67%. Those cases involving a combination of a current violent offense and a Category II prior record yielded a compliance rate of 66%, while those with the most significant midpoint enhancements, for both a violent instant offense and a Category I prior record, yielded a lower compliance rate of 63%.

Figure 13

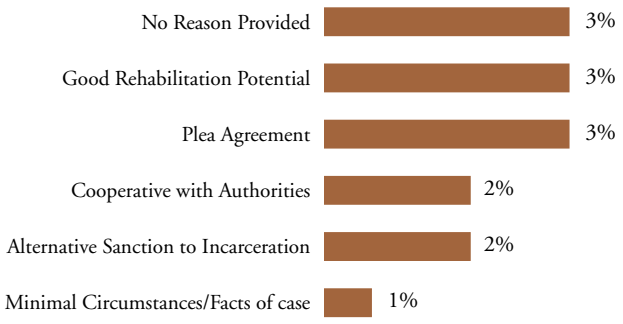
Compliance by Type of Midpoint Enhancement, FY2004

Offense	Compliance	Mitigation	Aggravation	Number of Cases
None	83.4%	6.1%	10.5%	17,155
Category I Record	65.3	31.4	3.3	666
Category II Record	75.1	19.0	5.9	2,021
Instant Offense	67.0	22.5	10.5	1,207
Instant Offense & Category I	62.9	30.9	6.2	243
Instant Offense & Category II	65.8	26.7	7.5	424

Analysis of departure reasons in cases involving midpoint enhancements focuses on downward departures from the guidelines (Figure 14). Examination of midpoint enhancement cases shows that 3% are mitigations, but do not have a departure reason provided on the guidelines form submitted to the Commission. For those that do have a departure reason cited, the most frequent reasons cited for mitigation were based on the defendant's rehabilitation potential (3%) or the involvement of a plea agreement (3%). Among other most frequently cited reasons for mitigating, judges noted that the defendant cooperated with authorities, alternative sanctions to incarceration were imposed, or there were minimal circumstances involved.

Figure 14

Most Frequently Cited Reasons for Mitigation in Midpoint Enhancement Cases,* FY2004



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

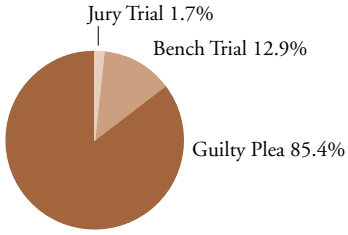
Juries and the Sentencing Guidelines

There are three general methods by which Virginia's criminal cases are adjudicated: guilty pleas, bench trials, and jury trials. Felony cases in the Commonwealth's circuit courts overwhelmingly are resolved as the result of guilty pleas from defendants or plea agreements between defendants and the Commonwealth. During the last fiscal year, more than four in every five guidelines cases (85%) were sentenced following guilty pleas (Figure 15). Adjudication by a judge in a bench trial accounted for 13% of all felony guidelines cases sentenced, while less than 2% of felony guidelines cases involved jury trials. Under truth-in-sentencing, the overall rate of jury trials has been approximately half of the jury trial rate that existed under the last year of the parole system.

Virginia is one of only five states that allow juries to determine sentence length in non-capital offenses. Since the implementation of the truth-in-

Figure 15

Percentage of Cases Received by Method of Adjudication, FY2004



sentencing system, Virginia's juries typically have handed down sentences more severe than the recommendations of the sentencing guidelines. In fact, in FY2004, as in previous years, a jury sentence was far more likely to exceed the guidelines than fall within the guidelines range. By law, juries are not allowed to receive any information regarding the sentencing guidelines.

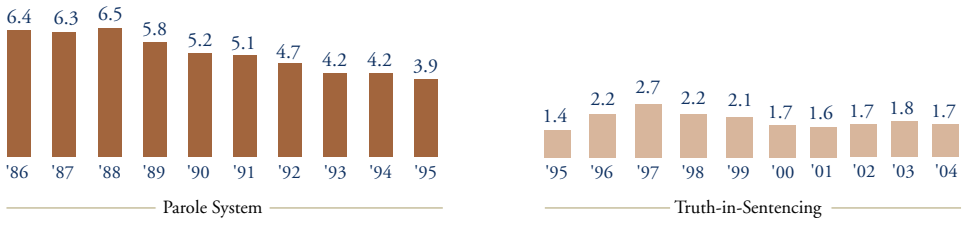
Since FY1986, there has been a generally declining trend in the percentage of jury trials among felony convictions in circuit courts (Figure 16). Under the parole system in the late 1980s, the percent of jury convictions of all felony convictions was as high as 6.5% before starting to decline in FY1989. In 1994, the General Assembly enacted provisions for a system of bifurcated jury trials. In bifurcated trials, the jury establishes the guilt or innocence of the defendant in the first phase of the trial, and then, in a second phase, the jury makes its sentencing decision. When bifurcated trials became effective on July 1, 1994 (FY1995), jurors in Virginia, for the first time, were presented with information on the offender's prior criminal record to assist them in making a sentencing decision. During the first year of the bifurcated trial process, jury convictions dropped slightly to fewer than 4% of all felony convictions, the lowest rate since the data series began.

Among the early cases subjected to the truth-in-sentencing provisions, implemented during the last six months of FY1995, jury adjudications sank to just over 1%. During the first complete fiscal year of truth-in-sentencing (FY1996), just over 2% of the cases were resolved by jury trials, half the rate of the last year before the abolition of parole. Seemingly, the introduction of truth-in-sentencing, as well as the introduction of a bifurcated jury trial system, appears to have contributed to the significant reduction in jury trials. The percentage of jury convictions rose in FY1997 to nearly 3%, but since has declined to under 2%.

Inspecting jury data by offense type reveals very divergent trends for person, property and drug crimes. From FY1986 through FY1995 parole system cases, the percent of convictions by juries for crimes against the person

Figure 16

Percent of Felony Convictions Adjudicated by Juries, FY1986 – FY2004
Parole System v. Truth-in-Sentencing (No Parole) System



(homicide, robbery, assault, kidnapping, rape and sexual assault) was typically three to four times the percent for property and drug crimes, which were roughly equivalent to one another (Figure 17). However, with the implementation of truth-in-sentencing, the percent of convictions handed down by juries dropped dramatically for all crime types. Under truth-in-sentencing, jury convictions involving person crimes have varied from 7% to nearly 11% of felony convictions. The percent of felony convictions resulting from jury trials for property and drug crimes has declined to less than 1% under truth-in-sentencing.

In FY2004, the Commission received 322 cases tried by juries. While the compliance rate for cases adjudicated by a judge or resolved by a guilty plea was at 81% during the fiscal year, sentences handed down by juries concurred with the guidelines only 34% of the time (Figure 18). In fact, jury sentences fell above the guidelines recommendation in 44% of the cases. This pattern of jury sentencing vis-à-vis the guidelines has been consistent since the truth-in-sentencing guidelines became effective in 1995.

Judges, although permitted by law to lower a jury sentence, typically do not amend sanctions imposed by juries. Judges modified jury sentences in 16% of the FY2004 cases in which juries found the defendant guilty. Of the cases in which the judge modified the jury sentence, judges brought a high jury sentence into compliance with the

Figure 17

Percent of Felony Convictions Adjudicated by Juries, FY1986 – FY2004
Parole System v. Truth-in-Sentencing (No Parole) System

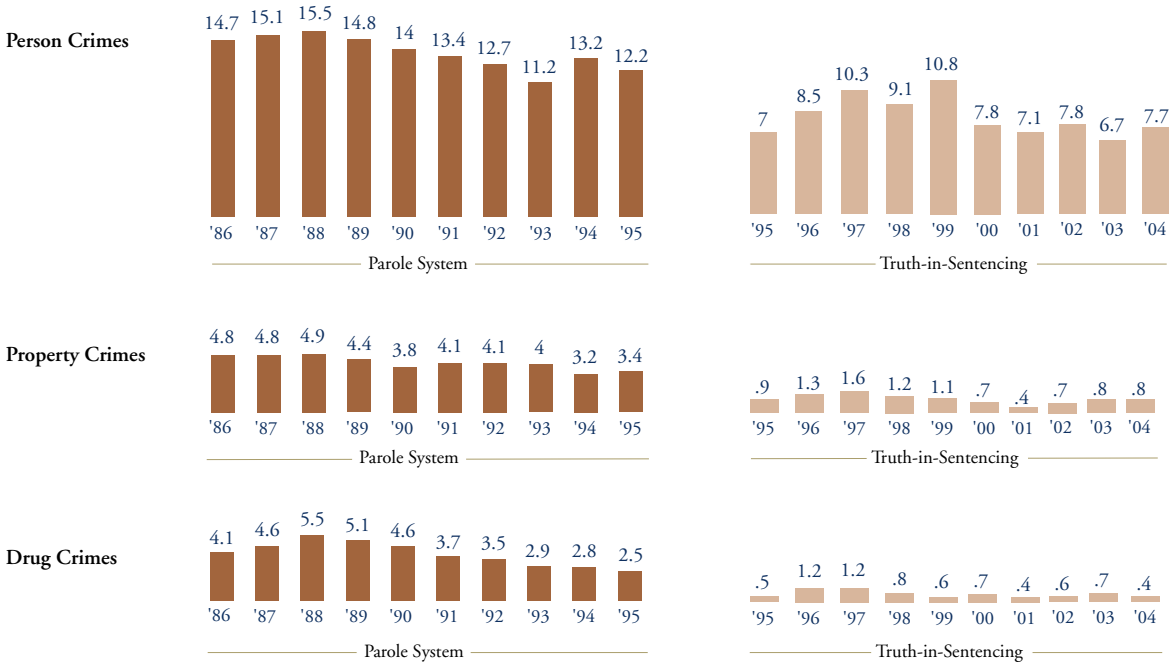
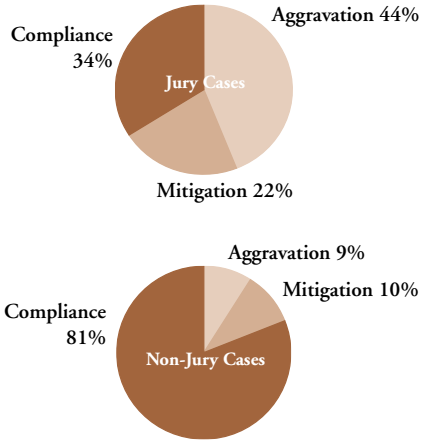


Figure 18

Sentencing Guidelines Compliance in Jury Cases and Non-Jury Cases, FY2004

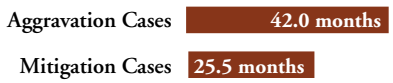


guidelines recommendation 30% of the time. In another 30% of the cases, judges modified the jury sentence but not enough to bring the final sentence into compliance.

In those jury cases in which the final sentence fell short of the guidelines, it did so by a median value of just over two years (Figure 19). 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 three and one-half years.

Figure 19

Median Length of Durational Departures in Jury Cases, FY2004



Compliance and Nonviolent Offender Risk Assessment

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

Between July 1, 2003 and June 30, 2004, more than two-thirds of all guidelines received by the Commission were for nonviolent offenses. However, only 42% (6,141) of these nonviolent cases were actually eligible to be assessed for an alternative sanction rec

ommendation. The goal of the nonviolent risk assessment instrument is to divert low-risk offenders, who are recommended for incarceration on the guidelines, to an alternative sanction other than prison. Therefore, nonviolent offenders who are recommended for probation/no incarceration on the guidelines are not eligible for the assessment. Furthermore, the instrument is not to be applied to offenders convicted of distributing one ounce or more of cocaine or those who have a current or prior violent felony conviction. In addition, there were 2,247 nonviolent offense cases for which a risk assessment instrument was not completed, including those cases that may have been eligible for assessment.

Of the 6,141 eligible nonviolent offense cases in FY2004, 38% were recommended for an alternative sanction by the risk assessment instrument (Figure 20). During the same time period, the average risk score for screened offenders was 39 points. Risk assessment cases can be categorized into four groups based upon whether the offender was recommended for an alternative sanction by the risk assessment instrument and whether the judge subsequently sentenced the offender to some form of alternative punishment. Of the eligible offenders screened with the risk assessment instrument, 17% were recommended for and sentenced to an alternative punishment (Figure 21). Another 21% were sentenced to a traditional term of incarceration despite being recommended for an alternative sanction by the risk assessment instrument. In 18% of the screened cases, the offender was not recommended for, but was sentenced to, an alternative punishment. It is notable that one in five of these offenders scored just over the thirty-five point threshold (36 to 38 points). Beginning July 1, 2004 (FY2005), the number of points an offender can score and still be recommended for an alternative sanction was increased from 35 to 38 points. The impact of this change will be assessed in next year's *Annual Report*. Nearly 45% of the offenders screened in FY2004 were not recommended for an alternative, and judges concurred in these cases by utilizing traditional incarceration.

Figure 20

Percentage of Eligible Non-Violent Risk Assessment Cases Recommended for Alternatives, FY2004

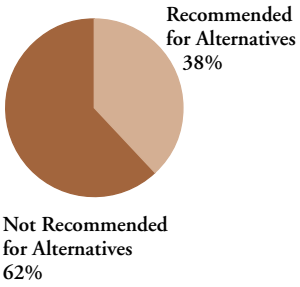


Figure 21

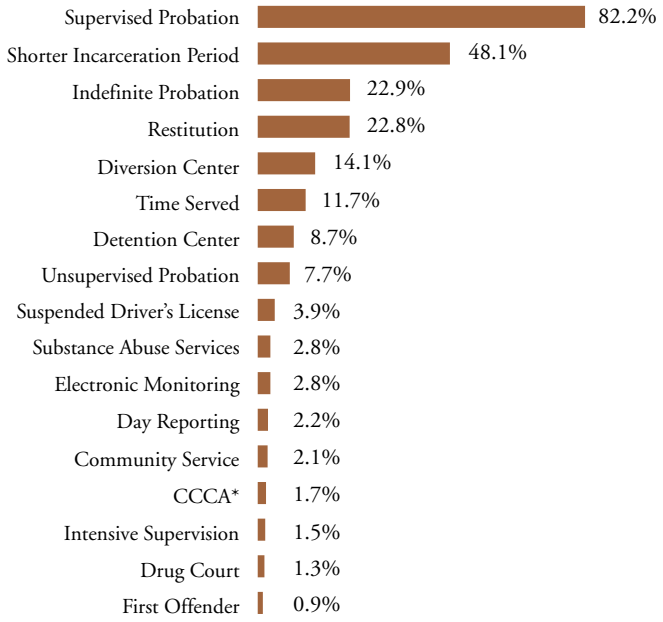
Recommended and Actual Dispositions to Alternative Sanctions, FY2004

	Actual Disposition	
Recommended Disposition	Offender Received Alternative	Offender Did Not Receive Alternative
Offender Recommended for Alternative	16.5%	21.0%
Offender Not Recommended for Alternative	17.6%	44.9%

In cases in which offenders were recommended for and received an alternative sanction, judges most often sentenced the offender to a period of supervised probation (82%) (Figure 22). In addition, in nearly half the cases in which an alternative was recommended, judges sentenced the offender to incarceration, but to a term shorter than what the traditional guidelines range provided. Other frequent sanctions reported include indefinite probation (23%), restitution (23%), and time served (12%). The Department of Corrections' Diversion Center program was cited in 14% of the cases; the Detention Center program was cited as an alternative sanction approximately 9% of the time. Less frequently cited alternatives include unsupervised probation, suspended driver's license, substance abuse services, home electronic monitoring (HEM), day reporting, community service, etc.

Figure 22

Types of Alternative Sanctions Imposed, FY2004



* Any program established through the Comprehensive Community Corrections Act

Of the risk assessment worksheets received, drug cases represent nearly half of all offenses, with the large majority (44%) consisting of Schedule I/II drug offenses. Of the 3,065 eligible drug cases in FY2004, 19% were recommended for and received an alternative sanction to prison (Figure 23).

Another 13% were not recommended for an alternative by the risk assessment instrument; however, the judge deemed that an alternative would be appropriate and sentenced the individual as such.

Just under one-third (31%) of all risk assessment cases sentenced during the time period were larceny offenses. Of the 1,877 eligible larceny cases, 5% were recommended for and received

Figure 23

Recommended & Actual Dispositions to Alternative Sanctions in Drug Cases, FY2004

Drug Schedule I/II & Drug/Other Cases (N=3,065)

	Received Alternative	Did Not Receive Alternative
Recommended for Alternative	19.3%	27.4%
Not Recommended for Alternative	13.5%	39.8%

Figure 24

Recommended & Actual Dispositions to Alternative Sanctions in Larceny Cases, FY2004

Larceny Cases (N=1,877)

	Received Alternative	Did Not Receive Alternative
Recommended for Alternative	5.4%	12.9%
Not Recommended for Alternative	18.4%	63.2%

Figure 25

Recommended & Actual Dispositions to Alternative Sanctions in Fraud Cases, FY2004

Fraud Cases (N=1,199)

	Received Alternative	Did Not Receive Alternative
Recommended for Alternative	26.7%	17.2%
Not Recommended for Alternative	26.7%	29.4%

an alternative sanction (Figure 24). Another 18% were not recommended for an alternative sanction, but the judge sentenced the individual to an alternative form of punishment. Nearly two-thirds of larceny offenders (63%) were not recommended for, and did not receive, an alternative sanction on the risk assessment instrument. In these cases, the judge agreed that a traditional incarceration sentence was the appropriate punishment. The nonviolent offender risk assessment instrument recommends fewer larceny offenders for alternative sanctions because both the National Center for State Courts evaluation and the Commission's validation study found that larceny offenders are most likely to recidivate among nonviolent offenders.

Fraud offenses accounted for about 23% of the nonviolent risk assessment cases in FY2004. Of the 1,199 eligible fraud cases, 27% were recommended for and received an alternative sanction to prison (Figure 25). Another 27% were not recommended for an alternative on the risk assessment instrument, but the judge felt that an alternative was the most appropriate sanction. In total, 53% of eligible fraud offenders screened by the risk assessment instrument received an alternative sanction. This would seem to indicate that judges feel fraud offenders are the most amenable, among nonviolent offenders, for alternative sanctions.

Compliance and Sex Offender Risk Assessment

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

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

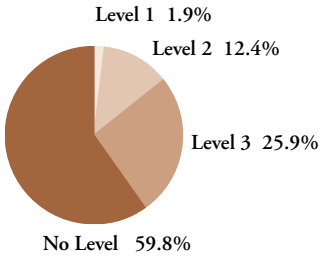
The risk assessment instrument was incorporated into the sentencing guidelines for sex offenders beginning July 1, 2001. For each sex offender identified as a comparatively high risk (those scoring 28 points or more on the risk tool), the sentencing guidelines have been revised such that a prison term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

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

The low end and the midpoint remain unchanged. Increasing the upper end of the recommended range provides judges the flexibility to sentence higher risk sex offenders to terms above the traditional guidelines range and still be in compliance with the guidelines. This approach allows the judge to incorporate sex offender risk assessment into the sentencing decision while providing the judge with flexibility to evaluate the circumstances of each case. Findings from the most recent year of available sex offender risk assessment data (FY2004) are presented on the following page.

Figure 26

Sex Offender Risk Levels for Other Sexual Assault Offenses, FY2004



**Excludes cases missing the sex offender risk assessment portion of the Other Sexual Assault worksheet.*

During FY2004, there were 413 offenders convicted of an offense covered by the Other Sexual Assault guidelines. The majority (60%) were not assigned a level of risk by the sex offender risk assessment instrument (Figure 26). Approximately 26% of Other Sexual Assault guidelines cases resulted in a Level 3 risk classification, with an additional 12% assigned to Level 2. Only 2% of offenders reached the highest risk category of Level 1.

Under sex offender risk assessment, the upper end of the guidelines range is extended by 300%, 100% or 50% for offenders assigned to Level 1, 2 or 3, respectively. Judges have begun to utilize these extended ranges when sentencing sex offenders. For sexual assault offenders reaching Level 1 risk, 13% were given sentences within the extended guidelines range (Figure 27). Judges were more likely to use the extended guidelines range in Level 2 risk cases (31%). Judges rarely sentenced Level 1, 2 or 3 offenders to terms above the extended guidelines range provided in these cases. However, offenders who scored 28 points or less on the risk assessment instrument (who are not assigned a risk category and receive no guidelines adjustment) were the least likely to be sentenced in compliance with the guidelines (69%) and the most likely to receive a sentence that was an upward departure from the guidelines (19%).

Offenders on the Other Sexual Assault worksheet who are assigned a risk level (Level 1, 2, or 3) are automatically recommended for a term of incarceration that includes a prison sentence. Therefore, some sex offenders who historically were recommended for probation or a short jail term on the guidelines are now recommended for prison. During FY2004, there were 53 cases affected by this change in guidelines. In three out of four cases where the recommended disposition changed from probation or jail to a term that includes prison, judges agreed with the recommendation and imposed an

Figure 27

Other Sexual Assault Compliance Rates by Risk Level, FY2004

		Compliance			
	Mitigation	Traditional Range	Adjusted Range	Aggravation	Number of Cases
Level 1	0%	88%	13%	0%	8
Level 2	14	49	31	6	51
Level 3	15	70	9	6	107
No Level	12	69	—	19	247
Overall	13%	68%	6%	13%	413

effective prison sentence. In the remaining 25% of affected cases, judges sentenced the offender to probation or to an incarceration period of six months or less.

In FY2004, there were 233 offenders convicted of offenses covered by the Rape guidelines (which include rape, forcible sodomy, and object penetration). Among offenders convicted of these crimes, nearly one-half (49%) were not assigned a risk level by the Commission's risk assessment instrument. The proportion of offenders receiving a risk classification and, therefore, an adjusted guidelines recommendation is higher among Rape offenders than among Other Sexual Assault offenders (51% versus 40%). Nearly 27% of Rape cases resulted in a Level 3 adjustment—a 50% increase in the upper end of the traditional guidelines range recommendation (Figure 28). An additional 22% received a Level 2 adjustment (100% increase). The most extreme adjustment (300%) affected 2% of Rape guidelines cases.

For the four rape offenders reaching Level 1 risk group, judges did not use the extended guidelines range (Figure 29). However, 29% of offenders with a Level 2 risk classification, and 14% of offenders with a Level 3 risk classification, were given prison sentences within the adjusted range of the guidelines. With extended guidelines ranges available for higher risk sex offenders, judges did not sentence Level 1, 2 or 3 offenders above the expanded guidelines range. Offenders within a Level 1 or Level 2 risk category were sentenced below the guidelines recommendation 25% of the time. Over one-third (36%) of rape cases with a Level 3 risk had sentences that fell below the recommended guidelines range. Offenders who did not fall into a category of risk were sentenced below the recommended range of incarceration approximately 28% of the time.

Figure 28

Sex Offender Risk Levels for Rape Offenses, FY2004

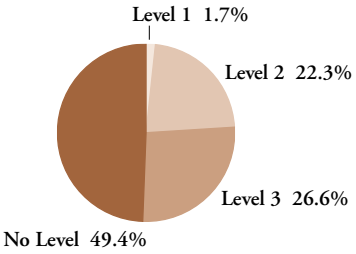


Figure 29

Rape Offense Compliance Rates by Risk Level, FY2004

		Compliance			
	Mitigation	Traditional Range	Adjusted Range	Aggravation	Number of Cases
Level 1	25%	75%	0%	0%	4
Level 2	25	46	29	0	52
Level 3	36	50	14	0	62
No Level	28	62	—	10	115
Overall	21.5%	61%	8%	8.8%	233

3 A Decade of Truth-In-Sentencing

The reform of a decade ago dramatically changed the way felons are sentenced and serve time in Virginia.

Introduction

January 1, 2005, will mark the tenth anniversary of the abolition of parole and the institution of truth-in-sentencing in the Commonwealth of Virginia. The implementation of truth-in-sentencing in Virginia culminated a year of work by the Governor's Office and the legislature. In January 1994, then-Governor George Allen had appointed the Commission on Parole Abolition and Sentencing Reform to develop recommendations for revamping the criminal justice system in the Commonwealth. On September 19, 1994, the Virginia General Assembly convened in a Special Session to deliberate upon the recommendations of the Governor's Commission. Less than one month later, on October 13, 1994, Governor George Allen signed House Bill 5001 and Senate Bill 3001 into law. The new laws became effective on January 1, 1995.

Virginia entered a new era in 1995. The reform of a decade ago dramatically changed the way felons are sentenced and serve time in Virginia. Beginning January 1, 1995, the practice of discretionary parole release from prison was abolished and inmates were limited to earning no more than 15% off their sentences. Virginia's felons now must serve at least 85% of their sentences in prison or jail. This type of system is referred to as "truth-in-sentencing," since offenders must serve all, or nearly all, of the sentences handed down by the court. Judges and citizens are able to predict actual time served in jail or prison under this system with a high degree of accuracy. This embodies the truth-in-sentencing philosophy.

A critical component of the new system was the integration of sentencing guidelines for use in felony cases tried in the state's circuit courts. Originally adopted by Virginia's judges several years earlier, the voluntary sentencing guidelines were revised to be compatible with the new sentencing system. Chief features of the new guidelines were codified. A new state agency called the Virginia Criminal Sentencing Commission was created to implement and oversee the new truth-in-sentencing guidelines, to monitor criminal justice trends, and to examine key issues at the request of policymakers.

Of the many approaches to truth-in-sentencing taken by states around the nation, Virginia's approach has proven to be one of the most successful and effective avenues for reform.

Goals of Sentencing Reform

The cornerstone of reform in Virginia was the abolition of discretionary parole release and the adoption of truth-in-sentencing. Under parole eligibility laws, inmates served a fraction of the sentence handed down by a judge or a jury before becoming eligible for parole release. A first-time inmate, for example, became eligible for parole after serving one-fourth of his sentence. In addition, inmates could earn as much as 30 days in sentence credits for every 30 days they served. Half of this sentence credit could be applied toward the offender's parole eligibility date, further reducing the portion of the sentence that needed to be served before a prisoner could be granted parole and released. As a result, inmates often served as little as one-fifth of the sentence ordered by court.

Under Virginia's truth-in-sentencing system, parole has been eliminated for any felony committed on or after January 1, 1995. In conjunction with the abolition of parole, the system by which inmates earned sentence credits was revamped. In contrast to the 30 days an inmate could receive for every 30 days served under the parole system, an offender committed to the state penitentiary under truth-in-sentencing provisions may not earn more than 4.5 days for every 30 days served (or 15%) off his incarceration sentence. Although jail and state prison inmates served under different systems prior to 1995, all felons sentenced under truth-in-sentencing provisions must serve at least 85% of the incarceration sentence whether they serve that time in a local jail or in a state institution.

Abolishing parole and achieving truth-in-sentencing were not the only goals of the reform legislation. Ensuring that violent criminals serve longer terms in prison than in the past was also a priority. The Governor's Commission recommended, and the General Assembly adopted, modifications to the judicial sentencing guidelines to increase the sentences recommended for violent offenders. The sentencing enhancements built into the guidelines prescribe prison sentences for violent offenders that are significantly longer than historical time served by these offenders. Unlike other initiatives, which typically categorize an offender based on the current offense alone, sentencing reform provisions define an offender as violent based on the totality of his criminal career, both the current offense and his prior criminal history.

During the development of sentencing reform legislation, much consideration was given to balancing the goals of truth-in-sentencing and longer incarceration terms for violent offenders with demand for expensive correctional resources. Reform measures were carefully crafted with consideration of Virginia's current and planned prison capacity and with an eye towards using that capacity to house the state's most violent felons. To reserve the most expensive resources for the most dangerous offenders, reformers under-

scored the importance of making the most efficient use of the state's remaining correctional resources to punish nonviolent offenders.

This prioritization of resources led to an additional reform goal: to safely redirect low-risk nonviolent felons from prison to less costly sanctions. In its 1994 charge to the newly-created agency, the General Assembly instructed the Commission to develop a risk assessment instrument for nonviolent offenders, predictive of the relative risk a felon would become a threat to public safety. Such an instrument, based on empirical analysis of actual patterns of recidivism among Virginia's felons, can be used to identify offenders who are likely to present the lowest risk to public safety in the future. The Commission was to determine if 25% of incarceration-bound offenders could be safely redirected to alternative punishment options in lieu of traditional jail or prison.

At the same time, reformers sought to establish a continuum of sanctioning options for Virginia's nonviolent felons, including new alternative punishment programs for low-risk offenders. The reform package adopted by the General Assembly and signed by Governor Allen established a community-based corrections system at the state and local level. Existing sanctioning options were expanded and new programs were authorized to create a network of local and state-run community corrections programs for nonviolent offenders. This system was implemented to provide judges with additional sentencing options as alternatives to traditional incarceration for nonviolent offenders, enabling them to reserve costly correctional institution beds for Virginia's violent offenders. Although the state already operated some community corrections programs at the time truth-in-sentencing laws were enacted, a more comprehensive system was enabled through this legislation.

Governor Allen's Commission and Virginia's legislature recognized the unique role of sentencing guidelines in achieving and sustaining truth-in-sentencing reform in the Commonwealth. To further the goals of sentencing reform, formal integration of sentencing guidelines into reform provisions was a key objective. For the first time, the blueprint of Virginia's truth-in-sentencing guidelines was laid out in statute and the process mandated. The Virginia Criminal Sentencing Commission was created to implement and oversee the discretionary sentencing guidelines. The Commission held its first meeting on December 12, 1994.

Inherent in Virginia's truth-in-sentencing reform is the goal of reducing unwarranted disparity in the punishment of offenders in Virginia. Sentencing guidelines provide a set of rational and consistent sentencing standards. Use of guidelines can reduce disparity not attributable to the circumstances of the offense or the defendant's criminal history. Rational and consistent sentencing practices foster public confidence in the criminal justice system, the ultimate goal of Virginia's truth-in-sentencing reform.

Virginia's Truth-in-Sentencing Guidelines

The design and the process for using Virginia's truth-in-sentencing guidelines are laid out in § 17.1-805 of the *Code of Virginia*. These guidelines were derived from historical sentencing practices of circuit court judges, adjusted to reflect patterns of actual term served in prison. Special "enhancements" are mandated by § 17.1-805 to increase sentence recommendations for violent offenders. These mandated prescriptive, or normative, adjustments are made for offenders convicted of violent crimes and offenders with a criminal record that includes a conviction or juvenile adjudication for a violent felony offense. The guidelines recommend terms for nonviolent offenders roughly equal to the terms they served historically, prior to the abolition of parole. For violent offenders, however, the guidelines recommend terms significantly longer than those served under parole laws (two to six times longer, depending on the offender's current offense and the seriousness of his prior criminal record). The guidelines indicate the actual time to be served in jail or prison, with the offender only eligible for limited sentence credits.

The truth-in-sentencing guidelines process is mandatory. The guidelines must be completed and reviewed in every felony case for which guidelines exist. Compliance with the guidelines remains discretionary, but if a judge departs from the guidelines, he or she must state in writing the reason for the departure.

Today, offender risk assessment is an integral component of Virginia's sentencing guidelines system. In 1994, the truth-in-sentencing reform legislation charged the Commission with studying the feasibility of using an empirically-based risk assessment instrument to redirect 25% of the lowest risk, incarceration-bound, drug and property offenders to alternative (non-prison) sanctions. After extensive study, a risk assessment tool was piloted from 1997 to 2001, when an independent evaluation was completed by the National Center for State Courts (NCSC). In 2001, the Commission conducted a validation study of the original risk assessment instrument to test and refine the instrument. In July 2002, the nonviolent risk assessment instrument was implemented statewide. At the request of the 2003 General Assembly, the Commission re-examined the risk instrument and began to recommend additional low-risk offenders for alternative punishment options. This change took effect July 1, 2004.

Sentencing Reform Performance Measure: Sentencing Guidelines Compliance

Judicial compliance with the truth-in-sentencing guidelines is voluntary. A judge may depart from the guidelines recommendation and sentence an offender either to a punishment more severe or less stringent than called for by the guidelines. The overall compliance rate summarizes the extent to which Virginia's judges concur with recommendations provided by the sentencing guidelines, both in type of disposition and in length of incarceration. For fiscal year (FY) 2004, the compliance rate was its highest ever, approaching 81% (Figure 30). This high rate of concurrence with the guidelines indicates that the guidelines serve as a useful tool for judges when sentencing felony offenders.

The rate at which judges sentence offenders to sanctions more severe than the guidelines recommendation, known as the "aggravation" rate, was 9.7% for FY2004. The "mitigation" rate, or the rate at which judges sentence offenders to sanctions considered less severe than the guidelines recommendation, was 9.6% for the fiscal year. When judges do depart from the recommended range, half of the departures result in sentences above the guidelines and half result in sentences below the guidelines. The departure pattern is balanced. This suggests that, overall, the recommendations provided by the guidelines are very representative of the types of cases that judges see most often in their courtrooms. General acceptance of the guidelines has been crucial in the successful transition from sentencing in a system in which time served was governed by discretionary parole release to a truth-in-sentencing system in which felons must serve nearly all of the incarceration time ordered by the court.

Figure 30

Sentencing Guidelines Compliance, FY2004

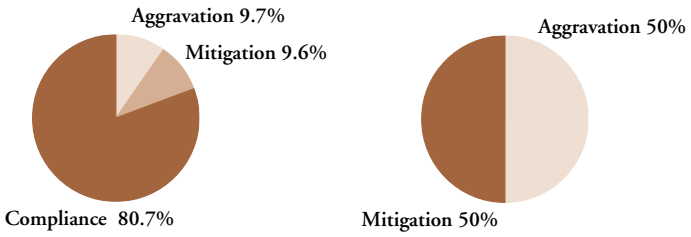


Figure 31

Guidelines Compliance by Circuit, FY2004

Circuit		Compliance	Mitigation	Aggravation	# of Cases
1	Chesapeake	89.0%	4.7%	6.3%	801
2	Virginia Beach	82.2	8.8	9.0	1,534
3	Portsmouth	78.2	10.1	11.7	719
4	Norfolk	80.1	15.7	4.2	1,559
5	Suffolk Area	83.5	8.2	8.3	527
6	Sussex Area	73.2	12.3	14.5	400
7	Newport News	89.6	5.0	5.4	797
8	Hampton	81.3	10.6	8.1	454
9	Williamsburg Area	79.3	7.3	13.4	454
10	South Boston Area	85.0	7.8	7.2	525
11	Petersburg Area	84.8	7.4	7.8	409
12	Chesterfield Area	80.3	6.5	13.2	851
13	Richmond City	81.3	9.5	9.2	1,104
14	Henrico	82.7	11.0	6.3	1,107
15	Fredericksburg Area	71.6	11.1	17.3	1,193
16	Charlottesville Area	81.1	6.6	12.3	595
17	Arlington Area	78.3	7.4	14.3	618
18	Alexandria	81.7	9.5	8.8	432
19	Fairfax	79.4	10.0	10.6	1,237
20	Loudoun Area	89.2	5.0	5.8	379
21	Martinsville Area	74.6	12.3	13.1	343
22	Danville Area	74.5	7.2	18.3	655
23	Roanoke Area	77.4	13.3	9.3	541
24	Lynchburg Area	73.7	16.4	9.9	768
25	Staunton Area	82.6	9.8	7.6	694
26	Harrisonburg/Winchester Area	78.6	11.7	9.7	745
27	Radford Area	86.0	7.9	6.1	688
28	Bristol Area	83.0	11.0	6.0	419
29	Buchanan Area	67.9	8.0	24.1	324
30	Lee Area	84.3	9.4	6.3	192
31	Prince William Area	85.6	8.0	6.4	612

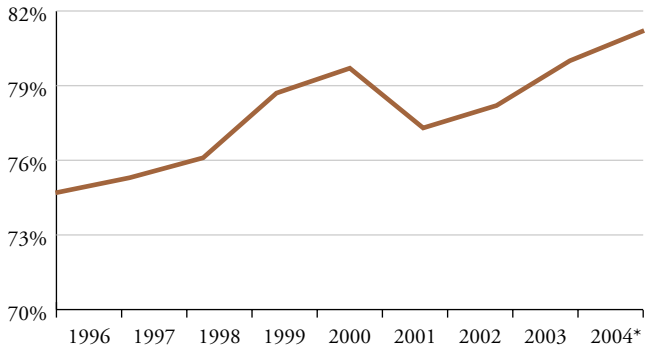
Compliance rates and departure patterns have varied across Virginia's 31 judicial circuits; however, patterns do not indicate an extreme variation in concurrence with the guidelines (Figure 31). In FY2004, nearly two-thirds (61%) of the state's 31 circuits exhibited compliance rates at or above 80%, while just over one-third (35%) reported compliance rates between 70% and 79%. Only one circuit had a compliance rate below 70%.

Since January 1, 1995, more than 200,000 felony cases have been sentenced under truth-in-sentencing laws. Compliance with the guidelines, nearly 75% when truth-in-sentencing was first implemented, has climbed nearly every year over the last decade (Figure 32). For calendar year (CY) 2004 (through November 16) the compliance rate has exceeded 81%. This increasing trend is likely due to several factors. Over the years, judges have become more accustomed to the guidelines and sentencing under no-parole provisions. Since 1995, the Commission has recommended, and the General Assembly has approved, modifications to refine the guidelines for some offenses, to bring recommendations more in sync with judicial thinking. Pursuant to legislative mandate, the Commission in 2002 implemented a risk assessment instrument designed to identify low-risk incarceration-bound drug and property offenders who pose little risk to public safety. This tool provides additional information for judges to consider when sentencing these offenders.

The high rate of concurrence with the sentencing guidelines is a testimonial to Virginia's circuit court judges. Judges seamlessly made the transition from sentencing under the parole system to sentencing under truth-in-sentencing, with its 85% time-served requirement. Without a successful transition, growth of Virginia's prison population would have accelerated rapidly. The success of voluntary guidelines in Virginia is a testament to the experience and expertise of Virginia's judiciary.

Figure 32

Guidelines Compliance Trend, CY1996-2004



*Data for 2004 represent cases received and automated through November 16, 2004.

Sentencing Reform Performance Measure: Unwarranted Disparity

There is sufficient empirical evidence to demonstrate that, overall, Virginia's sentencing guidelines have alleviated unwarranted sentencing disparity in the Commonwealth. Virginia's guidelines, despite their discretionary nature, have served to reduce disparity over the long term. Virginia's sentencing guidelines contain factors to account for the type of offense and the number of charges resulting in conviction, the circumstances of the offense (such as victim injury and weapon use), the legal status of the offender at the time the offense was committed, and the number and seriousness of the convictions in the offender's prior record. Prior to the implementation of Virginia's first sentencing guidelines system in 1991, judicial sentencing practices were more divergent than they have become under the truth-in-sentencing guidelines. Before guidelines were developed, approximately half of the sentence variation could be explained by guidelines factors (Figure 33). The remaining sentence variation could not be explained by guideline factors, but were related to other factors such as offender gender, race, drug use history, alcohol and drug use at time of offense, the offender's relationship with the victim, employment, education history, the particular judicial circuit and the judge's identity. By 2002, judicial sentencing patterns had changed significantly. A larger share of the sentence variation can be explained by guideline factors. Guideline factors now account for 69% of sentence variation.

This decrease in unwarranted sentencing disparity is noteworthy. There are likely several reasons to explain why the guidelines have not further reduced disparity. Unlike some other

Figure 33

Impact of Sentencing Guidelines on Disparity Reduction

	Sentence Length Decisions	
	Pre-Guidelines	Post-Guidelines
Guideline Factors	49%	69%
Non-Guideline Factors	51%	31%

Examples of non-guideline factors include: offender gender, race, drug use history, alcohol and drug use at time of offense, relationship with the victim, employment, education history, circuit and judicial identity.

states or the federal judicial system, which have presumptive sentencing guidelines, compliance with the guidelines has always been discretionary in Virginia. Furthermore, a judge can sentence anywhere in the recommended range and be considered in compliance with guidelines. This allows the judge to use discretion in each particular case when choosing what he or she feels to be the most appropriate sentence for the offender. Although compliance with the guidelines is high (nearly 81%), variation in sentencing may still exist within the broad range of sentences recommended by the guidelines. The guidelines, while accounting for numerous offense and prior record details, cannot account for all legal factors that a judge may consider when formulating a sentencing decision. In addition, the distribution of offenses and various punishment options vary considerably across the Commonwealth. Certain jurisdictions may see atypical cases not reflected in statewide averages. Furthermore, the availability of alternative or community-based programs differs from locality to locality. Differences in programming options can affect sentencing decisions, particularly in localities where viable alternative sanctions are more readily available.

Sentencing Reform Performance Measure: Percent of Sentence Served

Since 1995, the Commission has carefully monitored the impact of truth-in-sentencing reforms on the state's criminal justice system. One of the goals of the reform was to reduce drastically the gap between the sentence pronounced in the courtroom and the time actually served by a convicted felon. Prior to 1995, extensive good conduct credits combined with the granting of parole resulted in many inmates serving as little as one-fifth of the sentence ordered by the court. Today, under the truth-in-sentencing system, each inmate is required to serve at least 85% of his sentence.

The Department of Corrections (DOC) policy for the application of earned sentence credits specifies four different rates at which inmates can earn credits: 4.5 days for every 30 served (Level 1), three days for every 30 served (Level 2), 1.5 days for every 30 served (Level 3) and 0 days (Level 4). Inmates are automatically placed in Level 2 upon admission into DOC, and an annual review is performed to determine if the level of earning should be adjusted based on the inmate's conduct and program participation in the preceding 12 months. If an inmate served his entire sentence earning 4.5 days in sentence credits for every 30 days served, the prisoner would serve 85% of the incarceration term.

Under truth-in-sentencing, with no parole and limited sentence credits, inmates in Virginia's prisons are serving a much larger proportion of their sentences in incarceration than they did under the parole system. For instance, offenders convicted of first-degree murder under the parole system, on average, served less than one-third of the effective sentence (imposed sentence less any suspended time). Most offenders given a life sentence could become parole eligible after serving between 12 and 15 years. Under the truth-in-sentencing system, first-degree murderers typically are serving 91% of their sentences in prison (Figure 34). A life sentence under truth-in-sentencing requires that an offender remain incarcerated for life unless released conditionally under § 53.1-40.01 after reaching the age of 60 or 65.

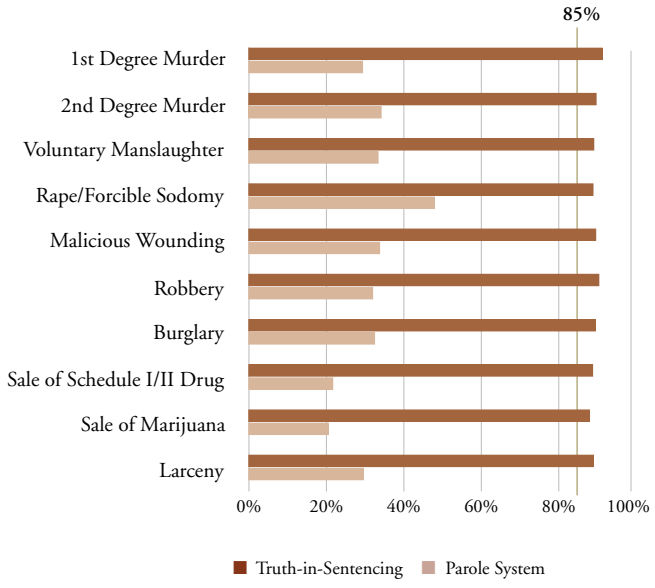
Robbers, who on average spent less than one-third of their sentences in prison before being released under the parole system, are now serving over 90% of the sentences handed down by the court.

Property and drug offenders are also serving a larger share of their prison sentences. Although the average length of stay in prison under the parole system was less than 30% of the sentence, larceny offenders convicted under truth-in-sentencing provisions are serving nearly 89% of their sentences. For selling a Schedule I/II drug like cocaine, offenders typically served only about one-fifth of their sentences when parole was in effect. Under truth-in-sentencing, offenders convicted of selling a Schedule I/II drug, on average, are serving 89% of the sentences handed down by judges and juries in the Commonwealth.

The impact of truth-in-sentencing on the percentage of sentence served by prison inmates has been to reduce significantly the gap between the sentence ordered by the court and the time actually served by a convicted felon in prison.

Figure 34

Percentage of Prison Sentence Served-
Parole System v. Truth-in-Sentencing System



Parole system data represent FY1993 prison releases: truth-in-sentencing data is derived from the rate of sentence credits earned among prison inmates as of December 31, 2003.

Sentencing Reform Performance Measure: Time Served by Violent Offenders

Eliminating the practice of discretionary parole release and restructuring sentence credits created a system of truth-in-sentencing in the Commonwealth and diminished the gap between sentence length and time served. However, targeting violent felons for longer prison terms than they had served in the past was also a priority of the designers of the truth-in-sentencing system. The truth-in-sentencing guidelines were carefully crafted with a system of scoring enhancements designed to yield longer sentence recommendations for offenders with current or prior convictions for violent crimes, without increasing the proportion of convicted offenders sentenced to the state's prison system.

When the truth-in-sentencing system was implemented in 1995, a prison sentence was defined as any sentence over six months. With scoring enhancements, whenever the truth-in-sentencing guidelines call for an incarceration term exceeding six months, the sentences recommended for violent felons are significantly longer than the time they typically served in prison under the parole system. Offenders convicted of nonviolent crimes with no history of violence are not subject to any scoring enhancements and the guidelines recommendations reflect the average incarceration time served by offenders convicted of similar crimes during a period governed by parole laws, prior to the implementation of truth-in-sentencing.

There is considerable evidence that the truth-in-sentencing system is achieving the goal of longer prison terms for violent offenders. In the vast majority of cases, sentences imposed for violent offenders under truth-in-sentencing provisions are resulting in substantially longer lengths of stay than those seen prior to sentencing reform. In fact, a large number of violent offenders are serving two, three or four times longer under truth-in-sentencing than criminals who committed similar offenses did under the parole system.

The crime of rape illustrates the impact of truth-in-sentencing on prison terms served by violent offenders. Offenders convicted of rape under the parole system were released after serving, typically, five and a half to six and a half years in prison (1988-1992). Having a prior record of violence increased the rapist's median time served (the middle value, where half of the time served values are higher and half are lower) by only one year (Figure 35). Under sentencing reform (FY1995-FY2004), rapists with no previous record of violence will be serving prison terms with a median nearly twice the historical time served.

Virginia's truth-in-sentencing system has had an even larger impact on prison terms for violent offenders who have previous convictions for violent crimes. Offenders with prior convictions for violent felonies receive guidelines recommendations substantially longer than those without a violent prior record, and the size of the increased penalty recommendation is linked to the seriousness of the prior crimes, measured by statutory maximum penalty. The truth-in-sentencing guidelines specify two degrees of violent criminal records. A previous conviction for a violent felony with a maximum penalty of less than 40 years is a Category II prior record, while a past conviction for a violent felony carrying a maximum penalty of 40 years or more is a Category I record.

In contrast to the parole system, offenders with a violent prior record will serve substantially longer terms than those without violent priors. Based on the median, rapists with a less serious violent record (Category II) are being given terms to serve of 18 years compared to the 7 years they served prior to sentencing reform. For those with a more serious violent prior record (Category I), such as a prior rape, the sentences imposed under truth-in-sentencing are equivalent to time to be served of nearly 32 years. This is more than four times longer than the prison term served by these repeat violent offenders historically.

An examination of prison terms for offenders convicted of robbery reveals considerably longer lengths of stay after sentencing reform. Robbers who committed their crimes with firearms, but who had no previous record of violence, typically spent less than three years in prison under the parole system (Figure 36). Even robbers with the most serious type of violent prior record (Category I) only served four years in prison, based on the median, prior to the sentencing reform and the introduction of the truth-in-sentenc-

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

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

Figure 35 • Forcible Rape

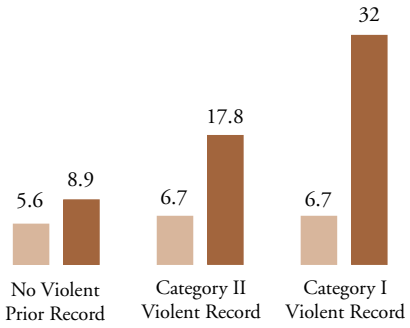
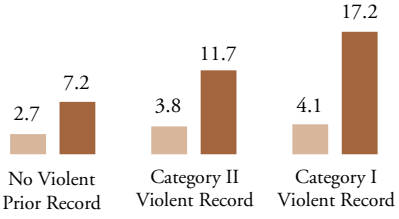


Figure 36 • Robbery with Firearm



ing guidelines. Today, however, offenders who commit robbery with a firearm are receiving prison terms that will result in a median time to serve of seven years, even in cases in which the offender has no prior violent convictions. This is more than double the typical time served by these offenders under the parole system. For robbers with the more serious violent prior record (Category I), such as a prior conviction for robbery, the expected time served in prison is now 17 years, or four times the historical time served for offenders fitting this profile.

Sentencing patterns for first and second-degree murder also illustrate the impact of truth-in-sentencing reforms. Under the parole system, offenders convicted of first-degree murder who had no prior convictions for violent crimes were released typically after serving 12 years in prison, based on the time-served median. Under the truth-in-sentencing system, however, first-degree murderers having no prior convictions for violent crimes have been receiving sentences with a median time to serve of 32 years (Figure 37). In these cases, time served in prison has almost tripled under truth-in-sentencing. First-degree murderers with any violent record, Category I or Category II, have been sentenced to serve 44 to 46 years, compared to the typical time served of 15 years under the parole system.

First-degree murder is the only guidelines offense where it is possible to receive a sentence recommendation of life. For all the other offenses the recommendation is in years and months. For this analysis, a sentence of life was calculated based on the offender's life expectancy as defined by the Center for Disease Control. For example, a 35 year-old offender is expected to live on average another 43.5 years; therefore, a life sentence is calculated as 43.5 years for this individual. A 20 year old is expected to live an additional 57.7 years and life is calculated as such.

Figure 37 • First-Degree Murder

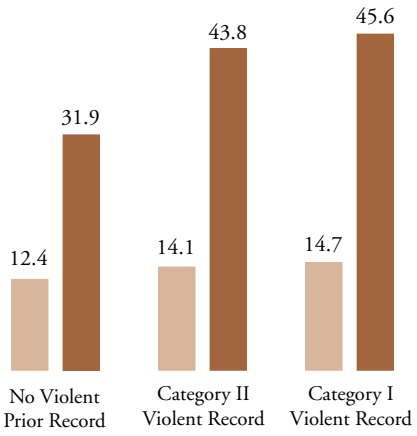
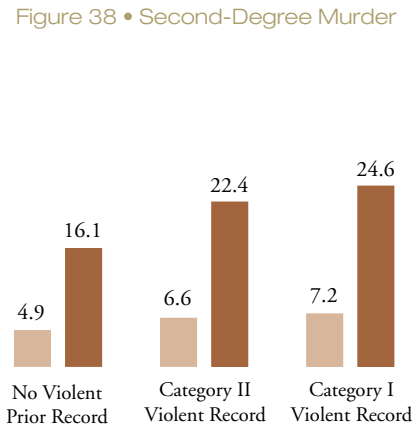


Figure 38 • Second-Degree Murder



These figures present values of actual incarceration time served under parole laws (1988-1992) and expected time to be served under truth-in-sentencing provisions for cases sentenced FY1995 through FY2004. Time served values are represented by the median (the middle value, where half the time served values are higher and half are lower). Truth-in-sentencing data include only cases recommended for, and sentenced to, incarceration of more than six months.

Parole System
Truth-In-Sentencing

Under the former parole system an offender sentenced to life was eligible for parole after serving between 12 and 15 years. Under the no-parole system a sentence of life or a lengthy sentence in years has essentially the same effect —life in prison.

The crime of second-degree murder also provides an example of the impact of Virginia's truth-in-sentencing system on lengthening prison stays for violent offenders. Second-degree murderers historically served five to seven years under the parole system. With the implementation of truth-in-sentencing, offenders convicted of second-degree murder who have no record of violence have received sentences producing a median time to be served of over 16 years (Figure 38). For second-degree murderers with prior convictions for violent crimes the impact of truth-in-sentencing is even more pronounced. Under truth-in-sentencing, these offenders are serving a median between 22 and 25 years, or more than 3 times the historical time served.

Truth-in-sentencing reform has achieved longer prison terms for violent offenders which has resulted in fewer repeat violent offenders returning through the circuit courts of the Commonwealth.

Sentencing Reform Performance Measure: Violent Recidivism

Targeting violent offenders for longer terms of incarceration serves to incapacitate offenders for a greater portion of what is often referred to by criminologists as the "crime prone age years." Many criminologists consider the ages of 15 to 24 to be the years during which a person is at greatest risk for becoming involved in criminal activity, particularly violent criminal behavior. For example, of all individuals arrested for the crime of robbery in 2003, nearly two-thirds (60%) were between the ages of 15 and 24 (Figure 39). The peak age for robbery arrestees was 18 years. As individuals age, the risk of being arrested for robbery declines significantly. Less than 17% of robbery arrestees are age 35 or older.

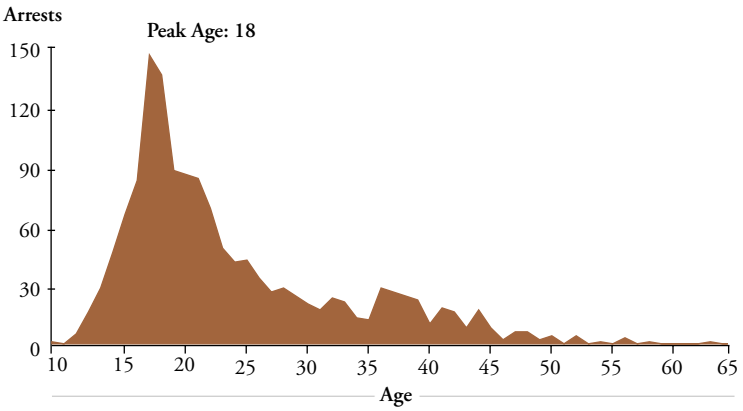
Virginia's truth-in-sentencing reform has achieved longer prison terms for violent offenders. A large share of these offenders are young and at greatest risk for returning to a criminal lifestyle when released, were it not for longer prison stays. Longer terms incapacitate at-risk offenders through years during which they would be most likely to engage in crime. By achieving longer lengths of stay for violent offenders, sentencing reform should result in fewer repeat violent offenders returning through the circuit courts of the Commonwealth.

Whenever the sentencing guidelines recommend a prison term, the guidelines preparer must categorize the offender's prior record as violent or nonviolent. According to guidelines data, the percent of violent offenders convicted in circuit court who have a prior conviction for a violent felony offense has declined since 1996. In 1996, more than 28% of violent offenders had a violent felony record. By 2004, this figure had dropped to 24%.

The impact of truth-in-sentencing reform on violent recidivism has not been fully realized as yet. Violent offenders typically served several years in prison, even under the old parole system. As many violent offenders sentenced under truth-in-sentencing would still be incarcerated if parole laws were in effect today, the full impact of longer lengths of stay under truth-in-sentencing has not been fully achieved. Over the next few years, when more violent offenders have surpassed the typical time they would have served under the parole system, the incapacitation effect will be more fully realized.

Figure 39

Age Distribution of Robbery Arrestees in Virginia, 2003



Source: Crime in Virginia, Virginia Department of State Police

Figure 40

Percentage of Violent Recidivists Convicted in Virginia's Circuit Courts

Year	Percent
1996	28.4%
1997	26.3
1998	27.6
1999	26.4
2000	26.9
2001	25.7
2002	25.5
2003	25.3
2004	24.4

Source: Virginia Sentencing Guidelines database

Sentencing Reform Performance Measure: Alternative Punishment for Nonviolent Offenders

In 2002, the Commission incorporated risk assessment for nonviolent offenders into Virginia's sentencing guidelines. Risk assessment applies in felony drug, fraud and larceny cases. Between July 1, 2003, and June 30, 2004, more than two-thirds of all guidelines received by the Commission were for these nonviolent offenses. However, only 42% (6,141) of the cases involved an offender who met all of the Commission's risk assessment eligibility criteria. Of the 6,141 cases with eligible offenders in FY2004, 38% were recommended for an alternative sanction by the risk assessment instrument. During the same period, 35% of these offenders received some form of punishment other than the traditional incarceration recommended by the guidelines. The most common alternatives given to these low-risk offenders were probation supervision or a short jail term (in lieu of prison). For example, a large share of offenders found to be low-risk through the risk assessment process are given a short jail sentence to be followed by probation in the community instead of the prison term recommended by the standard guidelines.

Sentencing Reform Performance Measure: Percent of Violent Offenders Housed in Prison

As noted above, Virginia's reform has resulted in longer terms for violent offenders. With the Commission's risk assessment program and the availability of alternative sanction options for judges to utilize, many nonviolent offenders are punished without traditional prison incarceration. This approach to reform was expected to alter the composition of the state's prison population. Over time, violent offenders will queue up in the system due to longer lengths of stay than under the previous system. At the same time, nonviolent offenders sentenced to prison, by design, are serving about the same amount of time on average as they did under the parole system. In addition, a portion of nonviolent offenders receive alternative sanctioning in lieu of prison.

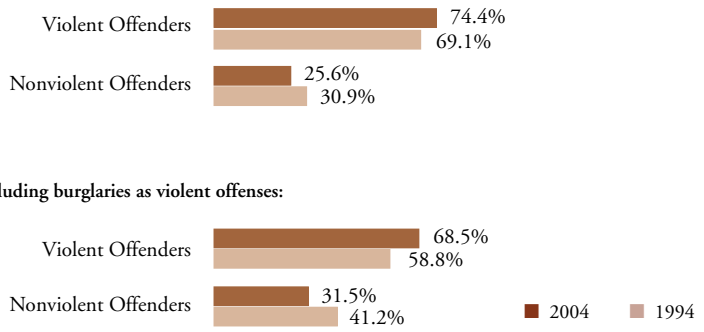
The composition of the prison population is undergoing a dramatic shift. An important element of Virginia's reform, violent offenders are no longer designated by their current offenses only. Instead, an offender is defined as violent based on the totality of his criminal career, including prior convictions and juvenile adjudications. Section 17.1-805 of the *Code of Virginia* defines violent offenses for the purposes of the truth-in-sentencing guidelines. The definition includes offenders convicted of burglary of a dwelling and burglary while armed with a deadly weapon. The definition also includes offenders who have been convicted of any burglary in the past.

Using this broader definition of a violent offender, the prison population now is composed of a larger percentage of violent offenders than a decade ago. On June 30, 1994, approximately 69% of the state-responsible (prison) population classified by the Department of Corrections (DOC) were violent offenders (Figure 41). At that time, nearly one of three inmates was in prison for a nonviolent crime and had no prior conviction for an offense defined as violent. By May 30, 2004, the percent of the prison population defined as violent had increased to about 74%. If burglaries are not included as violent offenses, the proportion of violent offenders comprising Virginia's prison system has increased from 59% to nearly 69%.

A clear shift has begun. Because violent offenders are serving significantly longer terms under truth-in-sentencing provisions than under the parole system and time served by nonviolent offenders has been held relatively constant, the proportion of the prison population composed of violent offenders relative to nonviolent offenders will continue to grow. The impact of Virginia's reform on the composition of Virginia's prison population will take many years to reach its full impact. Only one in five felons sentenced in Virginia's circuit courts is defined as violent under the sentencing guidelines, based on a current or previous conviction for a violent felony. Until 2002, when risk assessment of nonviolent offenders began statewide, Virginia's sentencing guidelines were not designed to alter the historical proportion of offenders given prison sentences. As violent offenders continue to serve longer terms and risk assessment identifies low-risk nonviolent offenders for alternative punishment options, the proportion of violent offenders housed in Virginia's prison system will continue to increase.

Figure 41

Percent of Violent Offenders in Virginia's Prison System



Note: Analysis compares state-responsible (prison) inmates classified by the Department of Corrections as of June 30, 1994, to those as of May 30, 2004.

Sources: Virginia Department of Corrections' Felon Analysis and Simulation Tracking (FAST), Inmate Record System (IRS), and Pre/Post-Sentence Investigation (PSI) report system

Sentencing Reform Performance Measure: Controlled Prison Growth

During the development of sentencing reform legislation, balancing the goals of truth-in-sentencing and longer incarceration terms for violent offenders with demand for expensive correctional resources was considered to be crucial. Under the truth-in-sentencing system, the sentencing guidelines recommend prison terms for violent offenders that are up to six times longer than those served prior to sentencing reform, while recommendations for nonviolent offenders are roughly equivalent to the time actually served by nonviolent offenders under the parole system. Moreover, the truth-in-sentencing guidelines were formulated not to increase the proportions and types of offenders sentenced to prison. At the same time, reform legislation established a network of local and state-run community corrections programs for nonviolent offenders. In other words, reform measures were carefully crafted with consideration of Virginia's current and planned prison capacity and with an eye towards using that capacity to house the state's most violent felons.

Sentencing reform and the abolition of parole did not have the dramatic impact on the prison population that some critics had once feared when the reforms were first enacted. Despite dramatic increases in the inmate population in the late 1980s and early 1990s, with several years of double-digit growth, the number of state prisoners grew at a slower rate beginning in 1996. Some critics of sentencing reform had been concerned that significantly longer prison terms for violent offenders, a major component of sentencing reform, might result in tremendous increases in the state's inmate population. Although the prison population grew a total of 154% from 1985 to 1995, growth slowed to a total of 31% between 1995 and 2004. As a result, the forecast for state prisoners developed in 2004 projects average annual growth of 3.2% over the next five years. This forecast calls for 2,531 fewer prison beds by 2009 than last year's forecast. This slower than anticipated growth is attributable to a complex array of factors, which may include incapacitation of violent offenders, declining crime rates, fewer prison admissions than projected, and statewide application of risk assessment to redirect nonviolent offenders to nonprison sanctions.

Sentencing Reform Performance Measure: Crime Rates

On the heels of rising crime rates in the late 1970s, crime in Virginia and nationally stabilized and declined somewhat during the early 1980s. This reprieve did not last long. A dramatic turnaround began in 1986, and crime rates rose steeply into the early 1990s.

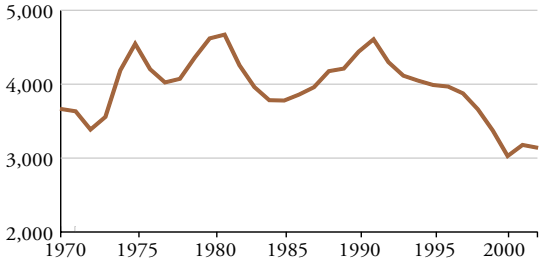
From the highs of the early 1990s, however, Virginia's crime rate has dropped during the last decade (Figure 42). With the exception of a slight increase in 2001, the downturn is the longest sustained period of decline in the crime rate in more than 35 years. In 2002, the total index crime rate was lower than at any point since before 1970. Since 1994, the overall crime rate has dropped more than 22%.

Similarly, the violent crime rate grew steeply beginning in the late 1980s, after more than a decade of relative stability. The rate of violent crime peaked in 1992-1993. Beginning in 1994, violent crime rates in Virginia began to drop (Figure 43). Steeper drops began in 1996. Violent crime today is at its lowest since 1978. Between 1994 and 2002, the violent crime rate declined nearly 20%. Last year (2003), the number of murders reported (409) was 28% lower than the number reported in 1994 (570). Similarly, robberies reported to police dropped 23% (from 8,608 to 6,588) from 1994 to 2003. Aggravated assaults dropped by 10% during this same period (from 12,414 to 11,200).

While the sentencing reforms passed in 1994 appear to be fulfilling many of the intended goals (truth-in-sentencing, longer incarceration terms for violent offenders and expansion of alternative sanctions for nonviolent offenders), the impact of the reforms on crime in Virginia is difficult to ascertain. One way for Virginia's truth-in-sentencing to have an impact on crime in the state is by having a deterrence effect. If sentencing reform has had

Figure 42

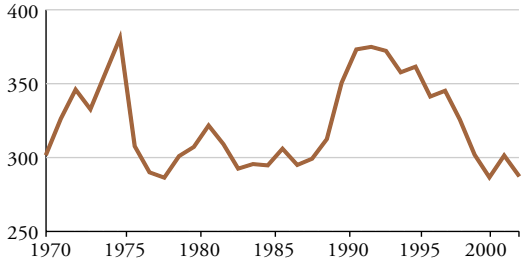
Index Crimes in Virginia (per 100,000 residents), 1970-2002



Index crimes are: murder, nonnegligent manslaughter, rape, robbery, aggravated assault, burglary, larceny, motor vehicle theft and arson.
Source: Virginia Department of Criminal Justice Services, Criminal Justice Research Center

Figure 43

Violent Index Crimes in Virginia (per 100,000 residents), 1970-2002



Violent index crimes are: murder, nonnegligent manslaughter, rape, robbery and aggravated assault.
Source: Virginia Department of Criminal Justice Services, Criminal Justice Research Center

an effect on crime, some persons who would otherwise have broken the law may be deterred from committing crime, or at least certain types of crime, because of the knowledge of the tough penalties associated with the truth-in-sentencing system. Criminological literature refers to two types of deterrence: specific deterrence and general deterrence. Specific deterrence relates to an individual who has committed a crime and the degree to which the threat or actual application of punishment will deter him from engaging in crime again. General deterrence is the degree to which knowledge of criminal penalties deters members of the general population, not just those convicted of crimes, from engaging in criminal behavior. General deterrence effects are difficult to assess since it is very hard to measure the depth of knowledge people have of criminal punishments, and what, if any, impact this knowledge has in preventing them from committing crime.

Virginia's truth-in-sentencing system, and its tougher penalties for violent offenders, also could have an impact on crime through incapacitation effects. The designers of sentencing reform targeted violent offenders, particularly repeat violent offenders, for significantly longer terms in prison than those typically served under the parole system. By incarcerating violent offenders longer than in the past, any new crimes they might have committed, had they been released into the community earlier, are prevented. As a result of this incapacitation of offenders, people who are incarcerated are not at liberty to commit crimes against the general public. Unfortunately, the incapacitation effect of the truth-in-sentencing system on crime also is difficult to measure.

While reported crime has declined in Virginia, crime has also been declining nationally, with most states witnessing downward trends in crime rates similar to those Virginia has experienced. Some of these states have abolished parole and toughened their punishments for violent offenders, while others have adopted other crime fighting strategies. It is not possible to determine what Virginia's crime rates would have been in the absence of truth-in-sentencing reforms. Clearly, however, lower crime rates benefit all Virginians and the reforms of a decade ago are compatible with the ends of public safety for the citizens of the Commonwealth.

Other Sentencing Initiatives

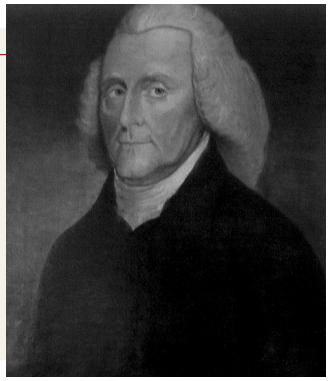
Created by the reform act, the Commission has overseen Virginia's sentencing guidelines system since 1995. One of the Commission's original charges under truth-in-sentencing reform was to develop and implement a risk assessment instrument applicable to nonviolent offenders. After pilot testing and independent evaluation, this risk assessment tool became effective statewide in July 2002. The nonviolent offender risk assessment program has been discussed extensively in this chapter. The General Assembly has developed other sentencing initiatives to complement the truth-in-sentencing reforms enacted in 1994. The Commission has been charged with implementing these new initiatives.

The 2000 General Assembly directed the Commission to develop a risk assessment instrument applicable to Virginia's felony sex offenders for incorporation into the sentencing guidelines (Senate Joint Resolution 333). This risk tool was to identify sex offenders who likely pose the greatest risk to public safety. The Commission conducted an extensive study of felony sex offenders convicted in Virginia's circuit courts and developed an empirical risk assessment tool based on offender risk, measured as a new arrest for a sex offense or other crime against the person. In 2001, the Commission implemented a risk assessment tool applicable in felony sex offense cases. That instrument is designed to identify those offenders who, as a group, represent the greatest risk for committing a new sex offense or other crime against the person once released back into the community. The guidelines for sex offenders are adjusted to ensure that a prison term is recommended in every case involving an offender identified as high-risk. In addition, the recommended sentence range is revised for high-risk offenders. In these cases, the upper end of the range is extended by 50% to 300% depending on the level of risk. The guidelines midpoint and the lower end of the range are unaffected by risk assessment.

In 2003, the General Assembly directed the Commission to develop, with due regard for public safety, discretionary sentencing guidelines for felony offenders who are determined by the court to be in violation of probation or post-release supervision for reasons other than a new criminal conviction (Chapter 1042 of the Acts of Assembly 2003). These offenders are also known as "technical violators." In determining the guidelines, the Commission was to examine historical judicial sanctioning patterns for such cases. Additionally, the Commission was to determine recidivism rates and patterns for these offenders and evaluate the feasibility of integrating a risk assessment instrument into the guidelines for violators not convicted of a new crime. In 2003, almost two-thirds of probation violators failed supervision without being cited for a new conviction. That year, nearly 4,800 such cases were handled in Virginia's circuit courts.

In response to the legislative directive, the Commission designed and implemented a two-phase research plan. The first phase of the study, developing historically-based sentencing guidelines, was completed in 2003. The General Assembly approved the use of these new guidelines beginning July 1, 2004. The second phase, analyzing recidivism and evaluating the feasibility of developing a risk assessment tool, is now complete. The Commission's proposals for integrating probation violator risk assessment are contained in the Recommendations chapter of this report.

Violent crime and serious property crime rates have decreased since the adoption of sentencing reform. Ten years after the enactment of sentencing reform legislation, evidence shows that the system is achieving what its designers intended.



Justice Edmund Pendleton, first president of the Virginia Supreme Court, 1779-1803

Summary

Virginia's comprehensive felony sentencing reform legislation marks its tenth anniversary on January 1, 2005. By all measures, this sweeping overhaul of the felony sanctioning system has, to date, been a resounding and unequivocal success.

Truth-in-sentencing has been achieved and approximately 90% of imposed incarceration time is actually being served. Sentences for violent felons are significantly longer than those historically served and are arguably among the longest in the nation.

Since its inception, approximately 200,000 felons have been sentenced under no-parole. Of those, about 40,000 were violent felons who received prison terms dramatically longer than those historically served. Clearly, many violent felons who likely would have been back on the streets under Virginia's old sentencing system have remained in prison and are unable to commit new crimes.

Virginia's prison population growth has now stabilized and become more predictable and manageable. Since 1996, our prison population has grown a total of only 25%, an annualized rate of growth of only 3%. Furthermore, the recently approved prison population forecast projects a growth rate of only 3.2% over the next five years.

Contributing greatly to the diminished demand for expensive prison beds has been the welcome expansion of new intermediate punishment/treatment programs designed for felons. Some of these intermediate sanction programs have already been integrated into the sentencing guidelines recommendations. Judges have embraced these new sentencing options that are designed for non-violent offenders who pose minimal risk to public safety. Consequently, Virginia's expensive prison beds have been prioritized to house violent felons and those who pose a significant risk of recidivism.

Violent crime and serious property crime rates have decreased since the adoption of sentencing reforms. The issue of whether the drop in crime rates is largely attributable to the sentencing reforms or some other combination of events and/or initiatives is complex. Also, since 1994, Virginia has adopted other crime fighting initiatives such as the sex offender registry and the Virginia Exile Program, which requires mandatory prison terms for certain firearm-related crimes.

Thus, ten years after the enactment of the sentencing reform legislation in Virginia, there is substantial evidence that the system is achieving what its designers intended.

4 Probation Violator Study

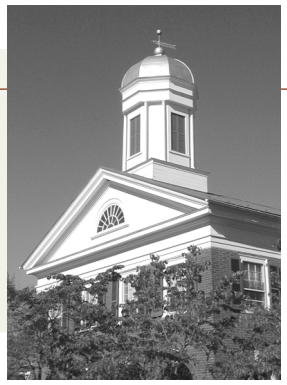
Introduction

In 2003, the General Assembly directed the Sentencing Commission to develop, with due regard for public safety, discretionary sentencing guidelines for application in cases involving felony offenders who were determined by the court to be in violation of probation or post-release supervision for reasons other than a new criminal conviction (Chapter 1042 of the Acts of Assembly 2003). These offenders are often referred to as "technical violators." In determining the guidelines, the Commission was to examine historical judicial sanctioning patterns in revocation hearings for such cases. Additionally, the Commission was directed to determine recidivism rates and patterns for these offenders and evaluate the feasibility of integrating a risk assessment instrument into the guidelines for violators not convicted of a new crime.

The first phase of the study, developing historically-based sentencing guidelines was completed in 2003. The Commission recommended, and the General Assembly approved, statewide implementation beginning July 1, 2004. The second phase of this study, analyzing recidivism and evaluating the feasibility of developing a risk assessment tool for these violators, is now complete. This chapter of the Sentencing Commission's *Annual Report* describes the Commission's study and presents the results of the risk assessment phase of this important project.

The Commission recommended, and the General Assembly approved, statewide use of probation violation sentencing guidelines beginning July 1, 2004.

Virginia is the first state in the nation to incorporate empirically-based offender risk assessment in sentencing guidelines.



Madison County Courthouse

Phase 1: Probation Violation Sentencing Guidelines

Charged with developing sentencing guidelines for offenders who violate the conditions of community supervision but are not convicted of a new crime, the Commission designed and implemented a research plan to examine historical sanctioning practices in revocation cases of this kind. The Commission reviewed the sources of data available for the study. The most complete resource regarding revocations of community supervision in Virginia is the Commission's Community Corrections Revocations Data System, also known as the Sentencing Revocation Report (SRR) database. First implemented in 1997 with assistance from the Department of Corrections (DOC), the SRR is a simple form designed to capture the reasons for, and the outcomes of, community supervision violation hearings. The probation officer (or Commonwealth's attorney) completes the first part of the form, which includes identifying information and check boxes indicating the reasons why a show cause or revocation hearing has been requested. The check boxes are based on the list of ten conditions for community supervision established for every offender, but special supervision conditions specific to the individual offender can also be recorded. Following the violation hearing, the judge completes the remainder of the form with the revocation decision and any sanction ordered in the case. The completed form is submitted to the Commission, where the information is automated. A revised SRR form was developed and implemented in 2004 to serve as a companion to the new probation violation sentencing guidelines.

The SRR database, however, provides only general information about the revocation case and the reasons why an offender was brought back to court. While indicating which conditions of supervision in general were violated, detailed information regarding the offender's behavior while under supervision is not recorded on the SRR form. With no other standardized data source available, manual data collection from offender files was necessary for the Commission's study. To provide the kind of rich contextual detail about the offender's behavior during the supervision period, the Commission examined offender probation files and extracted detailed information from the violation letter or letters contained in the offender's record. A violation letter is prepared by the probation officer and submitted to the court each time the officer requests a show cause or revocation hearing. These letters describe violation behaviors and document dates of specific violations. The Commission designed a special form to record information from the probation officers' violation letters (Figure 44). The information recorded on the special form was automated and added to the automated records already maintained by the Commission. This supplemental information proved invaluable to the Commission for the study of this offender population.

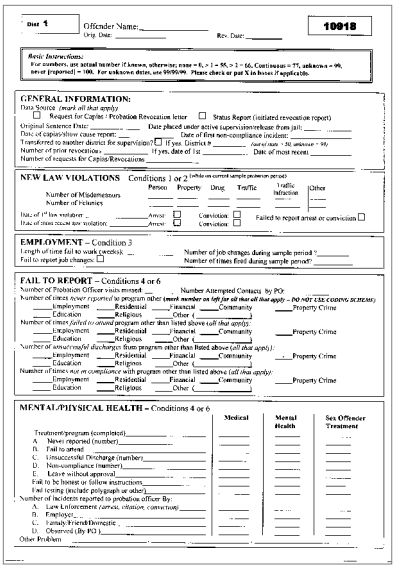
To further supplement information about offenders who violate, the Commission requested the criminal history record ("rap sheet") for each offender in the study sample. The rap sheet allowed the Commission to supplement automated information relating to the offender's criminal history prior to the offense for which he was placed on supervision. In addition, the rap sheets enabled the Commission to identify arrests and convictions that occurred during the probation period.

For additional information on the offender and the offense for which he was placed on community supervision, the Commission utilized Pre/Post-Sentence Investigation (PSI) data provided by DOC. Completed by DOC's Community Corrections division for most felony sentencing events in Virginia, the report contains a wealth of information regarding the circumstances of the crime (e.g., use of a weapon, victim injury, the offender's role in the offense, his relationship to the victim, if he resisted arrest, the quantity of drugs involved, etc.), his prior adult record, his juvenile record, family and marital information, education, military service, employment history, history of alcohol and drug use, as well as any substance abuse or mental health treatment experiences. The Commission also included data from its own Sentencing Guidelines (SG) database to the automated file developed for each offender in the study sample.

For the first phase of the study, the Commission drew a sample of 600 cases from its Community Corrections Revocation Data System, or Sentencing Revocation Report (SRR) database. Sample cases were drawn from revocations occurring from fiscal year

Figure 44

Supplemental Data Collection Form



Dist 1 Offender Name: Orig. Date: Rev. Date: 10918

Basic Instructions:
For numbers, use actual number if known, otherwise; none = 0, > 1 < 95, > 1 = 66, Continuous = 77, unknown = 99, never (reported) = 100. For unknown dates, use 99/99/99. Please check or put X in boxes if applicable.

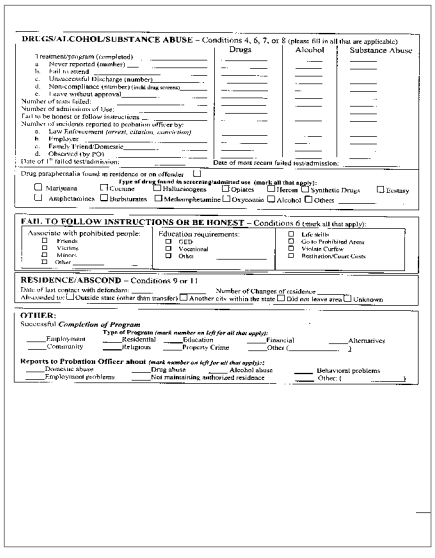
GENERAL INFORMATION:
Data Source (mark all that apply)
☐ Request for Capias / Probation Revocation letter ☐ Status Report (initiated revocation report)
Original Sentence Date: Date placed under active supervision/release from jail:
Date of capias/show cause request: Date of first non-compliance incident:
Transferred to member district for supervision? ☐ If yes, District # (numerical value = 50, unknown = 99)
Number of prior revocations: If yes, date of 1st Date of most recent
Number of requests for Capias/Revocations:

NEW LAW VIOLATIONS Conditions 1 or 2 (while on current sample probation period)
Person Property Drug Traffic Traffic Infraction Other
Number of Misdemeanors
Number of Felonies
Date of 1st law violation: Arrest ☐ Conviction ☐ Failed to report arrest or conviction ☐
Date of most recent law violation: Arrest ☐ Conviction ☐

EMPLOYMENT – Condition 3
Length of time fail to work (weeks):
Number of job changes during sample period ?
Fail to report job changes: ☐
Number of times fired during sample period?

FAIL TO REPORT – Conditions 4 or 6
Number of Probation Officer visits missed: Number Attempted Contacts by PO:
Number of times never reported to program (abs) (mark number on left for all that apply – DO NOT USE CODING SCHEME):
Employment Residential Financial Community Property Crime
Education Religious Other ( )
Number of times failed to attend program other than listed above (all that apply):
Employment Residential Financial Community Property Crime
Education Religious Other ( )
Number of unsuccessful discharges from program other than listed above (all that apply):
Employment Residential Financial Community Property Crime
Education Religious Other ( )
Number of times not in compliance with program other than listed above (all that apply):
Employment Residential Financial Community Property Crime
Education Religious Other ( )

MENTAL/PHYSICAL HEALTH – Conditions 4 or 6
Medical Mental Health Sex Offender Treatment
Treatment/program (completed)
A. Never reported (number)
B. Fail to attend
C. Unsuccessful Discharge (number)
D. Non-compliance (number)
E. Leave without approval
Fail to be honest or follow instructions
Fail testing (include polygraph or other)
Number of incidents reported to probation officer By:
A. Law Enforcement (arrest, citation, conviction)
B. Employer
C. Family/friend/associate
D. Observed (By PO)
Other Problem

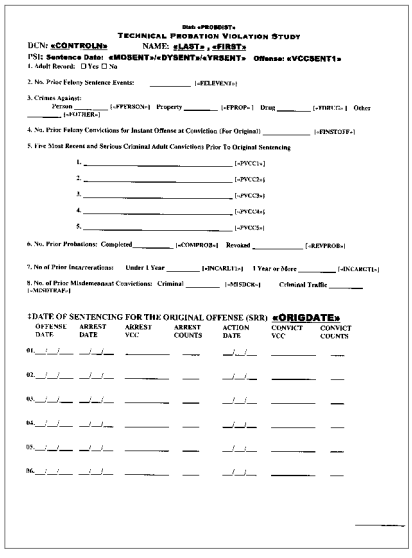


DRUGS/ALCOHOL/SUBSTANCE ABUSE – Conditions 4, 6, 7, or 8 (please fill in all that are applicable)
Drugs Alcohol Substance Abuse
Treatment/program (completed)
a. Never reported (number)
b. Fail to attend
c. Unsuccessful Discharge (number)
d. Non-compliance (number) (include drug screens)
e. Leave without approval
Number of tests failed:
Number of admissions of Use:
Fail to be honest or follow instructions
Number of incidents reported to probation officer by:
a. Law Enforcement (arrest, citation, conviction)
b. Employer
c. Family / Friend/Associate
d. Observed (by PO)
Date of 1st failed test/admission: Date of most recent failed test/admission:
Drug paraphernalia found in residence or on offender ☐
Type of drug found in screening/admitted use (mark all that apply):
☐ Marijuana ☐ Cocaine ☐ Hallucinogens ☐ Opiates ☐ Heroin ☐ Synthetic Drugs ☐ Ecstasy
☐ Amphetamines ☐ Barbiturates ☐ Methamphetamine ☐ Oxycontin ☐ Alcohol ☐ Others

FAIL TO FOLLOW INSTRUCTIONS OR BE HONEST – Conditions 6 (mark all that apply):
Associate with prohibited people: ☐ Friends ☐ Victims ☐ Minors ☐ Other
Education requirements: ☐ GED ☐ Vocational ☐ Other
☐ Life skills ☐ Go to Prohibited Areas ☐ Violate Curfew ☐ Restitution/Court Costs

RESIDENCE/ABSCOND – Conditions 9 or 11
Date of last contact with defendant: Number of Changes of residence
Absconded to: ☐ Outside state (other than transfer) ☐ Another city within the state ☐ Did not leave area ☐ Unknown

OTHER:
Successful Completion of Program
Type of Program (mark number on left for all that apply):
Employment Residential Education Financial Alternatives
Community Religious Property Crime Other ( )
Reports to Probation Officer about (mark number on left for all that apply):
Domestic abuse Drug abuse Alcohol abuse Behavioral problems
Employment problems Not maintaining authorized residence Other: ( )



Dists «PROBDIST»
TECHNICAL PROBATION VIOLATION STUDY
DCN: «CONTROLN» NAME: «LAST1» «FIRST»
PSI: Sentence Date: «MOSENT»/«DYSENT»/«YRSENT» Offense: «VCCSENT1»
1. Adult Record: ☐ Yes ☐ No
2. No. Prior Felony Sentence Events: [«FELEVENT»]
3. Crimes Against:
Person [«FPERSON»] Property [«FPROP»] Drug [«FDRUG»] Other [«FOTHER»]
4. No. Prior Felony Convictions for Instant Offense at Conviction (For Original) [«FINSTOFF»]
5. Five Most Recent and Serious Criminal Adult Convictions Prior To Original Sentencing
1. [«PVCC1»]
2. [«PVCC2»]
3. [«PVCC3»]
4. [«PVCC4»]
5. [«PVCC5»]
6. No. Prior Probations: Completed [«COMPROB»] Revoked [«REVPROB»]
7. No of Prior Incarcerations: Under 1 Year [«INCARLT1»] 1 Year or More [«INCARGT1»]
8. No. of Prior Misdemeanour Convictions: Criminal [«MISDCR»] Criminal Traffic [«MISDTRAF»]
‡DATE OF SENTENCING FOR THE ORIGINAL OFFENSE (SRR) «ORIGDATE»

	OFFENSE DATE	ARREST DATE	ARREST VCC	ARREST COUNTS	ACTION DATE	CONVICT VCC	CONVICT COUNTS
01.							
02.							
03.							
04.							
05.							
06.							

(FY) 1997 through FY2001. The study was designed to focus on sanctioning practices under the truth-in-sentencing/no-parole system, in place since 1995. Prior to drawing the sample, the Commission excluded offenders who were on probation or other forms of community supervision for an offense committed prior to 1995, since these offenders remain parole eligible (even for incarceration time re-imposed as a result of a revocation). Next, offenders on probation or other supervision for a misdemeanor offense were excluded from the sampling process. Because of the relatively small number of cases, all violators on probation for a violent felony were selected for the study. The Commission took this step to ensure that offenders convicted of violent crimes were more fully represented in the study, as a large share of violent felons subject to truth-in-sentencing provisions remain incarcerated and have not yet been released to supervision in the community. Once a sample of 600 cases was selected, the supplemental data collection began; however, 72 cases were dropped from the study during the data collection process, as some case files did not contain sufficient information and additional parole-eligible offenders were identified. The final sample for the Commission study contained 528 cases, a sample large enough to satisfy the Commission's strict statistical standards.

The analytical approach laid out by the Commission is not unlike that used for developing Virginia's historically-based sentencing guidelines. To develop guidelines for supervision violators, judicial decision-making was conceptualized as a two-step process. In the first step of this conceptual framework, the judge decides whether or not to incarcerate the offender. The second decision is dependent upon the outcome of the first. If the first step results in a decision to incarcerate, the judge must then determine the length of the incarceration term the offender is to be given. The factors considered in making the first decision are not necessarily the same as the factors considered in the second decision. Moreover, the degree to which a factor weighs in a judge's decision making, or its importance relative to other factors, may differ for the two types of sanctioning decisions. Structuring the analysis based on this two-step framework allows researchers to examine sentencing practices in a more detailed fashion.

In the development of sentencing guidelines, the Commission employs a number of quality control techniques. Two researchers conduct analysis on each step in the judicial decision-making process, working independently of one another. This tactic reduces the likelihood of errors, spurious findings, or results biased by the style of an individual analyst. Once the independent analysis is complete, the reconciliation process begins. In the reconciliation process, the researchers team up to evaluate the differences in their independently-developed

models and conduct statistical tests to determine which model best meets the Commission's objectives. The resulting model is then converted into a guidelines worksheet. With this process complete, the results are then reviewed by another analyst as an additional error check.

There are three major statistical techniques utilized in sentencing guidelines analysis. For the decision of whether to incarcerate the offender (the incarceration/no incarceration decision), two statistical techniques known as logistic regression and discriminant analysis are used. Logistic regression is a statistical technique that can predict a choice from two options. It is used to identify factors that best discriminate between two outcomes or groups (e.g., offenders sentenced to incarceration and offenders not sentenced to incarceration). A second technique, discriminant function analysis, is applied in order to establish the relative importance, or weight, for each factor identified by the logistic regression analysis. The incarceration/no incarceration (Section A) worksheet of the probation violation sentencing guidelines was developed based on the results of this process.

For the sentence length decision, a technique called ordinary least squares (OLS) regression is applied. Ordinary least squares regression can be used to estimate outcomes that fall along a continuum, such as the sentence length decision. This technique is used to identify factors (e.g., failing to meet with the probation officer, failing a drug test, or absconding) that influence a response measure (e.g., sentence length). Results are calculated by minimizing the model's prediction error. The effect of each variable on the outcome can be easily interpreted. The results of this statistical application served as the basis for the sentence length (Section C) worksheet of the new guidelines.

Using this methodology, the Commission developed empirically-based sentencing guidelines worksheets for violators that reflect judges' historical practices. In the case of offenders whose community supervision is revoked, incarceration is the result of a judge re-imposing previously suspended jail or prison time. For the violators in this study, 73% received an active term of incarceration of some kind, while 27% received some type of non-incarceration sanction for the revocation. Factors gathered through supplemental data were utilized to develop a guidelines model capable of explaining, at least in part, determinants of judicial decisions on whether an offender should be incarcerated.

The relative importance of the significant factors in the probation violator incarceration/no incarceration model are shown in Figure 45. In the model are a variety of factors that influence a judge's decision to incarcerate or not. There are two extralegal factors in this model: circuit and the offender's race. Circuit/region in the state is by far the most influential factor in determining whether or not a violator receives an active term of incarceration. Circuit/region is more than twice as important as any other factor. This result suggests that, all other factors being

equal, there is significant disparity in sanctioning these violators across Virginia's circuits. Although less influential in this model, offender's race is also statistically significant. The Commission's study found that, holding other factors constant, white violators are more likely to be incarcerated than nonwhite offenders. Neither of the extralegal factors are included on the guidelines worksheet.

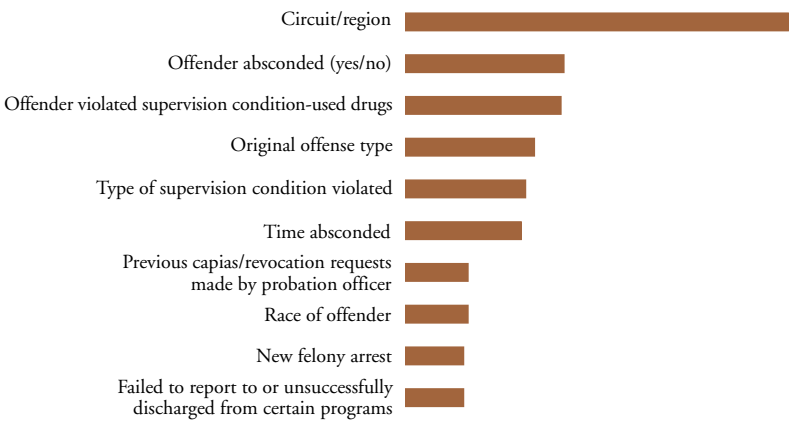
The legal factors found in the incarceration/no incarceration model reflect the offender's original offense and the offender's behavior while under supervision. The most important legal factor in explaining the incarceration decision is whether or not the offender had absconded from supervision. Offenders who absconded are much more likely to receive a jail or prison term than those who did not. Nearly as important in the incarceration decision, however, is the offender's continued use of drugs. This is followed closely by the type of the original offense (categorized as person, property, drug, felony traffic, weapon or other). Offenders originally convicted of third or fourth driving while intoxicated (DWI) offenses, habitual traffic offenses, weapons-related crimes, or any crime against a person are more likely to be incarcerated than other offenders following a violation. In addition to the supervision condition prohibiting drug use, the Commission found that offenders who violated other supervision conditions are also more likely to be sentenced to incarceration.

While absconding was found to be the most influential legal factor to explain incarceration sentences, the period of time the offender had absconded also plays a significant role. The number of capias/revocation hearing requests submitted by the probation officer to the judge during the offender's current supervision period, regardless of outcome, also increases the likelihood of incarceration. Although the guidelines target only violators that have not been convicted of a new crime during the current supervision period, a portion of the offenders had been rearrested while under supervision. The number of new arrests for felony crimes is highly correlated with the likelihood of receiving incarceration.

Finally, although less influential than other factors, an offender's failure to report to, or unsuccessful discharge from, certain programs affects judges' incarceration decisions. These include programs of a rehabilitative or punitive nature that the offender was in-

Figure 45

Relative Importance of Significant Factors in Incarceration/ No Incarceration Decisions



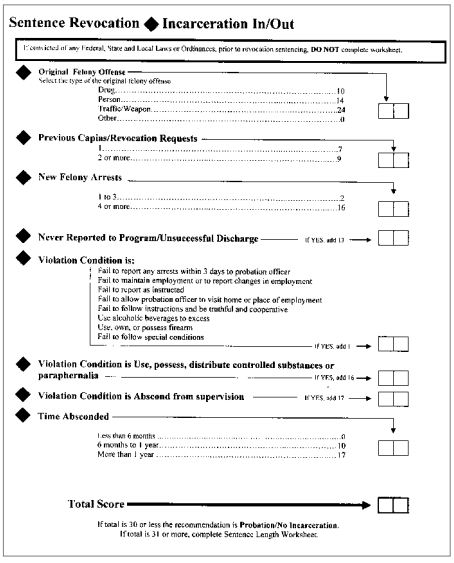
structed to attend and complete. For example, this factor encompasses employment programs, residential programs, day reporting, and community service programs. Residential programs include, but are not limited to, The Commonwealth's Detention or Diversion Center programs and youth programs. Programs that are specifically for drug, alcohol, or substance abuse are excluded from this factor.

The incarceration/no incarceration (Section A) worksheet first developed from this sentencing model appears in Figure 46. At the top of the worksheet are instructions that this worksheet should only be filled out if the violator has not been convicted of any federal, state or local law or ordinance violations prior to sentencing for the revocation. Guidelines do not apply to cases of revocation resulting from a new criminal conviction. Instructions at the bottom of the worksheet tell the preparer whether the violator is recommended for an active term of incarceration. Violators scoring 31 points or more are recommended for incarceration, while violators with a score up to 30 points are recommended for a non-incarceration sanction. The 30-point threshold selected by the Commission is tied to the actual rate of incarceration for these offenders found in the Commission's study of judicial sentencing practices. For offenders recommended for incarceration, the sentence length (Section C) worksheet must be completed.

The Commission modeled sentence length for offenders who served a period of incarceration as a result of the revocation of their community supervision. Figure 47 shows the relative importance of the significant factors

Figure 46

Probation Violation Sentencing Guidelines Incarceration/No Incarceration (Section A) Worksheet



Sentence Revocation ◆ Incarceration In/Out

If convicted of any Federal, State and Local Laws or Ordinances, prior to revocation sentencing, **DO NOT** complete worksheet.

◆ **Original Felony Offense**
Select the type of the original felony offense
Drug 10
Person 14
Traffic/Weapon 24
Other 0

◆ **Previous Capias/Revocation Requests**
1 7
2 or more 9

◆ **New Felony Arrests**
1 to 3 2
4 or more 16

◆ **Never Reported to Program/Unsuccessful Discharge** — If YES, add 13 →

◆ **Violation Condition is:**
Fail to report any arrests within 3 days to probation officer
Fail to maintain employment or to report changes in employment
Fail to report as instructed
Fail to allow probation officer to visit home or place of employment
Fail to follow instructions and be truthful and cooperative
Use alcoholic beverages to excess
Use, own, or possess firearm
Fail to follow special conditions
If YES, add 1 →

◆ **Violation Condition is Use, possess, distribute controlled substances or paraphernalia** — If YES, add 16 →

◆ **Violation Condition is Abscond from supervision** — If YES, add 17 →

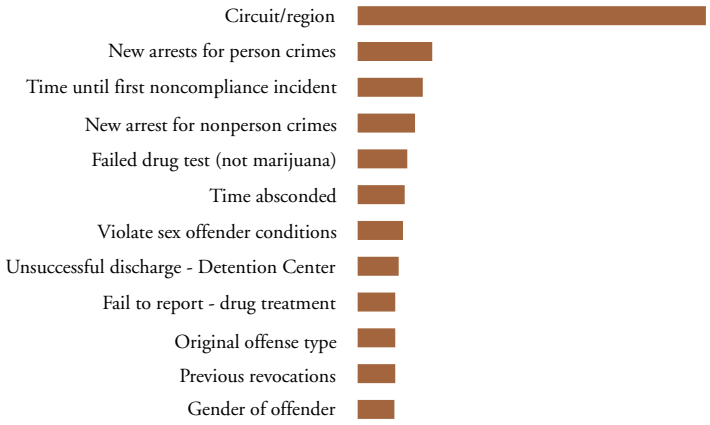
◆ **Time Absconded**
Less than 6 months 0
6 months to 1 year 10
More than 1 year 17

Total Score →

If total is 30 or less the recommendation is **Probation/No Incarceration.**
If total is 31 or more, complete Sentence Length Worksheet.

Figure 47

Relative Importance of Significant Factors in Sentence Length Decisions



in the sentence length decision. As with the incarceration/no incarceration model, numerous factors are related to judges' sentence length decisions. Like the incarceration/no incarceration decision, analysis revealed significant disparity across circuits in punishing violators. Once again, circuit/region was by far the most important determinant of sentence length decisions. Another extralegal factor, the offender's gender, was also statistically significant, although it was the least influential factor in the model. Holding other factors constant, the Commission found that, among violators sentenced to incarceration, male violators receive longer periods of incarceration than female violators.

The most influential legal factor in explaining the sentence length decision was the number of times the offender had been arrested for a crime against a person during the supervision period. The greater the number of these new arrests, the longer the period of incarceration the violator is sentenced to serve. Nearly as important in the sentence length decision is the period of time the offender was supervised before his first incident of noncompliance. A second arrest factor correlated with sentence length decisions, although to a lesser degree than the first, is number of new arrests for any crime other than a crime against a person.

As in the decision to incarcerate, the offender's continued drug use influences the sentence length decision. Holding other factors constant, violators who test positive for using a Schedule I/II or other drug receive longer sentences than violators who remain drug free. However, analysis revealed that, on average, testing positive for marijuana use did not contribute to a longer sentence. Therefore, marijuana is not included in this factor.

The period of time an offender has absconded from supervision also plays a significant role in sentence length decisions, as it did in the incarceration decision. In addition, the sentence length model contains a factor specifically relating to sex offenders supervised in the community. For sex offenders, judges often impose special conditions for supervision. The Commission's analysis revealed that when a sex offender violates a no-contact provision with the victim, enters a prohibited area such as a school, or has contact with a minor when prohibited from doing so, he is likely to receive a lengthy period of incarceration when his supervision is revoked. Failure to comply with a judge's order to complete a Detention Center program also results in longer terms of incarceration. Moreover, violators who fail to report to a drug treatment program ordered as a condition of supervision received longer terms when revoked from supervision. Additionally, sentence length is affected by the type of the original offense. In the sentence length model, violators originally convicted of a crime against a person, or a weapon-related offense, were given lengthier sentences of incarceration. The sentences associated with drug, property, DWI, and habitual traffic offenders are typically shorter. Finally, the number of prior failures of commu-

nity supervision, as measured by revocation, was found to be highly correlated with longer sentence lengths.

The legal factors in the sentence length model were assembled on the sentence length (Section C) worksheet (Figure 48). At the bottom of this worksheet, the score is totaled and the preparer is instructed to refer to the sentence length (Section C) recommendation table (Figure 49). The first column contains the score ranges and the second column presents the recommended sentence range associated with each score. A sentence recommendation of 12 months or less is considered a local-responsible (jail) sentence; a sentence recommendation of one year or more is defined as a state-responsible (prison) sentence. The Commission selected ranges of punishment that reflect historical patterns of sentencing for violators who have not been convicted of a new crime.

The Commission completed this phase of the study in 2003. After careful consideration of the findings, the Commission concluded that the probation violation sentencing guidelines could be a useful tool for circuit court judges in the Commonwealth. In its 2003 *Annual Report*, the Commission proposed statewide implementation of the new guidelines, and the 2004 General Assembly approved the Commission's recommendation. Statewide use began on July 1, 2004.

Figure 48

Probation Violation Sentencing Guidelines Sentence Length (Section C) Worksheet

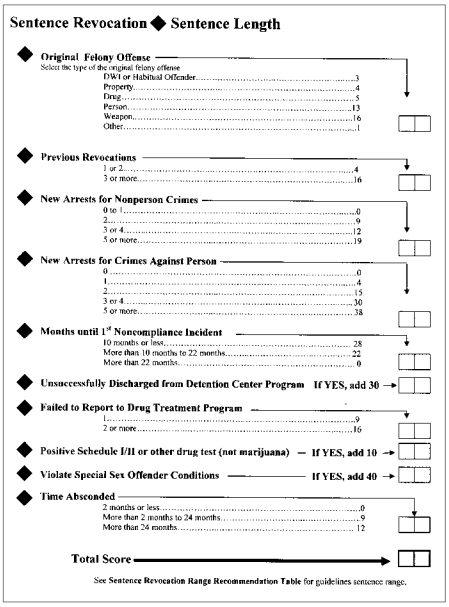


Figure 49

Sentence Length (Section C) Recommendation Table

Score	Recommended Sentence Range
Up to 33	1 Day up to 3 Months
34 - 41	More than 3 Months up to 6 Months
42 - 43	More than 6 Months up to 12 Months
44 - 48	1 Year up to 1 Year 3 Months
49 - 51	More than 1 Year 3 Months up to 1 Year 6 Months
52 - 55	More than 1 Year 6 Months up to 2 Years
56 - 62	More than 2 Years up to 3 Years
63 - 66	More than 3 Years up to 4 Years
67 - 74	More than 4 Years up to 5 Years
75 – 85	More than 5 Years up to 6 Years
86 +	More than 6 Years

Phase 2: Probation Violator Risk Assessment

With Phase 1 complete, the Commission in 2004 turned to Phase 2: probation violator risk assessment. Specifically, the General Assembly requested that "(t)he Commission shall also determine recidivism rates and patterns for these offenders and evaluate the feasibility of integrating a risk assessment instrument into these discretionary sentencing guidelines."

Criminal risk assessment estimates an individual's likelihood of repeat criminal behavior and classifies offenders in terms of their relative risk of such behavior. In practice, risk assessment is typically an informal process in the criminal justice system (e.g., prosecutors when charging, judges at sentencing, probation officers in developing supervision plans). Empirically-based risk assessment, however, is a formal process using knowledge gained through observation of actual behavior within groups of individuals. In Virginia, risk assessment has become an increasingly formal process. At sentencing, for example, judges are provided with a risk assessment for offenders convicted of sexual assault, rape, larceny, fraud or drug offenses. These risk assessment instruments were developed by the Commission and implemented as part of the statewide guidelines system in 2001 (rape and sexual assault) and 2002 (drug, fraud and larceny). Other forms of risk assessment instruments are also used by the Department of Corrections' Division of Community Corrections, the Department of Juvenile Justice, and the Parole Board.

Effectively, risk assessment means developing profiles or composites based on overall group outcomes. Groups are defined by having a number of factors in common that are statistically relevant to predicting the likelihood of repeat offending. Those groups exhibiting a high degree of re-offending are labeled high risk. This methodological approach to studying criminal behavior is an outgrowth from life-table analysis used by demographers and actuaries and the approach has been used by many scientific disciplines.

A useful analogy can be drawn from medicine. In medical studies, individuals grouped by specific characteristics are studied in an attempt to identify the correlates of the development or progression of certain diseases. The risk profiles for medical purposes, however, do not always fit every individual. For example, research demonstrates a strong statistical link between smoking and the development of lung cancer. Nonetheless, some non-smokers develop lung cancer. Similarly, not every offender that fits the lower-risk profile will refrain from criminal activity. No risk assessment research can ever predict with 100% accuracy. The goal, rather, is to produce an instrument that is broadly accurate and provides useful additional infor-

mation to decision makers. The standard used to gauge the success of risk classification is not perfect prediction; the standard should be the degree to which decisions made with a risk assessment tool are improved compared to decisions made without the tool.

Offender recidivism, however, can be measured in several ways. For instance, recidivism can be defined as any new offense, a new felony offense, a new offense for a specific type of crime (e.g., a new sex offense), or any number of other behaviors. The true rate at which offenders commit new crimes will likely never be known, since not all crimes come to the attention of the criminal justice system. Recidivism, therefore, is nearly always measured in terms of a criminal justice response to an act that has been detected by law enforcement. Probation revocation, re-arrest, reconviction and recommitment to prison are all examples of recidivism measures.

In risk assessment research, the characteristics, criminal histories and patterns of recidivism among offenders are carefully analyzed. Factors proven statistically significant (i.e., those with known level of success) in predicting recidivism can be assembled on a risk assessment worksheet, with scores determined by the relative importance of the factors in the statistical model. The instrument then can be applied to an individual offender to assess his or her relative risk of future criminality. Behavior of the individual is not predicted. Rather, this type of statistical risk tool predicts an individual's membership in a subgroup that is correlated with future offending. Individual factors do not place an offender in a high-risk group. Instead, the combination of certain factors determines the risk group of the offenders.

To investigate rates and patterns of recidivism among violators returned to court for reasons other than a new criminal conviction, the Commission utilized data collected for the development of historically-based guidelines in Phase 1. To ensure that sufficient cases would be available for the subsequent analyses, the Commission added 420 cases to its original sample of probation violation cases. For these 420 new cases, Commission staff reviewed probation files to collect supplemental information on the offender's behavior while under supervision, as was done for the cases in the Commission's original sample. The data collection process was completed for 302 of the 420 new cases. As with the Phase 1 data collection, some cases were excluded because there was not sufficient detail available, the offender was found to be parole-eligible, the case was the result of a revocation of the offender's first offender status (under § 18.2-251), the violator was convicted of a new crime, the original offense was a misdemeanor, or the offender was not found by the court to be in violation of supervision. For these reasons, 118 cases were dropped from the study during the Phase 2 supplemental data collection process. The resulting number of completed cases was well within the Commission's anticipated level of attrition. Combining Phase 1 and Phase 2 data resulted in 830 cases for the risk assessment phase of the study.

The Commission applied a "reweighting" process to ensure that the study sample reflected the entire population of violators, not cited for a new conviction, whose supervision was revoked.

In risk assessment phase, criminal history "rap sheets" were used to identify criminal activity that occurred subsequent to the probation violation, during the study's follow-up period. Arrests and convictions were recorded from rap sheets for all of the 830 cases in the recidivism analysis.

The Commission carefully considered how recidivism and the length of follow-up should be defined for the risk assessment study requested. A variety of recidivism measures and follow-up periods have been used in criminological studies of recidivism. Indeed, in the Commission's own risk assessment work, both the measure of recidivism and the length of follow-up have been tailored to specific goals. In the nonviolent risk assessment studies, the original legislative goal was to divert up to 25% of nonviolent offenders who otherwise would have been sentenced to prison. The Commission defined recidivism as any new arrest leading to a conviction within three years of release from confinement. By contrast, for the sex-offender risk assessment study, the goal was to identify those most likely to be sexual predators and to incapacitate those offenders for a substantial length of time. Recidivism, then, was defined as a new arrest for a sex crime or other crime against a person (misdemeanor or felony) with a minimum follow-up period of five years. Selection of this measure reflected the Commission's concerns regarding public safety, the difficulties encountered in prosecuting and obtaining a conviction in sex offense cases, and the longer periods during which sex offenders tend to recidivate.

In the current study, the goal is, again, to identify low-risk offenders who could be safely recommended for sanctions other than traditional incarceration in jail or prison. Persons coming before a judge for a revocation hearing have demonstrated problems in adjusting to the conditions of supervision in the community. Therefore, the Commission elected to measure recidivism as an arrest for a new crime. Other measures, such as reconviction, were also collected. For this study, the Commission selected a minimum follow-up period of 18 months. A concern when using a follow-up period as short as 18 months is whether the time period is long enough to capture the recidivist behavior. The follow-up period was of particular concern because researchers often utilize a follow-up period longer than 18 months. The time period was selected as a compromise between the desire for a longer follow-up period, if possible, and limitations in the availability of data, particularly for violent offenders sentenced under truth-in-sentencing provisions (who did not begin to appear in the Commission's Community Corrections Revocation database in significant numbers until the end of the study period, thus restricting the follow-up period). However, data from Phase 1 of this project indicate that the majority of offenders who violate do so within 18 months of release to the community.

Recidivism Analysis

With supplemental sample selection and data collection complete, the Commission began its analysis. The analytical approach used by the Commission is much like that used for developing Virginia's nonviolent offender risk assessment instrument, implemented statewide in 2002. To develop a risk assessment instrument for supervision violators not convicted of a new crime, the Commission utilized the probation violation sentencing guidelines developed in Phase 1 to determine which violators would be recommended for active incarceration in prison or jail. Only cases recommended for incarceration by the guidelines were analyzed for risk assessment.

The same quality control process applied in Phase 1 was utilized in Phase 2 of the project. As in Phase 1, two researchers worked independently of one another conducting analyses using competing analytical methods. This assures that the statistical method that most effectively identifies risk will be the basis of the risk assessment instrument. Once the independent analysis is finished, a reconciliation and comparison process is completed.

Multiple statistical techniques were applied to examine patterns of recidivism. Two of these were also utilized in Phase 1 and described earlier in this chapter. The first, logistic regression, was utilized in Phase 1 to model the factors most correlated with judges' incarceration decisions. In Phase 2, this technique, which identifies factors that best discriminate between two outcomes or groups, was used to differentiate recidivists from non-recidivists. Logistic regression requires that the follow-up period be the same for all offenders in the study. Therefore, only cases that had a minimum of an 18-month follow-up period could be included in this type of analysis. A total of 637 violators, who were recommended for incarceration on the guidelines and had a full 18 months of follow-up after release, were used for logistic regression analysis. Of the cases analyzed using this method, 39% of the offenders had been arrested for a new crime within 18 months of release for their probation revocation (31% had a new crime arrest within 18 months that resulted in a conviction).

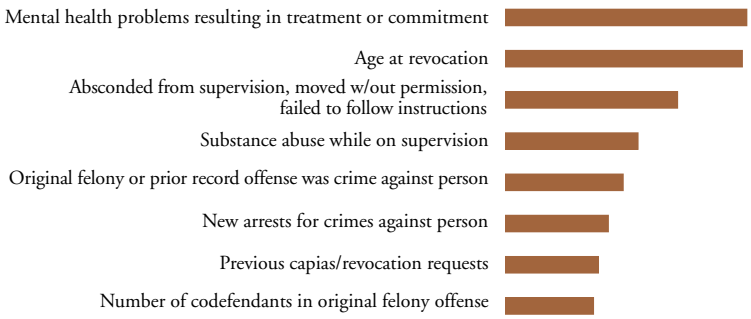
When using logistic regression, an analyst can easily determine which factors are statistically significant. Interpreting the effect of each factor relative to the other factors in the model, however, is complex. This is because logistic regression results are presented in terms of the log of the odds of a particular outcome (e.g., the odds of winning the state lottery). Thus, the drawback of logistic regression is that it cannot determine the relative importance, or weight, of the factors in the model, which is necessary to convert the model to scores on a guidelines worksheet. Logistic regression, therefore, is used in conjunction with discriminant function analysis. The discriminant function procedure discriminates between groups by group-

ing cases in such a way that the differences between the groups are maximized while the differences within the outcome groups are minimized. In terms of categorizing cases by type of outcome, models generated through logistic regression and discriminant function analysis provide strikingly similar results. Using the Commission's approach, logistic regression is used to identify those factors associated with recidivists. Then, the discriminant function procedure is applied to those factors to establish the relative importance, or weight, for each factor in the sentencing model.

The combined analytical results from logistic regression and discriminant function analysis were used to create a risk assessment model. This result was compared to a second model developed using another statistical technique called survival analysis. Survival analysis assesses the characteristics of individuals after various time intervals.

Figure 50

Relative Importance of Significant Factors in Probation Violator Recidivism



For this study, survival analysis was utilized to determine which factors were associated with recidivists following release into the community. Because survival analysis allows for varying periods of follow-up time, more cases (here 755) could be included in the analysis using this technique. Of those analyzed using survival analysis, 51% had a new crime arrest and 37% had a new crime arrest resulting in a conviction.

In the reconciliation process, the researchers team up to evaluate the differences in their independently-developed models and conduct statistical tests to determine the best model. The resulting model is then converted into a risk assessment worksheet. Once complete, the results are then reviewed by another analyst as an additional error check.

The first type of analysis, logistic regression combined with discriminant function analysis, proved to be the most accurate in predicting recidivism among supervision violators. This model correctly identified 74% of the offenders who, in fact, remained arrest-free when they returned to supervision following the violation.

Analysis revealed eight factors to be useful in predicting recidivism among this population. The relative importance of the significant factors in the violator risk assessment is shown in Figure 50.

The Commission's examination revealed that violators whose mental health problems have resulted in some type of mental health treatment or commitment in the past did not perform as well as other offenders when they returned to community supervision. In the Commission's analysis, this factor was found to be the most correlated with subsequent supervision failure. These offenders demonstrate a significantly higher level of risk of recidivism, perhaps due to an inability to recognize or address ongoing mental health issues while in the community. Offenders who had been involuntarily committed for mental health treatment sometime in the past were the least likely to complete supervision following a violation. Offenders who had undergone outpatient treatment only were at somewhat less risk for recidivism. Offenders who, in the past, had committed themselves voluntarily for mental health treatment recidivated at somewhat lower rates than other offenders with a history of mental health treatment.

Traditionally in criminological research on recidivism, younger offenders are at higher risk of repeat offending. This study of Virginia's probation violators produced similar results. Here, the offender's age at the time of the revocation hearing was the second most important factor in predicting recidivism. The Commission found that violators under the age of 30 recidivated at the highest rates relative to other offenders, while violators over the age of 48 had the lowest rates of recidivism.

Offenders who absconded from supervision, those who changed residences without informing the probation officer, and those who were returned to court for failing to follow the instructions of the probation officer were more likely to be rearrested than other offenders, based on the Commission's analysis. Although not as a strong a predictor as mental health problems and age, this factor links certain violation behaviors, like absconding, with the probability of future arrest for a new crime.

The Commission found that probationers who abuse alcohol or use drugs while under supervision are less successful, and more likely to be rearrested, once they return to the community following a probation violation or revocation. Violators who either admitted to, or had a positive drug screen for, using cocaine exhibited the highest recidivism rates among substance abusers. Use of drugs other than cocaine put the offender at an elevated risk for rearrest, but the recidivism rates were lower for these offenders than for cocaine-users. Offenders with documented alcohol abuse while under supervision also recidivated at higher rates than offenders who were not substance abusers. The identification of the offender's alcohol abuse may be based on incidents reported by law enforcement, the family, or employers, observations of the probation officer, positive tests or admission by the offender himself.

The Commission's analysis revealed that offenders who were on probation for a felony person crime and those who had a prior conviction for a crime against the person were more likely to recidivate than other offenders in the study. Similarly, offenders who had been arrested for, but not convicted of, a new person crime while under supervision went on to recidivate at higher rates than other offenders when returned to the community following the violation hearing. Only arrests are considered in this factor because violators who are convicted of new crimes while on supervision are not eligible for probation violation guidelines or risk assessment evaluation with the proposed tool.

The number of capias/revocation hearing requests previously submitted by the probation officer to the judge during the supervision period also proved to be indicative of recidivism risk. A prior capias/revocation request suggests the offender has had ongoing problems adjusting to supervision. Violators with two or more prior capias/revocation requests filed against them were considerably more likely to be rearrested upon return to supervision than other offenders.

Offenders whose original felony offense or offenses involved one or more codefendants recidivated at higher rates in the Commission's study. That the number of codefendants is associated with risk may relate to the offender's level of social connection with other criminals. As most offenders return to the same community where they were originally convicted, the presence of this factor may indicate that an offender, convicted with others, has an association with a criminal network in that community. According to the study findings, such a violator is at greater risk to return to criminal activity when he resumes his community supervision.

With the reform legislation, existing sanctioning options were expanded and new programs created to develop a network of local and state community corrections programs.

Proposed Risk Assessment Instrument

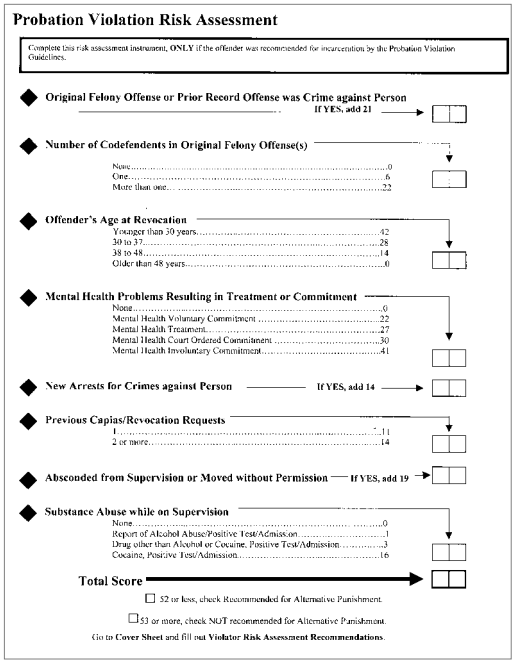
The factors proven statistically significant in predicting recidivism were assembled on a risk assessment worksheet, with scores determined by the relative importance of the factors in the statistical model. After careful consideration, the Commission adopted an adjustment to the risk assessment scale developed from the statistical model. One factor, which targets offenders who absconded from supervision, those who moved without informing the probation officer, and those who were returned to court for failing to follow the instructions of the probation officer, was modified. In the original statistical model, this factor included offenders returned to court for failing to follow instructions of the probation officer. Due to concern that the term "failing to follow instructions" is ambiguous, difficult to define, and may lead to subjective and inconsistent scoring, the Commission elected to remove this element from the factor. With this change, only offenders who absconded from supervision or moved without informing their supervising officer will be scored on this factor. All of the factors in the risk assessment model remain statistically significant with this adjustment. The probation violator risk assessment instrument approved by the Commission is shown in Figure 51.

In combination, these factors are used to calculate a score that is associated with risk of recidivism. Offenders with low scores share characteristics with offenders from the study sample who, proportionately, recidivated less often than those with higher scores. In this way, the instrument is predictive of offender risk. Behavior of the individual is not predicted. Rather, this type of statistical risk tool predicts an individual's membership in a subgroup that is correlated with future offending.

At the top of the worksheet are instructions that this worksheet should be filled out only if the violator has been recommended for incarceration on the probation violation sentencing guidelines. Risk assessment does not apply to offenders who were recommended for a non-incarceration sanction. Instructions at the bottom of the

Figure 51

Proposed Violator Risk Assessment Instrument



Probation Violation Risk Assessment

Complete this risk assessment instrument, **ONLY** if the offender was recommended for incarceration by the Probation Violation Guidelines.

- **Original Felony Offense or Prior Record Offense was Crime against Person** — If YES, add 21 → ☐☐
- **Number of Codefendents in Original Felony Offense(s)** → ☐☐
  - None……0
  - One……6
  - More than one……22
- **Offender's Age at Revocation** → ☐☐
  - Younger than 30 years……42
  - 30 to 37……28
  - 38 to 48……14
  - Older than 48 years……0
- **Mental Health Problems Resulting in Treatment or Commitment** → ☐☐
  - None……0
  - Mental Health Voluntary Commitment……22
  - Mental Health Treatment……27
  - Mental Health Court Ordered Commitment……30
  - Mental Health Involuntary Commitment……41
- **New Arrests for Crimes against Person** — If YES, add 14 → ☐☐
- **Previous Capias/Revocation Requests** → ☐☐
  - 1……11
  - 2 or more……14
- **Absconded from Supervision or Moved without Permission** — If YES, add 19 → ☐☐
- **Substance Abuse while on Supervision** → ☐☐
  - None……0
  - Report of Alcohol Abuse/Positive Test/Admission……1
  - Drug other than Alcohol or Cocaine, Positive Test/Admission……3
  - Cocaine, Positive Test/Admission……16

Total Score → ☐☐

☐ 52 or less, check Recommended for Alternative Punishment.

☐ 53 or more, check NOT recommended for Alternative Punishment.

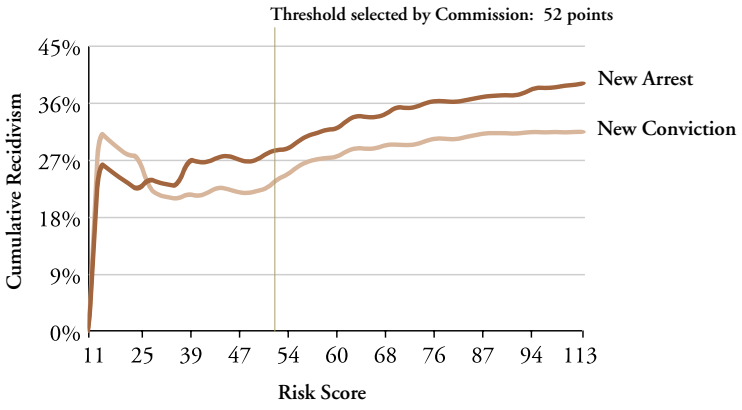
Go to **Cover Sheet** and fill out **Violator Risk Assessment Recommendations**.

worksheet tell the preparer whether the violator is recommended for an alternative sanction based on the risk assessment score.

The Commission next considered the risk assessment threshold. This is the maximum number of points an offender can score and be recommended for an alternative sanction option. For the nonviolent offender risk assessment initiative, the General Assembly directed the Commission to recommend up to 25% of nonviolent property and drug offenders for alternative punishment. For probation violator risk assessment, no target figure was mandated by the legislature. In making the decision about recommending violators for alternative sanctions, the Commission considered the levels of recidivism associated across a wide range of risk scores.

Figure 52

Cumulative Recidivism Rate by Risk Assessment Score



The Commission found that at the lower point levels, violators are somewhat homogeneous; that is, there are only slight variations in their levels of recidivism when returned to the community. However, applying the proposed risk assessment instrument, there is a point at which recidivism rates begin to rise steadily as the risk score increases (Figure 52). The Commission concluded that offenders scoring 53 points or more on the proposed risk scale are, overall, at greater risk of recidivism and, therefore, inappropriate candidates for alternative sanctions in lieu of incarceration in prison or jail. The Commission placed the threshold, or maximum score, at 52 points. Under the Commission's proposal, violators scoring 52 points or less on the risk assessment instrument will be recommended for an alternative sanction instead of the prison or jail confinement recommended by the probation violation sentencing guidelines. For offenders scoring 53 points or more, the recommendation for incarceration provided by the probation violation sentencing guidelines remains unchanged.

Applying the threshold chosen by the Commission, 56% of violators (returned to court for reasons other than a new conviction) will be recommended for alternative punishment options instead of a traditional prison or jail term. According to the Commission's data, less than 17% of the offenders recommended for an alternative sanction by the risk instrument were identified as recidivists. In contrast, the recidivism rate was nearly 44% among offenders not recommended for an alternative sanction by the risk tool.

Proposals for Integrating Probation Violator Risk Assessment

Discussion of the probation violator risk assessment study was a significant component of the Commission's agenda during 2004. The Commission's objective was to develop a reliable and valid predictive scale based on independent empirical research and to determine if the resulting instrument could be a useful tool for judges in sentencing violators who come before the circuit court. The Commission concluded that the risk assessment instrument would be a useful tool for the judiciary in Virginia. Therefore, the Commission approved the risk assessment instrument, with the single adjustment discussed above, and adopted a proposal to integrate the tool into the new probation violation sentencing guidelines. This proposal is described in detail in the Recommendation section of this report (Recommendation 2).

As noted above, a significant share of the violators who will be evaluated under the proposed risk assessment instrument will likely be deemed to be a low risk to public safety. Many of the probation violators will be identified as being a good risk for placement in a sanction alternative other than a traditional jail or prison. Unfortunately, it is the feeling of the Commission that judges in Virginia do not have an adequate range of alternative sanctions available to them to address this particular offender population. There is no question that the probation violators need to be held accountable for their misconduct. However, the Commission believes that public safety would not be compromised if sentencing options, much less costly than traditional incarceration, were more consistently applied to some of these felons.

The efficient utilization of our limited correctional resources is part of the puzzle that contributes to Virginia's ongoing successes with the truth-in-sentencing reforms adopted back in 1994. Virginia's sentencing reforms were carefully crafted with consideration of current and planned prison capacity and with an eye towards using that capacity to house the state's most violent felons. Virginia abolished parole and adopted new sentencing guidelines ten years ago. Felons today are, on average, serving over 90% of their incarceration sentences and violent offenders, in particular, are being incapacitated in prison for terms dramatically longer than any ever recorded in Virginia history. Consequently, violent felons are queuing up in our prison system and now comprise a much larger share of the incarcerated population than prior to the adoption of the reforms. Virginia's crime rate has been dropping over the last decade due, in part, to the incapacitation effect of holding certain violence-prone felons in prison longer.

In order to ensure that we continue to prioritize limited prison resources for incapacitating our most dangerous offenders, it is critically important to make available other sanctioning options for punishing the lower risk probation violators discussed in this chapter. In adopting the landmark 1994 no-parole legislation, the General Assembly recognized the long-term need to prioritize correctional resources and directed the Commission to develop a risk assessment instrument for those convicted of nonviolent felonies and identify if 25% of otherwise incarceration-bound offenders could be safely redirected to alternative punishment options. Today, risk assessment for nonviolent offenders is integrated into the sentencing guidelines system and is proving to be very successful in achieving its goals. The success of the risk assessment initiative is tied to many factors, among which is the availability of intermediate sentencing options for offenders identified to be good candidates. In order for the new proposed risk assessment instrument for probation violators to be equally successful, new sentencing alternatives for this specific population of felons will need to be created, funded and made available to the circuit court judges.

In adopting the landmark 1994 no-parole legislation, the General Assembly recognized the long-term need to prioritize correctional resources. The success of the risk assessment initiative is tied to many factors, among which is the availability of intermediate sentencing options.

5 Methamphetamine Crime in Virginia

Introduction

A derivative of amphetamine, methamphetamine is a potent psychostimulant that affects the central nervous system. Unlike other drugs such as cocaine that are plant derived, methamphetamine is a man-made drug that can be produced from a few over-the-counter and low-cost ingredients. Methamphetamine can be ingested orally, snorted, smoked or injected intravenously. In its powder form, methamphetamine resembles granulated crystals. Larger crystalline pieces that are clear in color are often known as "ice." Because of the potential for physical and psychological abuse and dependency and its limited medical applications, methamphetamine is listed as a Schedule II narcotic under the Controlled Substances Act, Title II, of the Comprehensive Drug Abuse Prevention and Control Act of 1970. In the United States, the use of methamphetamine is most prevalent in the West but its popularity has spread to many areas in the Midwest as well. Pockets in the Southeast also have reported rising numbers of methamphetamine users, such as in Atlanta and Miami (Community Epidemiology Work Group 2003).

Concerned over the potential impact of methamphetamine-related crime in the Commonwealth, the 2001 Virginia General Assembly directed the Virginia Criminal Sentencing Commission to examine the state's felony sentencing guidelines for methamphetamine offenses (Chapters 352 and 375 of *The Acts of the Assembly 2001*). The legislation specifically requested the Commission to focus on the quantity of methamphetamine seized in these cases.

In its 2001 study, the Commission found that the number of cases involving methamphetamine had been increasing in Virginia since the early 1990s but remained a small fraction of the drug cases in the state and federal courts in the Commonwealth. The Commission's analysis revealed sentencing in the state's circuit courts was not driven primarily by the quantity of methamphetamine but rather by the offender's prior criminal record, particularly if the offender had a prior conviction for a violent offense (*Annual Report 2001*). The Commission carefully examined the sentencing guidelines, including the factors that account for the offender's criminal record and the built-in enhancements that dramatically increase the sentence recommendation for offenders with a criminal history of violent offenses. In addition, the Commission considered the prevalence of methamphetamine in Virginia, the existing statutory penalties and the current mandatory pen-

Unlike other drugs such as cocaine that are plant derived, methamphetamine is a man-made drug that can be produced from a few over-the-counter and low-cost ingredients.

alties applicable in methamphetamine cases. With little evidence to suggest that judges were basing sentences on the amount of methamphetamine seized, the Commission concluded that Virginia's historically-based sentencing guidelines should not be adjusted to account for drug quantity in methamphetamine cases. Therefore, the Commission did not make any recommendations for revisions to the guidelines as a result of the 2001 study.

For many legislators and other public officials in Virginia, methamphetamine crime has remained an issue of concern in the years since the Commission's last study. In three of the last four years, the General Assembly has considered, although not adopted, legislation to revise the sentencing guidelines for methamphetamine cases involving the largest quantities. In response to this continued concern over methamphetamine, the Commission this year conducted a second detailed study on this specific drug. This chapter of the Commission's 2004 *Annual Report* presents a wide array of information on methamphetamine. It provides the most recent data available on use of the drug, lab seizures, arrests and convictions in the state. Also included is a summary of legislation adopted in other states related to methamphetamine, its manufacture and distribution. In conjunction with this newest study, the Commission once again analyzed the impact of drug quantity on sentencing outcome, and the results are documented later in the chapter. Finally, the Commission's deliberations on this matter are described.

Drug Use in Virginia

According to a national survey, illegal use of controlled substances in Virginia is slightly lower than the national average. Each year, the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA) conducts the National Household Survey on Drug Abuse. Begun in 1971, it provides information on the use of illicit drugs, alcohol and tobacco by the civilian, non-institutionalized population. Over a 12-month period, more than 70,000 people age 12 and older from every state participate in the survey. Based on 2001 survey results, 5.5% of Virginians used an illicit drug during the month preceding the survey, compared to 6.7% of all U.S. residents (Wright 2003). In Virginia, 2.6% had recently used a drug other than marijuana, while 2.9% of all Americans had.

Recent data on public drug treatment services in Virginia indicate that these services are sought most often for marijuana, cocaine and heroin use. The Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS) compiles data from Community Services Boards (CSBs) around the Commonwealth. Community Services Boards are agencies established and administered by localities. The local CSB

serves as the single point of entry into publicly-funded mental health, mental retardation and substance abuse services. CSBs are key operational partners with DMHMRSAS. DMHMRSAS contracts with, funds, monitors, licenses, regulates and provides consultation to local CSBs. A portion of CSB clients are referred from the criminal justice system, as many offenders are ordered by the court to undergo a substance abuse evaluation or complete a treatment program. Of the more than 36,000 individuals seeking treatment for substance abuse (excluding alcohol) from CSBs in 2003, nearly 9,700 reported marijuana as the primary drug used (Department of Mental Health, Mental Retardation and Substance Abuse Services 2004). More than 8,000 treatment seekers cited cocaine use, while another 4,500 indicated that use of heroin was the reason they were entering treatment. During the same year, 330 treatment seekers reported methamphetamine as the primary drug of choice.

Figure 53

Virginia Community Services Board (CSB) Substance Abuse Service Consumers by Primary Drug Type, 2003

Drug Type	Number
Marijuana	9,671
Cocaine/crack	8,048
Heroin	4,512
Non-prescription methadone	92
Other opiates/synthetics	1,503
PCP	137
Other hallucinogens	93
Methamphetamine	330
Other amphetamines	81
Other stimulants	75
Benzodiazepines	246
Other tranquilizers	23
Barbituates	28
Other sedatives/hypnotics	85
Inhalants	52
Over-the-counter	58
Unknown/None Reported	11,283
Total	**36317**

Source: www.dmhmrsas.state.va.us/documents/OSAS-UnduplicatedConsumersbyDrug.htm

Methamphetamine Use Among Arrestees

National data reveal that methamphetamine use among arrested persons remains highest in the western United States. Eastern states continue to report low levels of methamphetamine use among arrestees. The Arrestee Drug Abuse Monitoring (ADAM) program, sponsored by the National Institute of Justice (NIJ), is designed to measure drug use among the arrested population. Each year, this program assesses the prevalence of drug use among a representative sample of persons at the time of arrest. ADAM reports drug use and other characteristics of arrestees in 39 U.S. cities through interviews and drug testing in holding facilities. There are two fundamental components of the ADAM program: a questionnaire administered to the arrestee by a trained interviewer and drug testing collected through a urine specimen. All ADAM sites test for a core panel of five drugs (cocaine, marijuana, opiates, methamphetamine and phencyclidine (PCP)) selected by the National Institute on Drug Abuse. No locality in Virginia currently participates in the ADAM program. Several eastern cities are ADAM sites, however. These are: Albany, Atlanta, Charlotte, Fort Lauderdale, Miami, New York City, Philadelphia, and Washington DC. Additional southern sites include Birmingham and New Orleans.

Methamphetamine prevalence varies widely among ADAM sites. Perhaps more than any other drug, it shows clear regional variation. Among adult male arrestees, methamphetamine use is concentrated mainly in the western and southwestern United States (Figure 54). In 2003, 15 of the 21 western and southwestern ADAM sites reported double-digit rates of positive methamphetamine use among adult male arrestees. In fact, every western ADAM site except Anchorage and Seattle recorded methamphetamine rates of 25% or more. In Honolulu, 40% of adult males arrested tested positive for the drug.

In the Midwest, the 2003 results are mixed. In four of the seven Midwest cities participating in the ADAM program, methamphetamine use among arrested men was less than 4%. In the other three Midwest localities (Des Moines, Omaha and Woodbury, Iowa), methamphetamine use was substantially higher, with positive tests ranging from 14% to 28%.

In the Northeast, Southeast and South, a total of 11 sites, methamphetamine use among arrested males remains low. Seven of these sites reported less than 1% positive methamphetamine results. The sites with higher methamphetamine positive tests (Atlanta, Tampa, Birmingham and New Orleans) reported rates between 1% and 3%. These rates, while the highest in the east, were significantly lower than those reported in the western and southwestern regions.

Figure 54

Arrestee Drug Abuse Monitoring (ADAM) Program 2003 Test Results for Adult Male Arrestees

	Percent of Arrestees Testing Positive for:				
	Any of 5 Drugs*	Cocaine	Marijuana	Opiates	Methamphetamine
Northeast					
Albany, NY	72.3%	34.5%	53.7%	4.3%	0.0%
Boston, MA	80.3	31.8	51.3	17.3	0.0
New York, NY	69.7	35.7	43.1	15.0	0.0
Philadelphia, PA	67.0	30.3	45.8	11.5	0.6
Washington, DC	65.6	26.5	37.4	9.8	0.7
Southeast					
Atlanta, GA	72.4	49.8	41.8	3.0	2.0
Charlotte, NC	65.9	35.2	46.9	2.0	0.6
Miami, FL	63.2	47.1	40.7	2.5	0.4
Tampa, FL	60.1	30.1	45.2	3.8	1.6
South					
Birmingham, AL	66.1	34.3	44.6	8.3	1.2
New Orleans, LA	78.4	47.6	50.8	14.0	2.6
Midwest					
Chicago, IL	86.0	50.6	53.2	24.9	1.4
Cleveland, OH	74.5	39.0	48.9	5.4	0.3
Des Moines, IA	68.7	12.1	48.7	2.8	27.9
Indianapolis, IN	64.6	35.3	44.8	5.1	1.9
Minneapolis, MN	64.7	28.4	48.3	5.8	3.3
Omaha, NE	71.0	20.5	50.8	5.0	21.4
Woodbury, IA	41.6	2.6	34.1	1.6	14.3
Southwest					
Albuquerque, NM	66.6	35.0	41.6	11.2	10.1
Dallas, TX	62.3	32.7	39.1	6.9	5.8
Denver, CO	66.4	38.3	42.3	6.8	4.7
Houston, TX	61.7	22.6	47.5	5.7	2.1
Las Vegas, NV	65.3	21.9	34.4	6.4	28.6
Oklahoma City, OK	70.9	24.6	54.9	3.0	12.3
Phoenix, AZ	74.1	23.4	40.9	4.4	38.3
Rio Arriba, NM	77.2	37.8	50.0	28.4	2.8
Salt Lake City, UT	56.2	15.4	31.7	7.7	25.6
San Antonio, TX	59.6	30.5	41.9	9.1	3.5
Tucson, AZ	73.3	42.5	44.1	4.2	16.0
Tulsa, OK	69.8	20.4	51.6	5.0	17.4
West					
Anchorage, AK	66.3	25.4	52.0	7.4	0.7
Honolulu, HI	62.9	11.6	30.9	4.6	40.3
Los Angeles, CA	68.6	23.5	40.7	2.0	28.7
Portland, OR	71.5	29.7	38.4	15.0	25.4
Sacramento, CA	78.9	21.6	49.2	6.9	37.6
San Diego, CA	66.8	10.3	41.0	5.1	36.2
San Jose, CA	62.8	12.9	35.4	3.1	36.9
Seattle, WA	67.3	36.6	37.2	6.8	12.1
Spokane, WA	69.5	14.8	43.6	8.4	32.1

* The five drugs are cocaine, marijuana, opiates, methamphetamine and phencyclidine (PCP).
Source: *Drug and Alcohol Use and Related Matters among Arrestees*, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice (2003)

Although methamphetamine use continued to demonstrate considerable regional variation in 2003, overall rates of drug use did not present regional differences. The rate at which arrested men tested positive for any of the five core drugs varied from locality to locality, from 56% in Salt Lake City to 86% in Chicago (Woodbury, Iowa, reported a rate of less than 42%, but this was a significant departure from all other sites). Despite these city-to-city fluctuations, there were no discernable regional patterns in overall drug use among adult male arrestees.

Other drugs were far more popular than methamphetamine in most sites. Overall, in 2003, cocaine was more prevalent than methamphetamine in 26 of the 39 ADAM testing areas, including all localities in the Northeast, Southeast and South. In these areas, use of opiates, such as heroin, was also higher among arrested men than methamphetamine. In all but two sites, marijuana was the most popular drug used. The ADAM system continues to show that, in the eastern United States, use of methamphetamine among the arrested population remains low.

Use of Methamphetamine Among Felony Offenders in Virginia

While drug use is high among offenders convicted of felony crimes in Virginia, few felons admit to using methamphetamine or any other amphetamine drug. For most felony offenders sentenced in Virginia's circuit courts, the Department of Corrections' Community Corrections division is required to prepare a pre- or post-sentence investigation (PSI) report. The report contains a wealth of information about the defendant and the crime. The PSI captures information regarding the crimes for which the offender is convicted, the circumstances of the crime (e.g., use of a weapon, victim injury, the offender's role in the offense, etc.), his prior criminal record, family and marital information, education, employment history, mental health treatment experiences, as well as history of alcohol and drug use and substance abuse treatment.

PSI data on the level of drug use among felons and the specific types of drugs used by this population are based on information reported by the offender to the probation officer during the PSI interview. An offender can admit to using multiple drugs. Well over half of offenders admit to having used drugs when they are interviewed by the probation officer (Figure 55). In 1998, nearly 58% of felons admitted drug use. In 2002, admitted drug use among felons was 56%.

The drug used most among convicted felons in both 1998 and 2002 was marijuana, with nearly half of felons admitting to using it. Other than marijuana, cocaine has been the drug most commonly used among felons. In 1998, well over one-third responded that they had used cocaine or crack. The percent admitting the use of cocaine changed little in 2002.

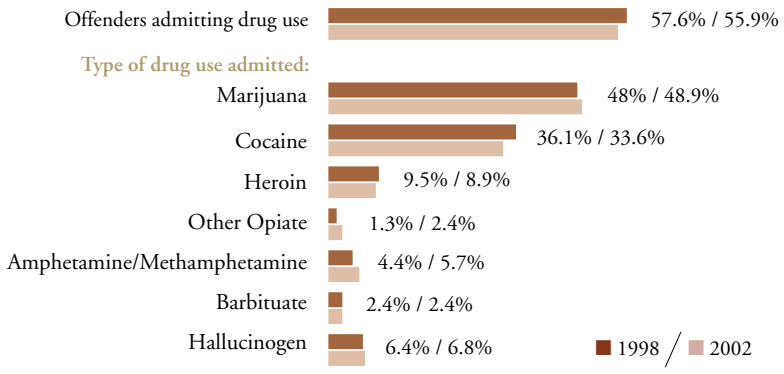
Use of other drugs has been less common among this offender population. In 1998 and 2002, fewer than one in ten offenders reported using heroin. Even fewer convicted felons admitted to taking hallucinogenic drugs. Amphetamine use (in any form, including methamphetamine) was reported by less than 6% of convicted felons in 2002. This is a marginal increase over 1998, when 4% of felons told the probation officer they had used an amphetamine or methamphetamine. Drug use patterns among the population of convicted felons changed little between 1998 and 2002.

Data on another criminal population also suggests that methamphetamine is used by a relatively small portion of felony offenders. In 2003, the General Assembly directed the Commission to study probation violators returned to court for reasons other than a new criminal conviction. These offenders are often referred to as "technical violators." The Commission was charged with developing sentencing guidelines and a risk assessment instrument for this group of supervision violators. The Commission embarked upon an extensive data collection effort in order to learn more about Virginia's probation violators. This effort, which included reviewing offenders' probation files, provided rich detail about violators, their behavior while under supervision and the specific reasons why probation officers brought offenders back to court for revocation hearings. Drug use was of particular interest to the Commission.

The Commission found that continued drug use was the single most common reason for offenders on supervision to be returned to court. During its case-by-case file review, the Commission recorded the specific types of drugs used by a violator, revealed either by a urine screen conducted by the probation officer or by admission of the

Figure 55

Drug Use Admitted by Convicted Felons, 1998 and 2002

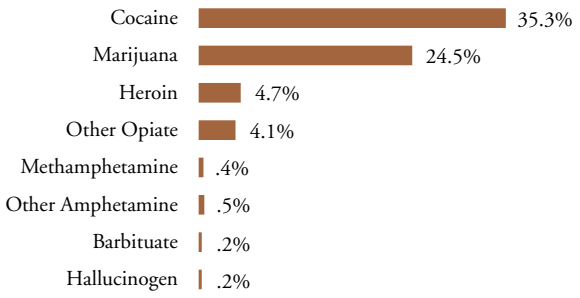


Note: Data is based on offender self-report. Offenders can admit to using multiple drugs.
Source: Pre/Post-Sentence Investigation (PSI) database, 1998 and 2002

offender. Among violators not convicted of a new crime, cocaine was the most common drug used. More than one in three (35%) of these violators tested positive or admitted to using the drug. Marijuana use was also prevalent among supervision violators, with one in four (25%) testing or admitting to using it. Use of other types of drugs was much less frequent. For example, less than 5% of violators used heroin while under supervision. Similarly, use of methamphetamine was detected for a very small number of violators. Approximately .5% of violators examined tested positive for or admitted using methamphetamine. These data indicate that use of methamphetamine is not prevalent among this population of Virginia's felons.

Figure 56

Drug Use by Supervision Violators Not Convicted of a New Crime



Note: Offender can test positive for or admit to using multiple drugs.
Source: Probation Violation Study database, 1997-2001

Drug Arrests in Virginia

According to the Virginia State Police, the number of arrests in the Commonwealth for drug law violations related to methamphetamine or other amphetamine derivative more than doubled between 2000 and 2003. Other types of drugs, however, account for the vast majority of narcotics arrests in the state. All law enforcement agencies in the state are required to report crimes and arrests to the State Police, which functions as the central repository. For drug arrests, the type of drug is also reported to the State Police, if it is known or can be identified at the time the arrest is made. The State Police aggregates and tabulates the crime and arrest data and each year publishes a report entitled *Crime in Virginia*.

Between 2000 and 2003, drug arrests related to marijuana were the most common, accounting for well over half of drug arrests every year (Figure 57). Beginning in 2000, Virginia law enforcement made approximately 13,500 to 14,500 arrests annually for marijuana violations. Excluding marijuana, crack cocaine was the drug most frequently reported by law enforcement. Arrests involving crack cocaine ranged from 3,500 to 4,200 per year between 2000 and 2003. Fewer arrests were made for cocaine in other

forms. Since 2000, cocaine arrests (other than crack) have numbered from 1,700 to just over 2,400 each year. Together, marijuana, crack and other forms of cocaine have accounted for more than 80% of drug arrests in Virginia.

Other drugs are reported to the State Police in significantly lower numbers. From 2000 to 2003, approximately 600 to 750 heroin arrests were recorded by law enforcement each year. Arrests for methamphetamine are included with other amphetamines in State Police reports. Together, methamphetamine and other forms of amphetamines accounted for 470 arrests in 2003, up from 203 in 2000. This represents a 131% increase in the number of methamphetamine arrests in the Commonwealth over the four year period. While the number of arrests increased from 2000 to 2003 for nearly all controlled substances, arrests associated with methamphetamine have been growing faster than any other type of drug. Despite this rise, methamphetamine arrests accounted for less than 2% of all drug arrests in 2003.

Figure 57

Drug Arrests in Virginia, 2000-2003

Year	Marijuana	Crack	Cocaine	Heroin	Amphetamines/ Methamphetamines	Other	Unknown	TOTAL
2000	13,559	3,532	1,766	635	203	1,304	2,182	23,181
2001	14,248	3,939	1,793	663	194	1,664	2,363	24,864
2002	14,312	4,183	2,177	738	332	1,104	2,398	25,244
2003	14,576	4,139	2,412	664	470	1,222	2,539	26,022

Source: Virginia State Police *Crime in Virginia* reports, 2000 through 2003

Methamphetamine Lab Seizures

Methamphetamine can be produced from a few over-the-counter and low-cost ingredients. As with other manufactured drugs, methamphetamine production facilities are typically known as laboratories, or "labs." Data on clandestine laboratory seizures in the states are maintained by the Drug Enforcement Agency (DEA). The DEA's El Paso (TX) Intelligence Center (EPIC) was established in 1974 and concentrates primarily on drug movement and immigration violations. Because these criminal activities are seldom limited to one geographic area, EPIC's focus has broadened to include all of the United States and the Western Hemisphere. In a continuing effort to stay abreast of changing trends, EPIC has developed the National Clandestine Laboratory Seizure System (CLSS). This database contains detailed information regarding the number, type, and location of the labs seized, and the number of children affected, broken down by state.

As of October 28, 2004, CLSS data show Virginia with a total of 63 methamphetamine lab seizures during the first ten months of 2004, for a rate of 6.3 seizures per month, compared with 30 seizures for all of 2003, a rate of 2.5 seizures per month (Figure 58). This ranks Virginia 32nd among the states in methamphetamine lab seizures to date for 2004, compared to a ranking of 38th for 2003. Although Virginia's numbers are comparatively small, the number of methamphetamine lab seizures has more than doubled last year's total during the first ten months of 2004.

Two of Virginia's neighbors recorded higher numbers of methamphetamine labs. Tennessee has the largest number of methamphetamine lab seizures of any neighboring state. During the first ten months of 2004, 898 labs were shut down in Tennessee, for a rate of 89.8 seizures per month, compared to 925 seizures for all of 2003, a rate of 77.1 seizures per month. This places Tennessee second in the nation so far for 2004, behind only Missouri, compared to seventh in 2003. If seizures continue at the same rate during the remaining two months of 2004, Tennessee will easily surpass last year's total number of meth lab seizures. A large majority of the recent lab seizures in Virginia have taken place in the far southwestern part of the state, along the Interstate 81 corridor and relatively close to Tennessee.

North Carolina's lab numbers are larger than Virginia's, but not nearly as large as those from Tennessee. North Carolina had 238 methamphetamine lab seizures during the first ten months of 2004, for a rate of 23.8 seizures per month, compared to only 168 seizures for all of 2003, a rate of 14 seizures per month. North Carolina ranks 15th in the nation so far for 2004, compared to 24th in 2003. However, the methamphetamine problem still seems to be virtually nonexistent in the state of Maryland, which has had just one lab seizure in 2004 and only two in 2003.

Figure 58

Methamphetamine Lab Seizures, 2003 and 2004

State	2004 Lab Seizures (through 10/28/04)	2004 Rank	2003 Lab Seizures (through 12/31/03)	2003 Rank
Missouri	1,791	1	2,886	1
Tennessee	898	2	925	7
Iowa	863	3	1,246	3
Illinois	753	4	744	9
Indiana	635	5	967	6
Arkansas	615	6	767	8
Washington	563	7	1,044	4
California	543	8	1,303	2
Kentucky	468	9	488	12
Kansas	466	10	634	11
Oklahoma	464	11	1,012	5
Texas	370	12	676	10
Oregon	310	13	419	13
Alabama	284	14	339	15
North Carolina	238	15	168	24
Florida	232	16	239	22
Michigan	197	17	266	18
Georgia	168	18	250	20
Ohio	165	19	126	27
Mississippi	161	20	333	16
North Dakota	144	21	252	19
Minnesota	134	22	309	17
South Carolina	133	23	64	34
Colorado	129	24	348	14
Nebraska	112	25	250	20
West Virginia	97	26	73	33
New Mexico	94	27	195	23
Pennsylvania	87	28	62	35
Louisiana	85	29	92	29
Arizona	75	30	139	25
Nevada	66	31	131	26
Virginia	**63**	**32**	**30**	**38**
Utah	58	33	84	31
Wisconsin	53	34	101	28
Alaska	50	35	40	36
Montana	44	36	74	32
Idaho	37	37	91	30
South Dakota	24	38	40	36
New York	22	39	18	40
Wyoming	13	40	26	39
Hawaii	7	41	3	41
Delaware	3	42	2	42
Maine	3	42	0	48
New Hampshire	2	44	1	44
District of Columbia	1	45	0	48
Massachusetts	1	45	1	44
Maryland	1	45	2	42
Vermont	1	45	0	48
Connecticut	0	49	1	44
New Jersey	0	49	0	48
Rhode Island	0	49	1	44

Source: Drug Enforcement Agency (DEA) El Paso Intelligence Center (EPIC)/National Clandestine Laboratory Seizure System (CLSS), 10/28/04

Tennessee, North Carolina, and Maryland are of special interest because they share a common border with Virginia, and because they are three of nine states previously selected for comparison with Virginia in a 2001 study prepared for the Virginia Department of Criminal Justice Services (DCJS). The study compared crime rates in Virginia to the corresponding rates in these "comparison states" (VisualResearch, Inc. 2001). The states selected were similar to Virginia on key characteristics expected to affect crime rates, including:

- A 1999 population of over 4 million residents,
- U. S. Bureau of the Census indicators such as population residing in metropolitan centers, general revenue per capita, and prisoners per 100,000 population,
- Two measures of citizen and government philosophy corresponding to ideology scores on a liberal-conservative scale.

The other states selected for comparison with Virginia were Georgia, New Jersey, Massachusetts, Minnesota, Wisconsin, and Washington. The number of labs seized in Georgia in 2003 was comparable to North Carolina, but Georgia's lab seizures are down somewhat in 2004. Georgia had 168 methamphetamine lab seizures during the first ten months of 2004, for a rate of 16.8 seizures per month, compared to 250 seizures for all of 2003, a rate of 20.8 seizures per month. This places Georgia 18th in the nation so far for 2004, compared to 20th in 2003. Like Maryland, New Jersey and Massachusetts had negligible numbers of lab seizures in 2003 and 2004.

Washington, the only west coast state in the comparison group, has had an increasingly serious methamphetamine problem since the mid-1990s, but recent figures suggest a reversal of the trend. Washington had 563 lab seizures during the first ten months of 2004, for a rate of 56.3 seizures per month, compared to 1,044 seizures for all of 2003, a rate of 87 seizures per month. This places Washington seventh in the nation so far for 2004, down from fourth in 2003. The monthly seizure rate is down approximately 35% in 2004. This decline coincides with the recent introduction of legislation to address Washington's methamphetamine problem. In addition to restrictions on the sale or transfer of products containing pseudoephedrine, Washington has child endangerment laws and cleanup and remediation standards specifically addressing the dangers posed by methamphetamine labs.

Minnesota and Wisconsin have also had recent success in reducing the rate of meth lab seizures in their states. Minnesota had 134 methamphetamine lab seizures during the first ten months of 2004, compared to 309 seizures for all of 2003. This places Minnesota 22nd in the nation so far for 2004, down from 17th in 2003. The monthly seizure rate for 2004 is roughly half the rate from the previ-

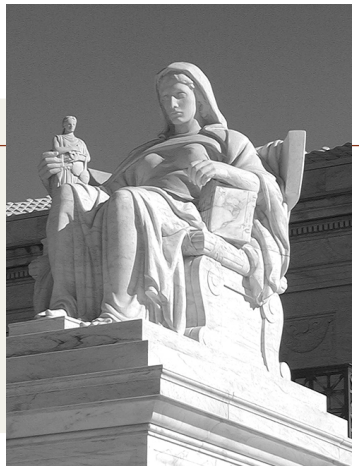
ous year. State officials intend to seek even tougher legislation in the 2005 Minnesota legislative session (Bakst 2004). Wisconsin had 53 methamphetamine lab seizures during the first ten months of 2004, compared to 101 seizures for all of 2003. Wisconsin ranks 34th in the nation so far for 2004, down from 28th in 2003.

Clearly the western and midwestern states having a well-established methamphetamine problem are taking various steps to combat it. Some are seeing the monthly rate of lab seizures decline, although in other states the numbers remain high. Tennessee also has a high number of methamphetamine lab seizures, and their monthly seizure rate is still increasing. The southeastern states where methamphetamine is an emerging drug, including Virginia, have much smaller numbers of lab seizures, but their numbers and rates are increasing in 2004, except for Georgia.

The Virginia State Police have provided detailed information characterizing 49 methamphetamine lab seizures in Virginia during 2004 through August 4, 2004. An overwhelming majority of these seizures, (43 or 88%) have occurred in the southwest corner of the state. Most of these 43 lab seizures have occurred in a four-county area; 11 in Smyth County, 10 in Washington County, 6 in Wythe County, and 6 combined in Pulaski County and Pulaski City. Interstate 81 runs southwest to northeast through the center of this area, offering easy access to many retail outlets where precursor chemicals can be purchased. Of the remaining seizures in this area, three occurred in Montgomery County, two in Grayson County, and one each in Bristol City, Carroll County, Giles County, Lee County, and Wise County.

State Police data also show that 59% of the lab seizures were in rural locations and the preferred sites were mobile homes, houses, and increasingly, motor vehicles. The red phosphorus method of production was used in 88% of the labs. Offenders faced state charges in 59% of the lab seizures and federal charges in 16%; for 25% of the cases jurisdiction was reported as "pending."

Since January 1, 1995, more than 200,000 felony cases have been sentenced under the truth-in-sentencing laws. For 2004, the compliance rate was the highest ever recorded in the Commonwealth, approximately 81%



Methamphetamine Convictions in Virginia

In order to conduct a thorough examination of methamphetamine cases in Virginia, the Commission collected conviction data from both the state and federal judicial systems. Because a portion of criminal cases are processed through the federal judicial system, including federal data provides a more complete picture of the pervasiveness of and trends in methamphetamine convictions in the Commonwealth. Conviction data in both the state and federal systems experience a lag before complete data are available for a given year. Federal data are complete through 2002. In the federal system, not only are sentencing guidelines mandated by law, but an accompanying pre-sentence report is required in every case. In narcotics cases, the report identifies the specific type of drug involved in the offense. Federal conviction data are available through the United States Sentencing Commission.

In contrast, in the state's judicial system, the preparation of sentencing guidelines is required in every felony case for which guidelines exist, but a pre-sentence report is not. An offender can waive preparation of the sentencing report, in which case the judge is provided with only the guidelines at sentencing. In most felony cases, if a pre-sentence report is waived, a post-sentence report will be completed and submitted after sentencing. Submission of a post-sentence report can occur many months, or even years, after the date of sentencing. In some felony cases, no report will ever be prepared. Typically, these are cases in which the offender will never come to the attention of the Department of Correction (i.e., there is no prison time to be served and there is no period of supervised probation that the offender is required to satisfy). With significant reporting lags and no reports in some cases, the PSI system is an incomplete accounting of convictions in the state's circuit courts. Virginia's sentencing guidelines, which cover 95% of felony convictions in circuit courts (including nearly all drug offenses), are more complete and more up-to-date. However, the state's sentencing guidelines do not systematically identify the specific type of drug or drugs in each case.

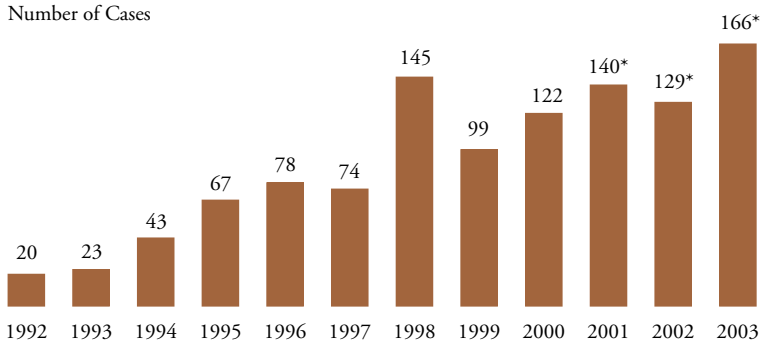
The PSI is designed to capture up to two drug types in each case. The number of cases in which drug type is left blank or is missing on the PSI has increased from less than 8% to nearly 12% between 1998 and 2002. With increased missing data, fewer cases involving specific drugs can be identified. In addition, review of offense narratives from PSI reports revealed that probation officers sometimes misidentify other drugs as methamphetamine. For example, probation officers sometimes incorrectly recorded ecstasy (methylenedioxy-methamphetamine or MDMA) and Ritalin (methylphenidate) as methamphetamine (also known as MDA) due to the similarity in their chemical names. According to the Division of Forensic Science of the Virginia Department of Criminal Justice Services, these drugs

are chemically distinct from methamphetamine. By reviewing the offense narrative for each PSI report recorded as methamphetamine, the Commission was able to correct these inaccuracies. Despite these limitations, the PSI system is the only source for drug-specific conviction data from circuit courts in Virginia.

According to available PSI data, the number of methamphetamine cases sentenced in the state's circuit courts has increased over the last decade (Figure 59). For the purposes of this report, a case includes all convictions handled together in the same sentencing hearing. In 1992, there were 20 cases reported for manufacturing, distributing, selling, possessing with intent to sell, selling for accommodation, and possessing (without intent to sell) methamphetamine. In 1998, the number of methamphetamine cases spiked to 145. Although the number of cases in state courts dropped the following year, the upward trend in methamphetamine cases resumed in 2000. In 2001, the number of methamphetamine cases rose to 140, with another 129 cases in 2002. In 2003, available PSI data include 166 methamphetamine cases. It should be noted that these figures are subject to change as additional post-sentence reports are submitted over time. While the figures for prior years may increase slightly as post-sentence reports are received, the figures for 2001, 2002 and 2003 should be considered incomplete and subject to greater increases as additional PSI reports are submitted. Data for these years, particularly 2003, underestimate the actual number of cases in circuit court.

Figure 59

Methamphetamine Cases in Virginia's Circuit Courts, 1992 - 2003

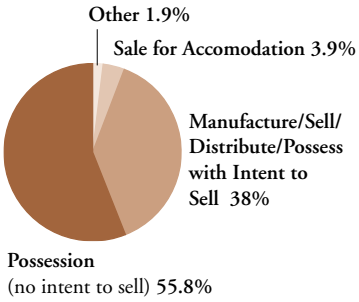


* Data are incomplete. While the figures for prior years may increase slightly as post-sentence investigation (PSI) reports are submitted over time, figures for 2001, 2002 and 2003 should be considered incomplete and subject to greater increases as additional PSI reports are received.

Note: A case includes all convictions that are handled together in the same sentencing hearing.
Source: Pre/Post-Sentence Investigation (PSI) Report Database

Figure 60

Methamphetamine Cases by Type of Offense, 1992-2003



Source: Pre/Post-Sentence Investigation (PSI) Report Database

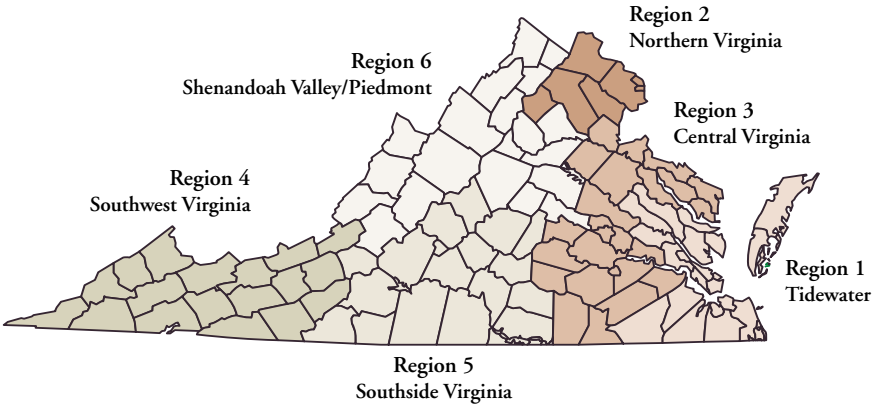
Of all the methamphetamine convictions in state courts, most are cases in which the offender was convicted of possessing methamphetamine without the intent to sell or distribute the drug. From 1992 through 2003, nearly 56% involve simple possession (Figure 60). Possession, defined by § 18.2-250 of the *Code of Virginia*, carries a statutory penalty range of 1 to 10 years incarceration. Another 4% of methamphetamine offenders were convicted of sale for accommodation only, an offense that carries the same statutory penalty as simple possession. During this period, 38% of the cases involved the manufacture, distribution, or sale, of (or possession with intent to sell) methamphetamine. These crimes, which are defined by § 18.2-248(C), carry a statutory penalty of 5 to 40 years.

Methamphetamine convictions are not evenly distributed around the Commonwealth. There is distinct geographic variation. Moreover, a clear regional shift has taken place over the last decade. The 137 localities that comprise Virginia's circuit court system are grouped into six administrative regions that roughly represent the main geographical areas of the state: Tidewater (Region 1), Northern Virginia (Region 2), Central Virginia (Region 3), Southwest Virginia (Region 4), Southside Virginia (Region 5), and the Shenandoah Valley/Piedmont (Region 6). The boundaries for the judicial administrative regions are established by the Supreme Court of Virginia. Figure 61 displays a map of the Virginia's judicial regions.

Regional patterns in circuit court methamphetamine cases changed significantly between 1993 and 2003. A decade ago, the largest share of the methamphetamine cases in state courts occurred in Central Virginia (Region 3). In 1993, this region accounted for 44% of the cases (Figure 62). By 2003, Central Virginia contributed only 2% of the cases involving methamphetamine. As the share of cases from Central Virginia declined, dramatic increases were occurring elsewhere in the Commonwealth. Accounting for only 13% of methamphetamine cases in 1993, the Shenandoah Valley/Piedmont area of the state (Region 6) produced over half of the state's methamphetamine

Figure 61

Supreme Court of Virginia Judicial Regions



cases in 2003. According to available 2003 data, 59% of the state's methamphetamine cases came through one of the three circuit courts that compose Region 6 (Circuits 16, 25 and 26). In that year, circuit courts in Southwest Virginia (Region 4) contributed an additional 12% of the methamphetamine cases. As described previously, most of the methamphetamine labs seized in the Commonwealth were located in the southwest corner of the state. Together, Regions 4, 5 and 6 accounted for 81% of methamphetamine cases resolved in circuit courts in 2003.

Among convictions for manufacturing, distributing, selling, and possessing with intent to sell methamphetamine, the majority of cases handled in the state's circuit courts involve relatively small amounts of the drug. Drug quantity is not known for all methamphetamine cases. Between 1992 and 2003, there were 420 cases involving manufacturing or sales-related offenses (this includes distribution and possession with intent to sell). Drug quantity was not recorded in 51 of those cases. Of the cases from 1992 through 2003 with a known drug quantity, the mean seizure was 25.3 grams (Figure 63). However, the mean may not be representative of the typical case, as a few large seizures can inflate the average. The median is often used to represent the typical case. The median defines the middle value, where half the cases have higher values and half the cases have lower values. The median seizure during this period was 2.85 grams. Approximately one-third of the sales cases involved one gram or less of methamphetamine. Few circuit court cases (13%) have resulted in a seizure of more than 28.35 grams (1 ounce) of this drug.

Examining quantity by judicial region suggests geographical differences in the size of methamphetamine seizures for cases handled in Virginia's circuit courts. In Northern Virginia (Region 2), Central Virginia (Region 3) and the Shenandoah Valley/Piedmont

Figure 62

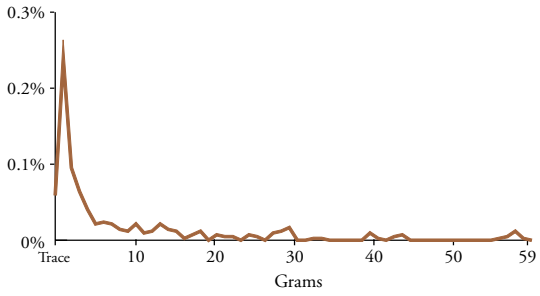
Methamphetamine Cases in Virginia Circuit Courts by Judicial Region

Judicial Region	1993	1998	2003
Tidewater (1)	17.4%	11.7%	6.7%
Northern Virginia (2)	4.3	11.7	10.3
Central Virginia (3)	43.6	13.1	2.4
Southwest Virginia (4)	4.3	13.8	11.5
Southside Virginia (5)	17.4	12.5	10.3
Shenandoah Valley/ Piedmont (6)	13.0	37.2	58.8
TOTAL	100.0%	100.0%	100.0%

Source: Pre/Post-Sentence Investigation (PSI) Report Database

Figure 63

Quantity of Methamphetamine in Manufacture/Sales Cases in Virginia's Circuit Courts, 1992-2003



Note: Analysis includes manufacture, distribution, sale and possession with intent to sell methamphetamine.
Source: Pre/Post-Sentence Investigation (PSI) Report Database

area (Region 6), the mean seizure of methamphetamine was greater than in the remaining three regions (Figure 64). However, the number of cases from Northern Virginia and Central Virginia was comparatively small (only 17 and 29, respectively). The data suggest there have been some number of relatively large "busts," which raises the mean considerably, especially if there are a small number of cases. The median quantity of methamphetamine indicates that the typical size bust is greatest in the Tidewater area (Region 1) and the Shenandoah Valley/Piedmont region, where just over four grams are seized when the typical offender is apprehended.

Figure 64

Quantity of Methamphetamine in Manufacture/Sales Cases in Virginia's Circuit Courts by Judicial Region, 1992-2003

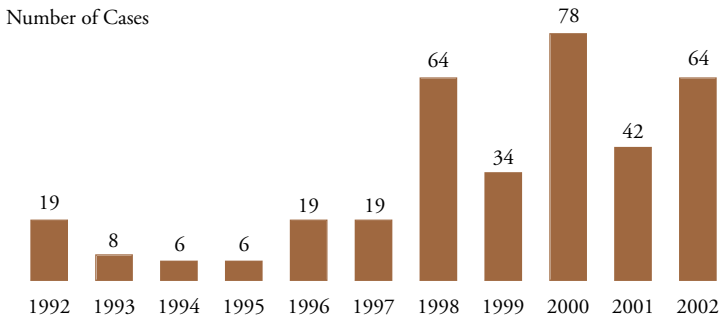
Judicial Region	Mean (in grams)	Median (in grams)	Cases
Tidewater (1)	11.2	4.2	30
Northern Virginia (2)	39.8	3.5	17
Central Virginia (3)	35.7	2.7	29
Southwest Virginia (4)	15.0	1.3	65
Southside Virginia (5)	16.5	3.7	52
Shenandoah Valley/ Piedmont (6)	31.1	4.1	176
TOTAL			369

Note: Analysis includes manufacture, distribution, sale and possession with intent to sell methamphetamine. Data exclude 51 cases for which quantity was not recorded.
Source: Pre/Post-Sentence Investigation (PSI) Report Database

Not all felony crimes in Virginia result in convictions in one of the state's circuit courts. Some felony cases are taken into the federal judicial system. The characteristics of cases processed through federal courts in Virginia are different than those handled in state courts. As in the state courts, the number of methamphetamine cases in federal courts in Virginia was higher after 1998 than before that year. However, the number of Virginia's methamphetamine cases that end up in federal court has fluctuated considerably, much more than state court cases. In 1998, methamphetamine convictions in federal court rose sharply to 64, but dropped back to 34 the following year (Figure 65). In 2000, cases rose again, up to 78. This was followed by another drop in 2001. In 2002, the latest federal data available, there were 64 methamphetamine convictions in federal courts in the Commonwealth, the same as in 1998.

Figure 65

Methamphetamine Cases in Federal Courts in Virginia, 1992 - 2002



There are two federal judicial districts in Virginia (Figure 66). In 2001 and 2002, the Western district of Virginia accounted for more than three in every four methamphetamine convictions in federal courts (Figure 67). This is a shift from the previous three years, during which the Eastern district of Virginia contributed the largest share of methamphetamine cases. The fluctuation in the overall number of cases in federal courts since 1998 is largely due to changes in the number of Eastern district cases. Western district cases have fluctuated less, with 34, 34, and 47 cases in 2000, 2001 and 2002, respectively.

Nearly all federal cases involve trafficking of methamphetamine. Only a small portion of federal cases result in convictions for possession (no intent to sell). This contrasts with state data, in which 38% of the cases involved trafficking, including manufacture, and other sales-related crimes. For a portion of federal cases, specific drug quantity is not provided. Instead, quantity data is supplied in the form of a range. The cases taken into the federal courts involve larger drug quantities than those left in state courts. In federal courts, approximately 41% of the 2001 and 2002 methamphetamine cases involved over 1,500 grams of the

Figure 66

Federal Judicial Districts

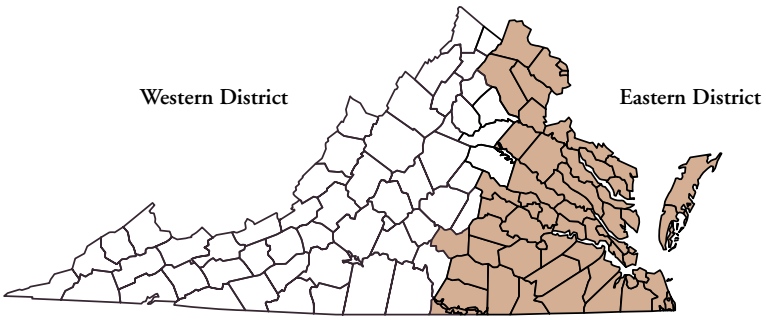


Figure 67

Methamphetamine Cases in Federal Courts in Virginia by Judicial Region

Year	Eastern	Western
1992	10.5%	89.5%
1993	37.5	62.5
1994	100.0	0.0
1995	100.0	0.0
1996	21.1	78.9
1997	21.1	78.9
1998	65.6	34.4
1999	67.6	32.4
2000	56.4	43.6
2001	19.0	81.0
2002	26.6	73.4

Source: United States Sentencing Commission

drug (Figure 68). In contrast, only one case in the state's circuit courts could be identified as involving that amount of drug. On average, larger quantity cases are entering the federal courts through the Western district of Virginia than the Eastern. During 2001 and 2002, two-thirds of the cases in the Western district involved over 500 grams. In the Eastern district, less than half of the cases fell into that category. On the other hand, cases associated with smaller quantities of methamphetamine (less than 200 grams) were more common in the Eastern district than in the Western district. This trend departs from previous data. Between 1992 and 1999, larger quantity cases, on average, were reported in the Eastern district of Virginia.

Figure 68

Quantity of Drug in Methamphetamine Trafficking Cases In Federal Courts in Virginia

Year	Eastern	Western	Overall
Less than 50g	8.3%	13.9%	12.5%
50g to 199g	37.5	11.1	17.7
200g to 349g	8.3	2.8	4.2
350g to 500g	0	6.9	5.2
501g to 1,500g	12.5	22.2	19.8
1,501g to 5,000g	16.7	22.2	20.8
More than 5,000g	16.7	20.8	19.8
Cases	24	72	96

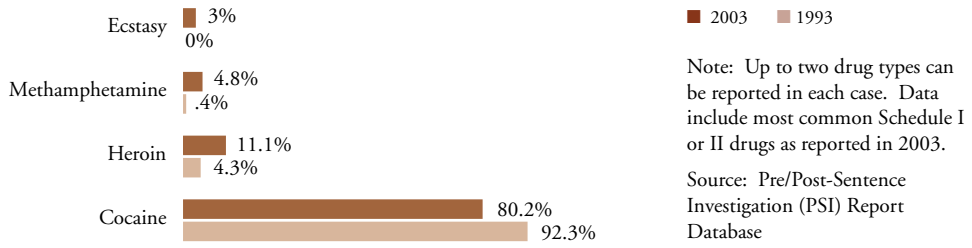
Note: Analysis excludes possession cases. Data does not include seven trafficking cases for which quantity range was not recorded.
Source: United States Sentencing Commission

Relative Prevalence of Methamphetamine

According to state and federal data, methamphetamine convictions have increased in the Commonwealth over the last decade. The number of methamphetamine cases in both state and federal courts in Virginia has been substantially higher since 1998 than in earlier years. Although methamphetamine is more prevalent in Virginia today, it remains much less pervasive than other Schedule I or II drugs statewide. Despite a decline during the last decade, the majority of Schedule I or II drug cases in Virginia's circuit courts statewide still are associated with cocaine. In 1993, more than 92% of Schedule I or II drug cases in circuit courts were related to cocaine (Figure 69). Ten years later, more than 80% of state cases were cocaine-related. Although cocaine cases declined over the period, eight of every ten Schedule I or II drug cases statewide involve cocaine in some form. Heroin cases also outnumber methamphetamine cases in state courts by more than two to one. In fact, of all Schedule I and II drugs, the largest percentage increase in the last ten years has been in heroin cases, which rose from 4% of cases in 1993 to 11% in 2003. Methamphetamine cases, which were negligible in 1993, accounted for approximately 5% of the Schedule I or II drugs in 2003. These data are based on Pre/Post-Sentence Investigation (PSI) reports, which record up to two drug types in each case.

Figure 69

Schedule I and II Drug Cases in Virginia's Circuit Courts by Drug Type(s) Reported



Note: Up to two drug types can be reported in each case. Data include most common Schedule I or II drugs as reported in 2003.

Source: Pre/Post-Sentence Investigation (PSI) Report Database

There are distinct regional patterns in the prevalence of methamphetamine in relation to other Schedule I and II drugs. In four of the six judicial regions in the Commonwealth, cocaine was reported in the majority of Schedule I and II drug cases in 2003. In fact, in Tidewater (Region 1), Northern Virginia (Region 2), Central Virginia (Region 3) and Southside Virginia (Region 5), cocaine was cited in 75% to 92% of the circuit court cases (Figure 70). In these four regions, at least 10% of cases involved heroin. Few cases in these regions were associated with methamphetamine. Ecstasy accounted for a small fraction of Schedule I and II drug cases in these four regions, although it was more common in Northern Virginia, where 7% of cases involved that drug.

In Southwest Virginia (Region 4) and the Shenandoah Valley/Piedmont (Region 6) areas of the state, however, the pattern is clearly different. In these two regions, approximately one in every four Schedule I or II drug cases in circuit court in 2003 involved methamphetamine. In Southwest Virginia, 24% of the cases cited methamphetamine, while in the Shenandoah Valley/Piedmont this figure reached 29%. These two regions had a lower percentage of heroin cases than the other four regions and comparable rates of ecstasy cases. Nonetheless, cocaine remained the most common drug in Southwest Virginia and in the Shenandoah Valley/Piedmont regions, with over half the cases recorded as cocaine. In the Southwest, 51% of the 2003 cases were associated with cocaine. In the Valley, this figure was slightly higher (59%).

Figure 70

Schedule I & II Drug Cases in Virginia's Circuit Courts by Judicial Region, 2003

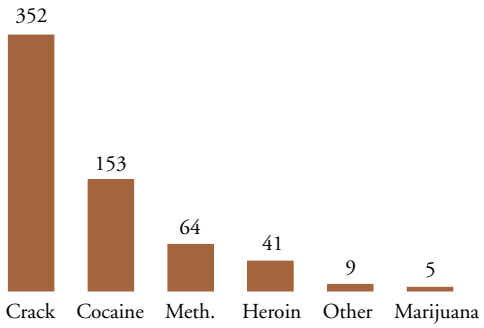
Judicial Region	Cocaine	Heroin	Methamphetamine	Ecstasy
Tidewater (1)	82.5%	16.6%	0.9%	2.5%
Northern Virginia (2)	75.4	10.6	2.5	7.1
Central Virginia (3)	87.9	10.4	0.7	1.7
Southwest Virginia (4)	51.3	3.8	24.4	1.3
Southside Virginia (5)	92.3	10.9	4.1	1.0
Shenandoah Valley/ Piedmont (6)	59.1	6.3	29.1	1.9

Note: Up to two drug types can be reported in each case. Data include most common Schedule I or II drugs as reported in 2003.
Source: Pre/Post-Sentence Investigation (PSI) Report Database

Data from the federal judicial system also reveal that cocaine, including crack, continues to dominate federal drug cases in the Commonwealth. In 2002, a total of 505 of 624 federal drug cases in Virginia involved cocaine or crack (Figure 71). This is 81% of the federal drug caseload. Although heroin was the most common Schedule I or II drug after cocaine in the state's circuit court cases, methamphetamine was the most common drug after cocaine among federal convictions in Virginia. Just over 10% of federal drug cases were related to methamphetamine. At the federal level, less than 7% involved heroin. Although federal convictions for methamphetamine were far greater after 1998 than before, cocaine and crack remain the most prevalent drugs in federal courts in Virginia.

Figure 71

Drug Cases in Federal Courts in Virginia, 2002



Source: United States Sentencing Commission

Virginia Sentencing Guidelines for Drug Offenses

When parole was abolished by legislative act in 1994, the Virginia General Assembly directed the Commission to develop and oversee a system of sentencing guidelines compatible with Virginia's new sanctioning system. Among the many goals of sentencing reform, the General Assembly sought to establish truth-in-sentencing in Virginia and to target violent offenders for longer prison stays. Under truth-in-sentencing, offenders serve all or nearly all of sentences imposed in the courtroom. Felony offenders in Virginia now serve at least 85% of their prison or jail sentences.

Virginia's sentencing guidelines were formulated to target violent offenders for incarceration terms longer than those served under the parole system. Any offender with a current or prior conviction for a violent felony is subject to enhanced penalty recommendations under the truth-in-sentencing guidelines. Offenders convicted of violent crimes and those with prior convictions for violent felonies are subject to guidelines recommendations up to six times longer than the historical time served in prison by those offenders. Only offenders who have never been convicted of a violent crime are recommended by the guidelines to serve terms roughly equivalent to the average time served historically by similar offenders prior to the abolition of parole.

For an offender convicted of one count of selling a Schedule I or II drug like methamphetamine, the guidelines score on the primary offense factor on the prison worksheet (Section C) is 12 for an offender who does not have a prior violent conviction (Figure 72). The score on this worksheet equates to months of imprisonment. If the offender has a prior conviction for a violent felony carrying a statutory maximum penalty of less than 40 years (Category 2 prior record), the guidelines score for this factor is increased to 36 months. If the offender has a prior conviction for a violent felony carrying a statutory maximum penalty of 40 years or more (Category 1 prior record), the guidelines score increases to 60 months.

Figure 72

Primary Offense Factor on Section C of the Schedule I or II Drug Sentencing Guidelines

Drug/Schedule I/II — Section C

Offender Name: _____

Primary Offense

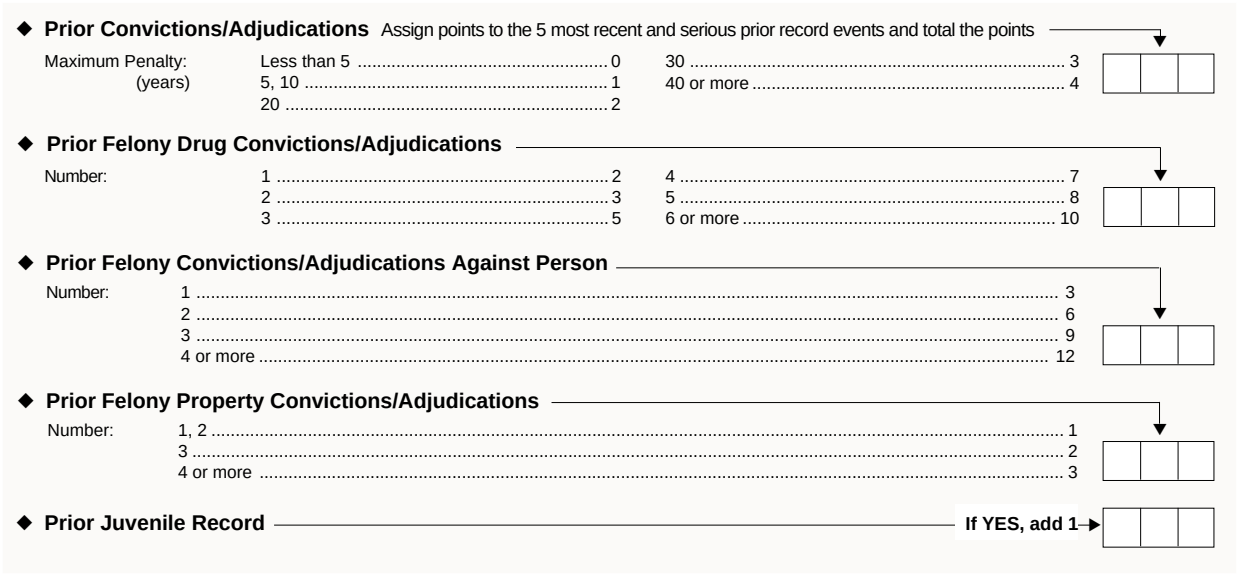
		Prior Record Classification		
		☐ Category I	☐ Category II	☐ Other
A.	Possess Schedule I or II drug - Attempted, conspired or completed:			
	1 count	20	10	5
	2 counts	28	14	7
	3 counts	36	18	9
B.	Sell, Distribute, possession with intent, Schedule I or II drug			
Completed:	1 count	60	36	12
	2 counts	80	48	16
	3 counts	95	57	19
	4 counts	130	78	26
Attempted or conspired:	1 count	48	24	12
	2 counts	64	32	16
	3 counts	76	38	19
	4 counts	104	52	26
C.	Sell, etc. Schedule I or II drug, subsequent offense; third or subsequent offense			
Completed:	1 count	110	66	22
	2 counts	310	186	62
Attempted or conspired:	1 count	88	44	22
	2 counts	248	124	62
D.	Sell, etc. Schedule I or II drug to minor			
Attempted, conspired or completed:	1 count	60	30	15
E.	Accommodation–Sell, etc. Schedule I or II drug - Attempted, conspired or completed:			
	1 count	32	16	8
	2 counts	40	20	10
F.	Sell, etc. imitation Schedule I or II drug - Attempted, conspired or completed:			
	1 count	12	6	3
	2 counts	20	10	5

Score ▼ ☐☐☐

In addition to these built-in enhancements for violent prior record, the prison worksheet for Schedule I or II drug offenses contains other factors to score prior criminal history (Figure 73). The Prior Convictions/Adjudications factor captures the seriousness of the offender's prior convictions and adjudications of delinquency as a juvenile, including nonviolent offenses. The number of prior felony drug, person and property convictions and adjudications are also scored on this worksheet and serve to increase further the offender's prison recommendation. An additional point is added if the offender has a juvenile record of delinquency.

Figure 73

Prior Record Factors on Section C of the Schedule I or II Drug Sentencing Guidelines



Virginia's sentencing guidelines apply to most crimes involving a Schedule I or II drug, including methamphetamine. Except for cocaine offenses, the guidelines are unaffected by the quantity of drug seized. On July 1, 1997, the Commission implemented guidelines enhancements for offenders who manufacture, distribute, sell or possess with intent to sell large amounts of cocaine, in any of its forms. Cocaine was selected for enhancements because at that time, cocaine represented approximately 90% of all Schedule I or II offenses resulting in conviction in Virginia's circuit courts. Cocaine continues to make up 80% of Schedule I or II drug convictions in the Commonwealth, as noted above. The enhancements to the drug sentencing guidelines increase the sentencing midpoint recommendation by three years in cases of cocaine distribution involving 28.35 grams (1 ounce) up to 226.7 grams. The midpoint recommendation is increased by five years in cocaine distribution cases in which 226.8 grams (1/2 pound) or more was seized.

Prior criminal history plays an important role in Virginia's sentencing guidelines. The structure of the state's sentencing guidelines ensures that offenders with a prior criminal record, particularly those with a history of violence, are recommended for longer terms, and in many cases, substantially longer terms than first-time and nonviolent felons.

Mandatory Penalties for Schedule I or II Drug Offenses

Although judges can utilize Virginia's sentencing guidelines as a tool in formulating sentencing decisions in most cases, the *Code of Virginia* specifies several mandatory minimum penalties for offenses involving Schedule I or II drugs. These are shown in Figure 74. Several of these mandatory minimum penalties were passed by the 2000 General Assembly as part of the legislative package known as the Substance Abuse Reduction Effort, or SABRE. Under the SABRE initiative, the General Assembly revised the drug kingpin statute and expanded it by adding methamphetamine to other drugs already covered by the drug kingpin law. Under § 18.2-248(H) of the *Code of Virginia*, an offender who manufactures, distributes, sells or possesses with intent to sell at least 100 grams of pure methamphetamine or at least 200 grams of a mixture containing methamphetamine is subject to a mandatory minimum penalty of 20 years unless the offender satisfies certain conditions, including cooperating with authorities in the prosecution of others. If the offender is operating a continuing criminal enterprise as defined by § 18.2-248(H1), the 20-year mandatory minimum penalty cannot be suspended. Under § 18.2-248(H2), if an offender manufactures, distributes, sells or possesses with intent to sell at least 250 grams of pure methamphetamine or at least one kilogram

of a methamphetamine mixture, a mandatory minimum penalty of life is applicable. The mandatory life penalty can be reduced to 40 years only if the offender aids law enforcement. These methamphetamine drug kingpin laws became effective July 1, 2000.

Other mandatory minimum penalty laws applicable to methamphetamine became effective on July 1, 2000. An offender who receives a third or subsequent conviction for selling a Schedule I or II drug is now subject to a three-year mandatory minimum sentence (§ 18.2-248(C)), as is an offender who transports an ounce or more of a Schedule I or II drug into the Commonwealth (§ 18.2-248.01). An offender convicted under § 18.2-248.01 for transporting an ounce or more of a Schedule I or II drug into the Commonwealth a second time must serve a minimum of ten years. Beginning July 1, 2000, selling or possessing a Schedule I or II drug while

Figure 74

Mandatory Minimum Sentencing Laws in Virginia Related to Schedule I or II Drugs

Offense	Statute	Mandatory Penalty
Sell, distribute, possess with intent to distribute, or manufacture quantities of Schedule I or II drug defined in § 18.2-248(H)	§ 18.2-248(H)	20 years
Sell, distribute, possess with intent to distribute, or manufacture quantities of Schedule I or II drug defined in § 18.2-248(H1) as part of continuing criminal enterprise	§ 18.2-248(H1)(ii)	20 years
Sell, distribute, possess with intent to distribute, or manufacture quantities of Schedule I or II drug defined in § 18.2-248(H2) as part of continuing criminal enterprise	§ 18.2-248(H2)(ii)	Life
Gross $100,000 but less than $250,000 within 12 month period from continuing criminal drug enterprise	§ 18.2-248(H1)(i)	20 years
Gross $250,000 or more within 12 month period from continuing criminal drug enterprise	§ 18.2-248(H2)(i)	Life
Sell, distribute, possess with intent to distribute, or manufacture (third or subsequent conviction)	§ 18.2-248(C)	3 years
Transport 1 ounce or more of cocaine or other Schedule I or II drug into Commonwealth	§ 18.2-248.01	3 years
Transport 1 ounce or more of cocaine or other Schedule I or II drug into Commonwealth (second or subsequent conviction)	§ 18.2-248.01	10 years
Sell Schedule I or II drug to a minor	§ 18.2-255(A)	5 years
Distribute Schedule I or II drug on school property	§ 18.2-255.2	1 year
Possess Schedule I or II drug while possessing a firearm on the person	§ 18.2-308.4(B)	2 years
Sell, distribute, possess with intent to distribute, or manufacture Schedule I or II drug while possessing a firearm	§ 18.2-308.4(C)	5 years

possessing a firearm was also subject to a five-year mandatory penalty. For offenders possessing a Schedule I or II drug, this mandatory penalty was reduced to two years in situations in which the offender carries the firearm about his person and was eliminated when an offender is found to have possessed the firearm but not on or about his person.

These laws defining mandatory penalties for offenses involving a Schedule I or II drug like methamphetamine can provide prosecutors with useful tools to secure minimum prison sentences for offenders who commit these crimes.

Mandatory sentences required by statute take precedence over the discretionary sentencing guidelines system. When scoring offenders on the sentencing guidelines, users of the guidelines are instructed to replace any part of the recommended sentence range (low, midpoint, or high) that falls below the mandatory minimum required by law with the specified mandatory minimum. This instruction ensures that the guidelines comply with any mandatory minimum penalties applicable in each case.

Comparing Virginia & Federal Sentencing Guidelines

The federal judicial system also utilizes sentencing guidelines, which are administered by United States Sentencing Commission. The federal sentencing guidelines differ from Virginia's guidelines system in several distinctive ways. First, the federal sentencing guidelines are considered to be presumptive. Federal judges are expected to comply. Federal judges can depart from the guidelines recommendations only for certain specified circumstances. Moreover, the range recommended by the federal guidelines is relatively narrow, further limiting judicial discretion. The sentencing guidelines range is limited by law such that it cannot be wider than 25% of the minimum recommended sentence or six months, whichever is greater. The federal sentencing guidelines are represented by a two-dimensional grid based on the seriousness of the current offense (called "offense level") and the overall prior record score of the defendant. For offenses involving any controlled substance, the current offense score under federal guidelines is directly linked to the quantity of the drug in the case. The quantity thresholds are not linked to analysis of sentencing patterns, but were set at normatively-selected levels. Compared to Virginia's sentencing guidelines, the federal guidelines place less emphasis on the defendant's criminal history. Prior criminal record, particularly prior violent record, serves to increase the guidelines recommendation to a greater degree under Virginia's guidelines system than the federal guidelines system.

Quantity of Methamphetamine and Sentencing in Circuit Court

The Commission monitors the sentencing guidelines system and, each year, deliberates upon possible modifications to enhance the usefulness of the guidelines as a tool for judges in making their sentencing decisions. The Commission studies changes and trends in judicial sentencing patterns in order to pinpoint specific areas where the guidelines may be out of sync with judicial thinking. This year, the Commission carefully examined the relationship between quantity of methamphetamine and sentencing outcome to assess the role quantity has played in judicial decision-making. This analysis focused on the offenders convicted in circuit courts in the Commonwealth. The analysis excluded federal cases because the federal sentencing guidelines explicitly account for quantity of drug. Furthermore, the sentence ranges recommended by the federal sentencing guidelines are relatively narrow and the guidelines are considered presumptive. For these reasons, drug quantity is undoubtedly tied to sentencing outcome in the federal judicial system. In contrast, Virginia's sentencing guidelines are discretionary and the ranges relatively broad. The relationship between drug quantity and sentencing outcome in state courts is not defined by the sentencing guidelines as it is in the federal sentencing guidelines. By analyzing circuit court cases, the Commission is able to evaluate the role of drug quantity among cases in which judges are free to consider quantity and incorporate it into the sentencing decision at their discretion.

For offenders convicted of manufacturing, selling, distributing or possessing with intent to sell methamphetamine, analysis of sentencing patterns reveals that sentencing in the state's circuit courts is not driven by quantity of drug. There is no consistent relationship between larger quantities of methamphetamine in these sale/manufacture cases and sentencing outcome.

Figure 75 illustrates the Commission's findings. Here, the Commission examined sale/manufacture cases in four equally sized groups, each representing 25% of the cases. The 25% of methamphetamine cases involving the smallest quantities (.84 grams or less) resulted in sentences with a mean of 17 months. The median sentence (or middle value, where half the sentences are lower and half of the sentences are higher) was eight months for these cases. For the group of offenders caught with slightly larger quantities (.85 to 2.85 grams), the mean sentence increased to nearly 25 months (median sentence of 12 months). For the next group of offenders, however, the average sentence was lower, despite the fact that they had been arrested with larger quantities of methamphetamine (2.86 to 13.42 grams); the mean sentence for this group was only 18 months.

The 25% of offenders selling or manufacturing the largest quantities of methamphetamine (13.43 grams or more) did not receive significantly higher sentences on average. For cases involving the largest quantities, the mean sentence was 25 months. This is comparable to the sentences received by offenders caught with .85 to 2.85 grams of the drug. The median sentence increased marginally from 12 to 18 months for offenders with largest amounts of methamphetamine. This analysis includes all sale/manufacture cases sentenced under Virginia's truth-in-sentencing provisions, including offenders who are convicted of multiple counts of selling or manufacturing and those who had prior felony records.

If the offender does not have a prior felony record and is convicted of only one count of selling or manufacturing methamphetamine, large drug quantity has even less bearing on sentencing outcome. Isolating cases involving one count and offenders with no prior felony record, sentencing patterns reveal that offenders with the least amount of drug (.84 grams or less) received lower sentences than those offenders who sold or manufactured more (Figure 76). These low-end cases resulted in a mean sentence of 12 months, but the median sentence was only one month. For offenders caught with larger quantities (.85 grams or more), mean sentences varied little, from 19 to 22 months, even for those who sold the largest amounts of the drug. Similarly, median sentences fluctuated marginally, from 11 months to 15 months. For offenders convicted of one count with no prior record, the guidelines recommend a range of 7 to 16 months of incarceration, with a midpoint of 12 months. Regardless of quantity of the drug, median sentences for offenders fitting this profile typically fell within the guidelines recommended range.

Figure 75

Sentence Length in Methamphetamine Sale/Manufacture Cases in Virginia's Circuit Courts (in months)

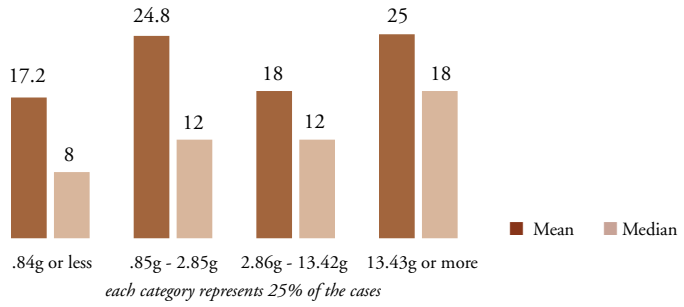
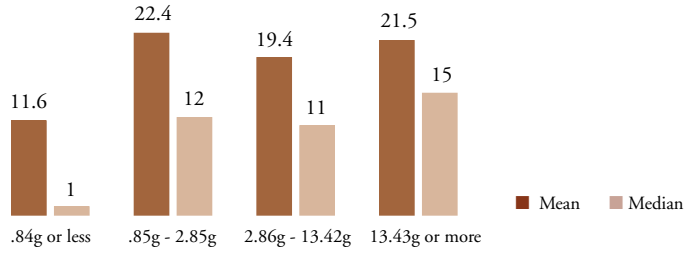


Figure 76

Sentence Length in Methamphetamine Sale/Manufacture Cases in Virginia's Circuit Courts (in months)

Offenders with no prior felony record convicted of 1 count.



Note: For figures 75 and 76, analysis is based on cases sentenced under Virginia's truth-in-sentencing/no-parole system from 1995 through 2003. Data include the offenses of manufacture, sale, distribution and possession with intent to sell.

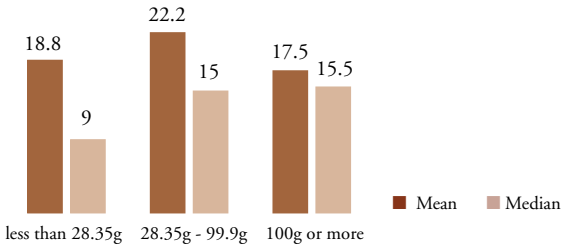
Analyzing sentencing at higher quantity levels does not provide evidence that the offenders selling the very largest amounts of drugs are receiving longer sentences in Virginia's circuit courts. For example, first-time felons convicted of selling or manufacturing less than 28.35 grams (1 ounce) of methamphetamine received a mean sentence of 19 months (Figure 77). Offenders convicted of selling 100 grams or more (the level at which Virginia's mandatory minimum penalties apply for offenses involving pure methamphetamine) received a sentence of 18 months on average (Figure 77). Instead of longer sentences for larger quantities of methamphetamine, the mean sentence for cases involving 100 grams or more is actually one month shorter than cases with less than 28.35 grams of the drug. For the handful of cases for offenders convicted of selling or manufacturing 226.8 grams (one-half pound) or more of methamphetamine, the mean sentence was even lower, at 11 months.

The analysis yields little evidence that judges are basing sentences on quantity of methamphetamine seized in a case. The Commission examined drug quantity at numerous levels and found none to have a significant impact on judicial decision-making. The Commission also analyzed drug quantity in relation to the existing sentencing guidelines for drug offenses by using the same methodology and statistical techniques originally used to develop Virginia's historically-based guidelines. Quantity of methamphetamine was not found to be a statistically significant factor in sentencing decisions. Sanctioning in methamphetamine cases is largely driven by the criminal history of the defendant and the number of charges in the case resulting in conviction. The sentencing guidelines, while not scoring the quantity of methamphetamine, do explicitly account for the number of charges at conviction and the defendant's complete criminal record. The guidelines measure criminal history not only by the number of prior offenses but also the seriousness of those prior offenses, based on statutory maximum penalty. In addition, the guidelines account for possession of a firearm at the time of the offense.

Figure 77

Sentence Length in Methamphetamine Sale/Manufacture Cases in Virginia's Circuit Courts (in months)

Offenders with no prior felony record convicted of 1 count.



Note: Analysis is based on cases sentenced under Virginia's truth-in-sentencing/no-parole system from 1995 through 2003. Data include the offenses of manufacture, sale, distribution and possession with intent to sell.

Legislative Responses to Methamphetamine Around the Nation

In July 2003, Commission staff conducted an Internet search of legislation applicable to methamphetamine offenses around the nation. The survey included laws covering not only the possession, manufacture, distribution, and sale of methamphetamine itself, but also regarding the possession, distribution, and theft of precursor substances used in methamphetamine production. Staff also researched state laws potentially applicable to other issues related to methamphetamine production, including child endangerment, environmental hazards and lab cleanup costs, and the booby-trapping of clandestine labs.

The survey results, recently updated, have been supplemented by data from a similar study conducted by the National Alliance for Model State Drug Laws (NAMSDL), and presented at the National Methamphetamine Legislative and Policy Conference on October 25-27, 2004, in St. Paul, Minnesota. The Alliance is a resource for state officials and legislators, drug and alcohol professionals, law enforcement, community leaders, the recovering community, and others striving for comprehensive, effective state drug and alcohol laws, policies, and programs. A successor to the President's Commission on Model State Drug Laws and funded by Congressional appropriations since federal fiscal year (FY) 1995, the Alliance is a 501(c)(3) nonprofit, bipartisan organization.

Virginia classifies methamphetamine as a Schedule II controlled substance. Like many other states, Virginia also lists the immediate methamphetamine precursor phenylacetone (also called P2P, phenyl-2-propanone, benzyl methyl ketone, methyl benzyl ketone) as a Schedule II controlled substance (§ 54.1-3448, *Code of Virginia*). This corresponds to the "narrow" definition, where the law applies only to a compound that immediately precedes the final illegal substance. Virginia law does not presently penalize possession or distribution of a broad range of precursor chemicals such as ephedrine, pseudoephedrine, acetone, ether, toluene, iodine, red phosphorous, or anhydrous ammonia, which are used in the manufacture of methamphetamine (Miller 2001).

There are three main methods for producing methamphetamine: the P2P method, the red phosphorous method, and the lithium or sodium reduction (Nazi) method. The P2P method is less common today, because its main precursor chemical (phenyl acetic acid) has been strictly regulated and is hard to obtain. The P2P method takes longer and produces a less pure and less potent form of the drug with worse side effects. Most methamphetamine manufacturers now use the latter two methods, in which ephedrine or pseudoephedrine is the main precursor chemical (Scott 2002). Virginia law may not address the two most common methods of methamphetamine production.

Under Virginia law, it is a Class 5 felony for any person to unlawfully possess a Schedule II controlled substance (§ 18.2-250(A, a)). This offense is punishable by a term of imprisonment from one to ten years. Under § 18.2-248(C), the manufacture, sale, distribution, or possession with intent to manufacture, sell or distribute a Schedule II controlled substance is a felony punishable by a term of imprisonment from 5 to 40 years and a fine not more than $500,000. Beginning in 2000, §§ 18.2-248(H)(5) and 18.2-248(H1) & (H2) (often referred to as Virginia's "drug kingpin laws") may be employed in cases involving larger amounts of methamphetamine. Manufacturing, selling, etc., of 100 grams or more of methamphetamine is subject to a penalty of 20 years to life with a mandatory minimum of 20 years. Additional fines and imprisonment are applicable for increased amounts of methamphetamine and the money made from its sale (for additional discussion of Virginia's mandatory minimum sentencing laws see the section of this chapter entitled "Mandatory Penalties for Schedule I or II Drug Offenses").

Other issues related to methamphetamine production include endangerment of children, environmental hazards and cleanup costs created by hazardous waste byproducts, and the booby-trapping of clandestine labs. Under § 18.2-371, Contributing to the Delinquency of a Minor, it is a Class 1 misdemeanor if a parent or other adult puts a minor in a situation in which there is "a substantial risk of death, disfigurement or impairment of bodily or mental functions." Recent legislation passed during the 2004 General Assembly session directly addresses the child endangerment issue. House Bill 1041 amended §§ 16.1-228 and 63.2-100 expanding the definition of child abuse and neglect to include the manufacture, attempted manufacture or unlawful sale of a Schedule I or II controlled substance in the presence of a child. House Bill 420, and its companion bill, Senate Bill 429, provided for the development of multidisciplinary teams to provide consultation to the local social services department during investigation of methamphetamine cases involving child abuse or neglect.

Chapter 25 of the *Code* references the Virginia Environmental Emergency Response Fund. Specifically, § 10.1-2502 states "the agency [Department of Environmental Quality] shall promptly seek reimbursement from any person causing or contributing to an environmental pollution incident for all sums disbursed from the Fund for the protection, relief and recovery from loss or damage caused by such person. In the event a request for reimbursement is not paid within sixty days of receipt of a written demand, the claim shall be referred to the Attorney General for collection. The agency shall be allowed to recover all legal and court costs and other expenses incident to such actions for collection." This would seem to

cover environmental cleanup costs for methamphetamine labs as well. However, according to NAMSDL research, Virginia currently has no statutes, regulations, guidelines, or guidance documents that specifically address clandestine laboratory cleanup and remediation.

Current Virginia law makes it illegal to maintain or operate a fortified drug house as specified under § 18.2-258.02. A fortified drug house is one "substantially altered from its original status by means of reinforcement with the intent to impede, deter or delay lawful entry by a law-enforcement officer." A violation is a Class 5 felony with a 10-year maximum. No attempt is made, however, to define booby traps or to prescribe penalties for the use of booby traps.

States across the nation have implemented a variety of responses to methamphetamine crime within their borders. Many western and midwestern states have laws penalizing the possession and distribution of numerous precursor substances used in the manufacture of methamphetamine. These states employ a "broad" definition and may list numerous specific precursors. In particular, ephedrine and pseudoephedrine are frequently listed as precursors. Arizona has laws regarding the quantity of pseudoephedrine necessary to trigger a violation, and also a law penalizing the possession of equipment used in methamphetamine production. Idaho also has a law regarding the quantity of precursor chemicals necessary to trigger a violation. Other states have laws that do not specify threshold quantities, but penalize "possession with intent to manufacture methamphetamine". Others (Texas, for example) penalize possession of at least three substances from a list of precursors. Missouri and Oklahoma have laws prohibiting the theft of anhydrous ammonia, an agricultural fertilizer used in the lithium/sodium reduction (Nazi) method of production.

Recent legislative efforts in the states have focused on restricting the sale or distribution of products containing pseudoephedrine. Many individuals working on methamphetamine-related issues feel that this is the most effective way to combat methamphetamine abuse. Readily available from over-the-counter cold medications and easily obtainable from numerous retail outlets, ephedrine or pseudoephedrine is the primary ingredient in virtually every recipe for methamphetamine production. At the same time, authorities recognize that pseudoephedrine has legitimate and significant medical usage, and must remain available to legitimate consumers and health care professionals. State officials are therefore striving to achieve a balance in their legislative and policy efforts to limit access to pseudoephedrine (NAMSDL 2004).

According to data presented by NAMSDL at the St. Paul conference, only 14 states (Alabama, Arizona, Arkansas, California, Illinois, Iowa, Louisiana, Michigan, Missouri, North

Dakota, Oklahoma, Oregon, Utah, and Washington) currently have quantity restrictions on the possession, purchase, sale or transfer of pseudoephedrine (Figure 78). Some of these states restrict both the number of packages (typically 2 or 3 packages) and the total quantity of pseudoephedrine (often 9 or 12 grams) that can be purchased or possessed at any one time. Even these restrictions, however, can be circumvented by theft or by multiple individuals making purchases from many different retail outlets at multiple times, a process known as "smurfing". Exemptions may be allowed for specified forms of pediatric products, liquid or gelcap formulations, and products formulated to effectively prevent the conversion of the active ingredient (i.e., pseudoephedrine) into methamphetamine.

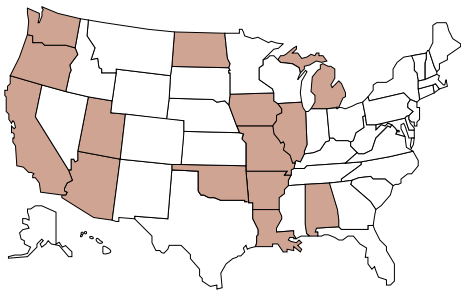
Several states are considering legislation similar to that recently adopted in Oklahoma. That state now classifies pseudoephedrine as a Schedule V controlled substance; as a result, medicines containing any detectable amount of pseudoephedrine can only be sold by a licensed pharmacist. The consumer must present a photo ID and sign written documentation of the transaction in order to purchase the product. These laws have been credited in reducing the number of methamphetamine lab seizures in Oklahoma by 50% to 70% in 2004 (Carnevale Associates, LLC 2004). However, as the states have discovered, such legislation is often strongly opposed by retail merchants associations and the pharmaceutical industry.

Thefts of anhydrous ammonia from tanks have presented particular problems in largely agricultural areas of the Midwest. Farmers have found they must install locks on their tanks or keep them under surveillance to discourage would-be thieves. Craig Kelly, a chemist at the Johns Hopkins University Applies Physics Laboratory in Laurel, Maryland, writes that, "Thieves normally pilfer only a few gallons of anhydrous ammonia but too often are the cause of major ammonia spills. Such spills not only result in the loss of thousands of gallons of ammonia for the farmer, but have resulted in the evacuations of entire towns due to the toxic cloud of ammonia produced" (Pace Publications 2003).

Chemical researchers at several universities are trying to develop additives to render anhydrous ammonia unusable in methamphetamine production. The Associated Press has reported that researchers at Southern Illinois University-Carbondale have developed an additive which stains the hands of

Figure 78

States With Pseudoephedrine Control Laws



Source: National Alliance for Model State Drug Laws (2004)

thieves, or the body parts of methamphetamine users who snort or inject the end product, a fluorescent pink. The visible stain, even if washed off, was still detectable by ultraviolet light 24 to 72 hours later. As another benefit, the additive, tentatively named GloTell, helped farmers detect tank leaks. Virginia-based Royster-Clark Inc. is to begin marketing the additive soon under an exclusive distribution agreement. However, GloTell likely will add about $9 per ton to the cost of anhydrous ammonia, which now costs about $240 a ton (Hegeman 2004). In addition, researchers at Iowa State University and in Maryland are working to develop additives which, if blended with anhydrous ammonia, render the chemical incapable of generating the reaction needed to produce methamphetamine (Van Haaften 2004 and Pace Publications 2003).

Endangerment of children by exposure to methamphetamine production has been identified in other states as a serious and expensive problem. Nationwide, a total of 3,419 children were endangered by methamphetamine production in 2003 (Carnevale Associates, LLC 2004). According to NAMSDL, children under 18 years of age are considered to be drug endangered if they suffer physical harm or neglect from direct or indirect exposure to illegal drugs or alcohol, or live in a dwelling where illegal drugs are used or manufactured. Children residing in close proximity to methamphetamine labs are exposed to many hazards, including fire, toxic fumes and chemicals, sexual and physical abuse and neglect, developmental, social, and psychological delays, bodily injury, and even death (NAMSDL 2004). In 2003, almost 1,300 children were directly exposed to toxic chemicals, 724 children were taken into protective custody, 44 children were injured, and 3 children died. Children of methamphetamine-using mothers can be endangered before they are even born. Although little is known about the long-term health effects of prenatal methamphetamine exposure, infants born under these circumstances have low birth weight, are irritable, have trouble eating and digesting foods, and are prone to pre-birth strokes and brain hemorrhages (Carnevale Associates, LLC 2004).

Currently 35 states (including Virginia) and the District of Columbia have specific statutes or regulations addressing drug endangered children (DEC). Arkansas, California, Idaho, Iowa, Missouri, Ohio, Tennessee, Washington, and Wyoming penalize the use of minors in or exposure of minors to methamphetamine production. Specific examples of state laws include an Arizona law (ARS 13-3623) passed in 2000 that creates liability when a person places a child in a location where a methamphetamine lab exists and a North Dakota law (HB 1351) passed in 2003 that makes it a felony to expose children or vulnerable adults to a controlled substance, precursor, or drug paraphernalia (Carnevale Associates, LLC 2004). A 2002

Tennessee law classifies exposing children to a methamphetamine lab as "severe child abuse," making it easier for that state to terminate the parental rights of parents who commit such an offense (Pace Publications 2002).

Some states have also mandated in the sentencing process that the presence of a child during the use, sale, or production of methamphetamine is an aggravating circumstance. In Wyoming, for instance, a person charged with unlawful clandestine lab operation in the presence of a child under 18 can receive a sentence up to five years longer and a fine up to $25,000 greater than when a child is not present. Likewise, in California, if a child under 16 is present in a seized methamphetamine lab, the offender is sentenced to an additional two years, and sentenced to an additional five years if the child has suffered "great bodily injury" (Carnevale Associates, LLC 2004). Some states provide for or are considering enhanced penalties when clandestine labs are found in certain locations (e.g., hotel rooms, apartments, mini-storage units, other rental properties, or close to schools, child care facilities, long-term care facilities, or residences of in-home child care providers).

Methamphetamine lab cleanup is a dangerous and rigorous process, due to the volatile and caustic nature of the chemicals involved in methamphetamine production. Each pound of methamphetamine manufactured yields five to seven pounds of toxic waste. Cleanup typically costs between $3,500 and $5,000, but some labs cost as much as $20,000 to clean up (Carnevale Associates, LLC 2004). If cleanup is inadequate, future tenants and property owners may face health hazards such as respiratory problems, headaches, and rashes from exposure to residual levels of toxic substances.

Currently only seven states (Alaska, Arizona, Arkansas, Colorado, Minnesota, Tennessee, and Washington) have specific statutes, regulations, or guidelines addressing methamphetamine lab cleanup (NAMSDL and Carnevale Associates, LLC 2004). These states have adopted specific legislation or guidelines that outline how to respond to, secure, and clean up methamphetamine labs. They have also established a risk-based decontamination standard specific to methamphetamine. Several state cleanup laws and regulations address the use of a state-approved environmental cleanup contractor and/or a certified industrial or environmental hygienist. Only three states, however, have tackled by statute or regulation the contractor and employee training and certification in detail. In Washington, Oregon, and Arizona, not only does the contractor need to be certified, but the employees and supervisors must all go through a specific training and certification process (NAMSDL 2004). These three states also require that prospective buyers or tenants of past methamphetamine lab sites be warned of possible environmental hazards.

State guidelines do not have the force of law by themselves, but in some instances local governments have passed ordinances requiring cleanup contractors to abide by the procedures and cleanup standards that the guidelines establish. Localities have also found that ordinances declaring methamphetamine labs a criminal or public health nuisance often help facilitate the cleanup of such sites. For example, in June of 2001, the Albuquerque, New Mexico, City Council passed into law a new Nuisance Abatement Ordinance. This ordinance defines a criminal nuisance as any property, real or personal, in or on which criminal activity occurs, and which endangers the health and well being of the public. The ordinance covers 50 crimes, 31 of which are felonies, including the distribution, manufacture, possession, or imitation of a controlled substance. If an investigation establishes that criminal activity has occurred, the city works with the property owner to obtain voluntary compliance with an abatement plan within 30 days. If an owner fails to cooperate, the case is presented to the Community Enforcement and Abatement Division for consideration of criminal or civil prosecution (Albuquerque Police Department 2004). Civil action (using the "preponderance of evidence" criterion) is often preferred over criminal prosecution, so that the matter can be resolved more quickly.

While states may not provide specific methamphetamine lab cleanup standards, they often do address the expense of cleanup by seeking liability. Compensation is sought through restitution (North Carolina) or civil proceedings (Ohio). Numerous states (Arkansas, California, Indiana, Kansas, Kentucky, Ohio, Oregon, and Washington) have enacted legislation to make offenders liable for costs associated with the cleanup of hazardous wastes from clandestine methamphetamine labs. Washington provides for fines of up to $25,000 for operators of clandestine methamphetamine labs, with the first $3,000 going to pay for cleanup.

According to the Centers for Disease Control (CDC), 51% of all injuries at methamphetamine labs happen to first responders. In addition to the toxic conditions found at many clandestine labs, first responders may encounter booby traps designed to protect the labs or warn of intruders. Types of booby traps include guard dogs, venomous snakes, concealed holes in the floor, spring devices with exposed nails or sharp objects, acid containers propped over doorways, pipe bombs, grenades, and aluminum foil balls containing explosive mixtures (Carnevale Associates, LLC 2004). Arizona, Montana, New Jersey, Utah, and Wyoming provide enhanced penalties if clandestine labs are booby-trapped or firearms are found. New Jersey's law (§ 2C:35-4.1) includes detailed definitions of a "booby trap" and a "fortified structure".

Commission Deliberations

Each year, the Commission monitors the sentencing guidelines system and considers possible modifications to enhance the usefulness of the guidelines as a tool for Virginia's circuit court judges. The Commission examines changes and emerging trends in judicial sentencing patterns. This is done to identify specific areas where the guidelines may be out of sync with judicial thinking.

This year the Commission has closely examined the sentencing guidelines for methamphetamine offenses. The Commission believes there is no compelling evidence to support revisions to the sentencing guidelines at this time. While available statistics indicate methamphetamine crimes increased during the 1990s, both nationally and in Virginia, the Commission found that methamphetamine crimes continue to represent a small share of criminal drug activity in the Commonwealth. Although the numbers of seizures and convictions involving methamphetamine have been increasing in Virginia, particularly in the Western area of the state, methamphetamine remains much less prevalent than other Schedule I or II drugs. Cocaine continues to be much more pervasive a drug in Virginia than methamphetamine. Statewide, convictions for heroin offenses also greatly outnumber those for methamphetamine. The Arrestee Drug Abuse Monitoring (ADAM) program continued to show little sign of methamphetamine's spread to arrestees in the eastern United States.

Overall, the Commission found that the quantity of methamphetamine is not a significant factor in the sentencing of offenders. Prior record, most notably violent prior record, and the number of charges resulting in conviction appear to be the most important factors in determining the sentencing outcome. The sentencing guidelines explicitly account for both of these factors. The guidelines contain built-in midpoint enhancements, which dramatically increase the guidelines recommendation for offenders with prior violent felony convictions or juvenile adjudications, in addition to other factors on the worksheets that increase the sentencing recommendation based on the number and types of prior convictions in the offender's record.

The Commission reviewed the numerous mandatory minimum penalties for offenses involving a Schedule I or II drug, including methamphetamine, specified in the *Code of Virginia*. Many of these mandatory penalty laws became effective as recently as July 1, 2000. These mandatory sentences take precedence over the discretionary guidelines system.

While concluding there is not convincing evidence to recommend revisions to the sentencing guidelines at this time, the Commission will continue to monitor emerging patterns and trends in the sentencing of methamphetamine cases. The Commission may consider recommending revisions to the sentencing guidelines at a future date.

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6 Recommendations of the Commission

Unless otherwise provided by law, the changes recommended by the Commission become effective on the following July 1.

Introduction

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

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

In 2004, the Commission continued its work on a legislative mandate from 2003. The General Assembly directed the Commission to develop discretionary sentencing guidelines and a risk assessment instrument for felony offenders who violate conditions of community supervision but are not convicted of a new crime. Sentencing guidelines for this population of offenders were implemented July 1, 2004. The Commission has monitored the early response to the implementation of these new guidelines. The risk assessment phase is now complete. After careful deliberation, the Commission developed two proposals related to this legislative charge.

In all, the Commission has adopted six recommendations this year. Each of these is described in detail on the pages that follow.

Recommendation 1

Refine the incarceration/no incarceration worksheet (Section A) of the probation violation sentencing guidelines by adjusting the points offenders receive for certain violations of community supervision and refine the sentence length (Section C) Recommendation Table to modify the point ranges associated with specific guidelines sentence ranges.

• Issue

The 2003 General Assembly directed the Commission to develop discretionary sentencing guidelines, based on historical judicial sanctioning practices, for felony probation violators returned to court for reasons other than a new conviction, offenders also known as "technical violators" (Chapter 1042 of the Acts of Assembly 2003). In 2003, the Commission conducted an extensive study of this population of offenders and developed historically-based sentencing guidelines applicable in these cases. The Commission recommended, and the General Assembly approved, statewide implementation beginning July 1, 2004. Early use of the new probation violation guidelines suggests that the guidelines may need further refinement to better reflect current judicial thinking in the punishment of supervision violators.

• Discussion

Since 1995, when sentencing reforms abolished parole, circuit court judges have dealt with a wider array of supervision violation cases, including violations of supervision following release from incarceration that formerly were handled by Virginia's Parole Board as parole violations. Despite the larger role they now play in overseeing supervision of offenders in the community, circuit court judges have had to perform these duties without sentencing tools, such as guidelines, available to them.

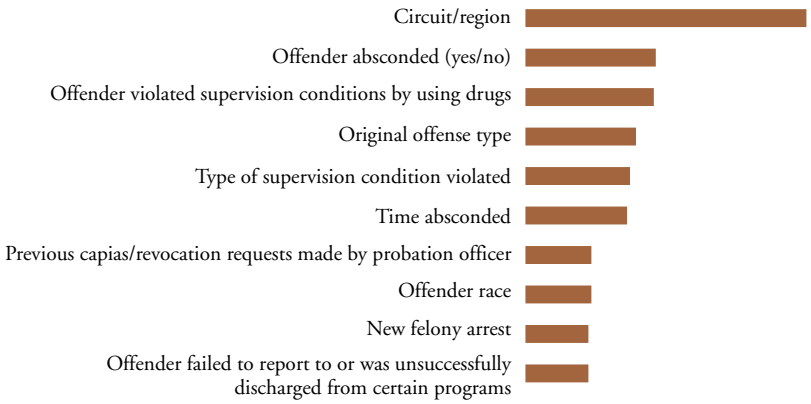
Pursuant to the 2003 legislative directive, the Commission designed and implemented a research plan to examine historical sanctioning practices for violations of community supervision not involving a new conviction. The analytical approach laid out by the Commission is not unlike that used for developing Virginia's historically-based sentencing guidelines for felony offenses, already utilized in circuit courts around the Commonwealth. Based on the results of this empirical study, the Commission produced historically-based discretionary sentencing guidelines applicable to these offenders.

The Commission encountered many challenges in developing sentencing guidelines for this population. Lack of standardized data was critical, and extensive manual data collection from offender files was necessary. Once data collection

was complete, the Commission's analysis revealed significant variation in the punishment of these violators. Disparate practices across the state made it difficult to identify factors used consistently by judges to base their sentencing decisions. Moreover, much variation simply could not be explained by guidelines factors or the numerous other legal and extra-legal factors examined by the Commission.

Figure 79

Sentencing of Probation Violators Not Convicted of a New Crime: Relative Importance of Significant Factors in Incarceration Decisions



The variation found by the Commission is illustrated by Figure 79, which shows the relative importance of the significant factors found in judges' incarceration decisions. Circuit/region in the state is by far the most influential factor in determining whether or not a violator receives an active term of incarceration. Circuit/region is more than twice as important as any other factor. This result suggests that, all other factors being equal, there is significant disparity in sentencing these violators across Virginia's circuits. Divergent practices were also found in the sentence length decision. Developing historical-based sentencing guidelines, when past practices have varied so widely, was very difficult. While many statistical tests were performed, application of the guidelines in the courtrooms, ultimately, is the most critical validation test of any sentencing tool.

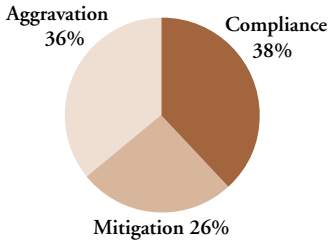
Approved by the General Assembly, the probation violation guidelines became effective statewide on July 1, 2004. Early use of the new probation violation guidelines suggests that the guidelines, and Section A in particular, may need further refinement so that the guidelines are more in sync with judicial sanctioning of supervision violators.

Judicial compliance with probation violation guidelines in the first months of statewide use is lower than expected. For the 768 cases received and automated through November 8, 2004, 38% were sentenced within the range recommended by the new guidelines (Figure 80). Nearly 36% of the violators were given sentences more severe than those recommended by the new guidelines. The remaining 26% were sentenced below the guidelines recommendation. Compliance and departure patterns in the early months indicate that adjustments to the new guidelines could improve their utility as a benchmark for judges.

Figure 80

Compliance with Probation Violation Sentencing Guidelines

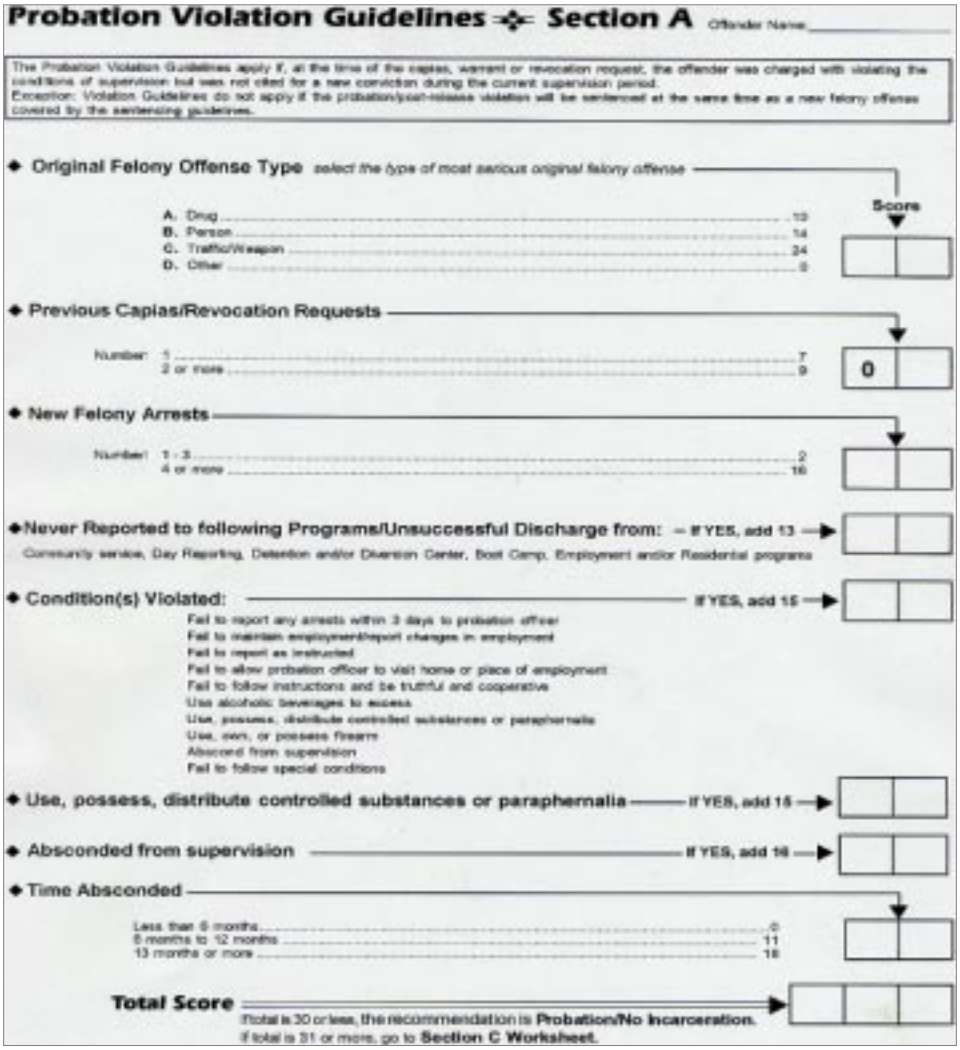
Cases Received and Automated July 1, 2004, through November 8, 2004



The Commission recommends refinement of the incarceration/no incarceration worksheet (Section A). The worksheet proposed by the Commission is shown in Figure 81. The same factors appear on the current and proposed worksheet. The proposed changes do not affect the first four factors in any way. The remaining factors, which are scored based on the particular conditions of community supervision the offender has violated, have been revised. While the factors to be scored are the same, the points assigned to these factors have been recalibrated. These modifications should result in incarceration recommendations that, overall, better reflect current judicial practices in the Commonwealth.

Figure 81

Proposed Probation Violation Guidelines
Incarceration/No Incarceration (Section A) Worksheet



Additionally, the Commission proposes revising the sentence length (Section C) recommendation table as shown in Figure 82. For violators recommended for an active term of incarceration, the preparer must complete the sentence length (Section C) worksheet. Sentence length recommendations begin with a range of one day to three months in jail; violators scoring the highest points are recommended for a prison term of more than six years. The proposed modifications to the sentence length range table are modest. These changes are expected to result in increased judicial concurrence with the probation violation guidelines.

The Commission carefully considered compliance and departures patterns and judicial feedback regarding the probation violation guidelines. The Commission concluded that sentencing guidelines for violators are a useful tool for circuit court judges, but that the guidelines could be improved. The changes proposed by the Commission are designed to enhance the usefulness of these guidelines for Virginia's circuit court judges as they make difficult sentencing decisions.

Figure 82

Proposed Changes to Probation Violation Guidelines Sentence Length (Section C) Recommendation Table

Recommended Sentence Range	Current Points Range	Proposed Points Range
Up to 3 mos.	Up to 33	Up to 36
3 mos. to 6 mos.	34 – 41	37 – 42
6 mos. to 12 mos.	42 – 43	43 – 45
1 yr. to 1 yr. 3 mos.	44 – 48	46 – 50
1 yr. 3 mos. to 1 yr. 6 mos.	49 – 51	51 – 52
1 yr. 6 mos. to 2 yrs.	52 – 55	53 – 57
2 yrs. to 3 yrs.	56 – 62	58 – 65
3 yrs. to 4 yrs.	63 – 66	66 – 69
4 yrs. to 5 yrs.	67 – 74	70 – 82
5 yrs. to 6 yrs.	75 – 85	83 – 89
More than 6 yrs.	86 +	90 +

Recommendation 2

Amend the probation violation sentencing guidelines by incorporating a risk assessment instrument that is designed to identify the violators who pose the lowest risk to public safety from among those recommended by the guidelines for an active term of incarceration.

• Issue

The 2003 General Assembly directed the Commission to develop discretionary sentencing guidelines, based on historical judicial sanctioning practices, for felony probation violators returned to court for reasons other than a new conviction, offenders also known as "technical violators." Additionally, the Commission was to determine recidivism rates and patterns for these offenders and evaluate the feasibility of integrating a risk assessment instrument into the guidelines for violators (Chapter 1042 of the Acts of Assembly 2003). The probation violation sentencing guidelines were implemented statewide on July 1, 2004. The Commission now has completed the risk assessment phase of the study and recommends the integration of risk assessment into the guidelines for probation violators.

• Discussion

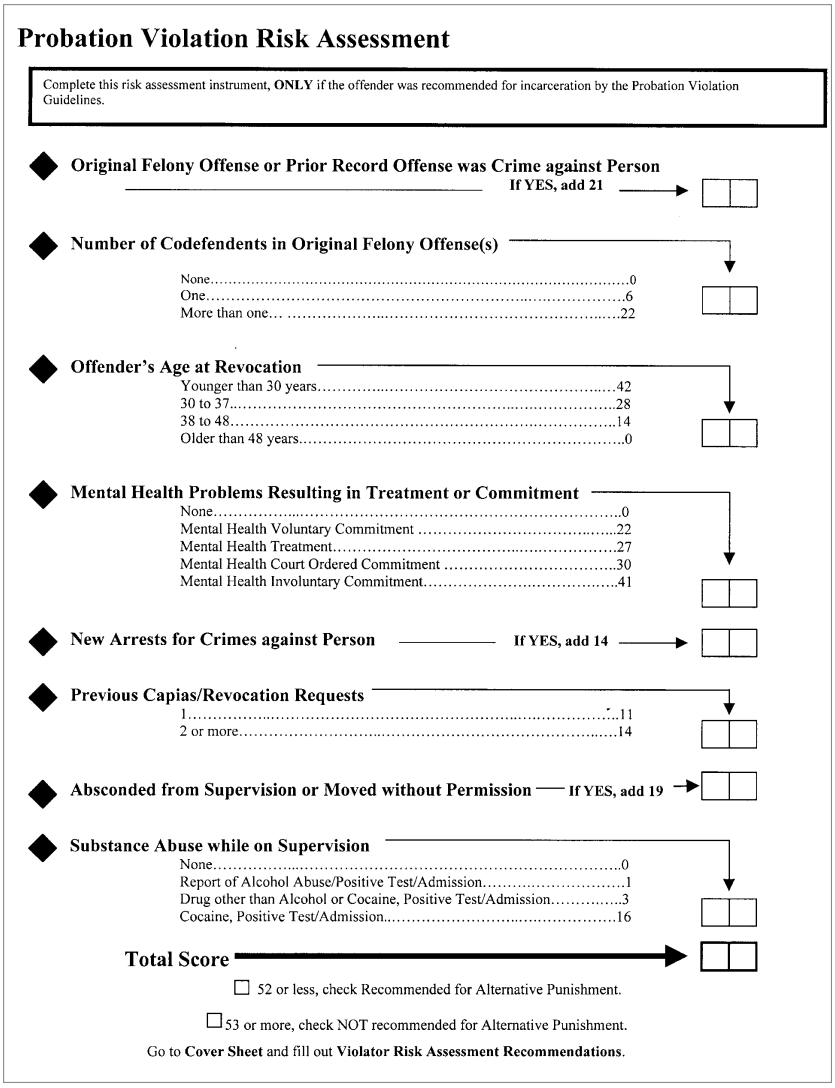
The purpose of risk assessment is to identify offenders who likely pose the least risk to public safety and to recommend those offenders for alternative sanctioning options in lieu of traditional incarceration in prison or jail. The Commission closely examined recidivism patterns among probation violators returned to court for reasons other than a conviction for a new crime. In selecting a risk assessment model, the Commission considered the accuracy of prediction, public safety, and the factors included in the model. The risk assessment model selected by the Commission for integration into the guidelines outperformed the alternative models in its ability to identify candidates for diversion who have the lowest rates of recidivism and, therefore, represent the least risk to public safety. A full discussion of the Commission's study and its findings can be found in the chapter of this report entitled Probation Violator Study.

No risk assessment tool can ever predict a given outcome with 100% accuracy. The goal is to produce an instrument that is broadly accurate and provides useful additional information to decision makers.

The risk assessment instrument proposed by the Commission appears in Figure 83. Factors on the refined risk assessment instrument are the result of statistical analysis. The factors reflect the circumstances of the offender's original crime, his criminal history, and the offender's behavior while under supervision. Individual factors by themselves do not place an offender in a high-risk group. It is the presence of certain combinations of factors that determines the risk group of the offender. The Commission made one adjustment to the statistical model, and this is discussed below.

Figure 83

Proposed Risk Assessment Instrument for Probation Violators Not Convicted of a New Crime



Probation Violation Risk Assessment

Complete this risk assessment instrument, **ONLY** if the offender was recommended for incarceration by the Probation Violation Guidelines.

◆ **Original Felony Offense or Prior Record Offense was Crime against Person** — **If YES, add 21** → ☐☐

◆ **Number of Codefendents in Original Felony Offense(s)**

None……0
One……6
More than one… ……22 → ☐☐

◆ **Offender's Age at Revocation**

Younger than 30 years……42
30 to 37……28
38 to 48……14
Older than 48 years……0 → ☐☐

◆ **Mental Health Problems Resulting in Treatment or Commitment**

None……0
Mental Health Voluntary Commitment ……22
Mental Health Treatment……27
Mental Health Court Ordered Commitment ……30
Mental Health Involuntary Commitment……41 → ☐☐

◆ **New Arrests for Crimes against Person** — **If YES, add 14** → ☐☐

◆ **Previous Capias/Revocation Requests**

1……11
2 or more……14 → ☐☐

◆ **Absconded from Supervision or Moved without Permission** — **If YES, add 19** → ☐☐

◆ **Substance Abuse while on Supervision**

None……0
Report of Alcohol Abuse/Positive Test/Admission……1
Drug other than Alcohol or Cocaine, Positive Test/Admission……3
Cocaine, Positive Test/Admission……16 → ☐☐

Total Score → ☐☐

☐ 52 or less, check Recommended for Alternative Punishment.

☐ 53 or more, check NOT recommended for Alternative Punishment.

Go to **Cover Sheet** and fill out **Violator Risk Assessment Recommendations**.

There are eight factors on the proposed risk assessment instrument.

- Original Felony Offense or Prior Record Offense was a Crime against Person. The Commission's analysis revealed that offenders who were on probation for a felony person crime and those who had a prior conviction for a crime against the person were more likely to recidivate than other offenders in the study. These offenders receive 21 points on the risk assessment instrument.
- Number of Codefendents in the Original Felony Offense(s). Offenders whose original felony offense or offenses involved one or more codefendants recidivated at higher rates in the Commission's study. That the number of codefendants is associated with risk may relate to the offender's level of social connection with other criminals. As most offenders return to the same community where they were originally convicted, the presence of this factor may indicate that an offender, convicted with others, has an association with a criminal network in that community. According to the study findings, such a violator is at greater risk to return to criminal activity when he resumes his community supervision. Thus, offenders who had a single codefendant receive 6 points on the proposed violator risk assessment instrument, while violators with multiple codefendants receive 22 points.
- Offender's Age at Revocation. Traditionally in criminological research on recidivism, younger offenders are at higher risk of repeat offending. This study of Virginia's probation violators produced similar findings. Offenders who are under the age of 30 at the time of revocation hearing receive the highest number of points (42), because these young violators demonstrated the greatest risk for recidivism. Offenders who are 30 to 37 years of age receive fewer points (28), followed by those who are 38 to 48 years of age at time of revocation, who are assigned 14 points. The oldest violators, offenders who are over the age of 48, were found to recidivate at considerably lower rates than other offenders, and therefore, receive no points on this factor.
- Mental Health Problems Resulting in Treatment or Commitment. The Commission's examination revealed that violators whose mental health problems have resulted in some type of mental health treatment in the past and those who have been committed previously for mental health treatment did not perform as well as other offenders when they returned to community supervision. In the Commission's analysis, this factor was found to be the most correlated with subsequent supervision failure. The factor is divided into five categories. Offenders with no prior mental health treatment history receive no points on the proposed risk assessment instrument. Offenders who committed themselves voluntarily for mental health treatment sometime in the past receive 22 points. Offenders who have undergone outpatient treatment only receive 27 points. A prior court-ordered mental health commitment results in 30 points, while a previous involuntary commitment that was not based on a court order adds 41 points to the offender's score. These offenders demonstrate a significantly higher level of risk of recidivism, perhaps due to an inability to recognize or address ongoing mental health issues while in the community.
- New Arrests for Crimes against a Person. Offenders who had been arrested for, but not convicted of, a new person crime while under supervision went on to recidivate at higher rates than other offenders when returned to the community following the violation hearing. Being arrested for, but not convicted of, a new crime against a person while on supervision, results in the violator receiving 14 points on the proposed risk assessment instrument. Only arrests are considered in this factor because violators who are convicted of new crimes while on supervision are not eligible for probation violation guidelines or risk assessment evaluation with the proposed tool.

- Previous Capias/Revocation Requests. The number of capias/revocation hearing requests previously submitted by the probation officer to the judge during the supervision period also indicates risk. Having had one such request results in the violator receiving 11 points on the proposed risk assessment instrument. More than one such prior request, which suggests the offender has had ongoing problems adjusting to supervision, yields 14 points on the proposed scale.
- Absconded from Supervision or Moved without Permission. Offenders who absconded from supervision and those who changed residences without informing the probation officer were subsequently more likely to be rearrested than other offenders, based on the Commission's analysis. In the original statistical model, this factor included another type of violation: failure to follow instructions of the probation officer. However, because of concern that the term "fail to follow instructions" may be ambiguous, is difficult to define, and may lead to subjective and inconsistent scoring, the Commission elected to remove "fail to follow instructions" from this factor. All of the factors in the risk assessment model remain statistically significant with this adjustment. Offenders who absconded or moved without permission receive 19 points on the proposed violator risk assessment instrument.
- Substance Abuse while on Supervision. The Commission found that offenders who abuse alcohol or use drugs while under supervision are less successful, and more likely to be rearrested, once they return to the community following a probation violation or revocation. The identification of the offender's alcohol abuse may be based on incidents reported by law enforcement, the family, or employers, observations of the probation officer, positive tests or admission by the offender himself. On the proposed risk tool, alcohol-abusing offenders receive one point. Those who either admit to using, or test positive for, drugs other than cocaine or alcohol, are at slightly higher recidivism risk and receive three points. Finally, those who either admit to using, or test positive for, cocaine receive 16 points.

In combination, these factors are used to calculate a score that is associated with risk of recidivism. Offenders with low scores share characteristics with offenders from the study sample who, proportionately, recidivated less often than those with higher scores. In this way, the instrument is predictive of offender risk.

In its 2003 directive to the Commission, the General Assembly did not identify a target, or the proportion of violators, to be redirected from jail or prison. However, the legislative charge directed the Commission to give "due regard to public safety." Accordingly, the Commission carefully examined the recidivism patterns of the violators. The Commission found that at the lower point levels, the offenders are somewhat homogeneous; that is, there are only slight variations in their levels of recidivism. Nevertheless, applying the proposed risk assessment instrument, there is a point at which recidivism rates begin to rise steadily as the risk score increases. The Commission concluded that offenders scoring 53 points or more on the proposed risk scale are, overall, at substantially greater risk of recidivism and, therefore, inappropriate candidates for alternative sanctions in lieu of incarceration in prison or jail. The Commission recommends the threshold, or maximum number of points an offender can score to receive a recommendation for alternative punishment, be set at 52 points. Under the Commission's

proposal, violators scoring 52 points or less on the proposed risk assessment instrument will be recommended for an alternative sanction instead of the prison or jail confinement recommended by the probation violation sentencing guidelines. For offenders scoring 53 points or more, the recommendation for incarceration provided by the probation violation sentencing guidelines remains unchanged.

Applying the threshold chosen by the Commission, 56% of violators (returned to court for reasons other than a new conviction) will be recommended for alternative punishment options. According to the Commission's study data, less than 17% of the offenders recommended for an alternative sanction were identified as recidivists during the study period. In contrast, the recidivism rate was nearly 44% among offenders not recommended for an alternative sanction by the selected risk assessment model.

As noted above, a significant share of the violators who will be evaluated under the proposed risk assessment instrument will likely be deemed to be a very low risk to public safety. Unfortunately, it is the feeling of the Commission that judges in Virginia do not have an adequate range of alternative sanctions available to them to address this particular offender population. There is no question that the probation violators need to be held accountable for their misconduct. However, the Commission believes that public safety would not be compromised if sentencing options, much less costly than traditional incarceration, were more consistently applied to some of these felons.

In order to ensure that we continue to prioritize limited prison resources for incapacitating our most dangerous offenders, it is critically important to make available other sanctioning options for punishing the lower risk probation violators. In adopting the landmark 1994 no-parole legislation, the General Assembly recognized the long-term need to prioritize correctional resources, directing the Commission to develop a risk assessment instrument for those convicted of nonviolent felonies and to determine if 25% of incarceration-bound offenders could be safely redirected to alternative punishment options in lieu of jail or prison. This risk assessment instrument is integrated into the sentencing guidelines system and is proving to be very successful in achieving its goals. The success of the risk assessment initiative is tied to many factors, among which is the availability of intermediate sentencing options for offenders identified to be good candidates. In order for the new proposed risk assessment instrument for probation violators to be equally successful, new sentencing alternatives for this specific population of felons will need to be created, funded and made available to the circuit court judges.

Recommendation 3

Conduct a thorough study of probation violators returned to court because of a new criminal conviction

• Issue

The 2003 General Assembly directive specified that the Commission examine supervision violators returned to court for reasons other than a conviction for a new crime. In 2004, the Commission implemented the probation violation sentencing guidelines. The new guidelines, however, do not apply to offenders who have been found in violation of the conditions of supervision because they have been convicted of a new crime. A large share of offenders have their probation revoked due to a new misdemeanor or felony conviction. Information related to new-crime violators is limited. Little is known about the circumstances related to the violation or the behaviors of these offenders while under supervision. In many cases, judges will not have sentencing guidelines to consider when formulating sentencing decisions.

• Discussion

Since 1991, Virginia's circuit judges have been provided with historically-based sentencing guidelines grounded in an analysis of criminal sanctioning practices. Today, sentencing guidelines apply to nearly all felony offenses committed in the Commonwealth. These guidelines are an important tool available to judges to assist them in formulating sentences for convicted felons.

Since 1995, when sentencing reforms abolished parole, circuit court judges have dealt with a wider array of supervision violation cases, including violations of supervision following release from incarceration that formerly were handled by Virginia's Parole Board as parole violations. Despite the larger role they now play in overseeing supervision of offenders in the community, circuit court judges have had to perform these duties without any sentencing tools available to them. Beginning July 1, 2004, there are now sentencing guidelines for probation violators returned to court for reasons other than a new conviction. However, no such tool exists exist for judges when faced with re-imposing suspended time for offenders returned to court for violating conditions of community supervision related to a new criminal conviction.

In 2003, nearly 40% of probation violators were convicted of a new crime while under community supervision. If the new crime is a felony covered by the sentencing guidelines, the probation violation can be scored as an additional offense

in the case. However, no guidelines will be prepared when the probation violation is handled separately from the new felony conviction, when the new crime is not covered by the guidelines, or when the new crime is a misdemeanor.

During its study of violators not convicted of a new crime, offenders also known as "technical violators," the Commission found significant variation in the punishment of violators and the re-imposition of suspended incarceration time. The locality where the offender was under supervision was the single most important determinant of the punishment a violator would receive. Given the disparate practices in the sanctioning of violators not convicted of a new crime, disparities may also exist in the punishment of new-crime violators. A thorough examination of this population of violators would provide insight into the behaviors of this group while under supervision and the judicial sentencing patterns in these cases. Studying new-crime violators will serve to complement the extensive work the Commission has recently completed on violators not convicted of new criminal charges.

Recommendation 4

Modify § 19.2-298.01 of the *Code of Virginia* to require 1) completion of the Sentencing Revocation Report (SRR) in all felony cases involving a violation of probation or other form of community supervision, 2) preparation and judicial review of the probation violation sentencing guidelines, when applicable, 3) written explanation of any departure from those guidelines, and 4) submission of these documents, including disposition in each case, by the clerk of the circuit court to the Virginia Criminal Sentencing Commission

• Issue

Currently, § 19.2-298.01 of the *Code of Virginia* outlines specific provisions requiring the completion and submission of the sentencing guidelines worksheets applicable for felony offenses. This provision became effective January 1, 1995.

Since that time, the Commission has implemented a reporting system for tracking community supervision violation proceedings in Virginia's circuit courts. This system provides information that is not available from any other source in the Commonwealth. Implemented in 1997, the report is a simple form known as the Sentencing Revocation Report (or SRR). In addition, at the direction of the General Assembly, the Commission implemented discretionary sentencing guidelines applicable to felony offenders who violate the conditions of probation but are not convicted of a new crime. Statewide use of the probation violation sentencing guidelines began July 1, 2004. Existing law does not specifically require completion and submission of the SRR or the new guidelines for felony probation violators.

• Discussion

Under current *Code*, the provisions of § 19.2-298.01 refer to the sentencing guidelines for felony offenses, established pursuant to § 17.1-800 through § 17.1-806. These provisions require the preparation of the sentencing guidelines worksheets in all felony cases (other than Class 1 felonies). In addition, the judge is required to review and consider the suitability of the guidelines in each case. When a judge sentences above or below the guidelines, the judge is to provide a written explanation for the departure. Finally, the clerk of the circuit court must submit the guidelines forms to the Commission.

The requirements pertaining to the sentencing guidelines for felony offenses are explicitly stated in § 19.2-298.01. Since § 19.2-298.01 was enacted, however, the Commission has developed and implemented two programs, one by mandate of the General Assembly, that are not specifically addressed by this statute.

Charged under § 17.1-803(7) with monitoring sentencing practices in felony cases, the Commission found that there was little to no information available on violations of community supervision or how judges were punishing violators. While the Commonwealth maintains a wide array of sentencing information on felons at the time they are initially sentenced in circuit court, information on the re-imposition of suspended incarceration time for felons returned to court for violation of the conditions of community supervision was, until 1997, largely unavailable and its impact difficult to assess. In 1997, the Commission teamed with the Department of Corrections (DOC) to implement a procedure for systematically gathering data on the reasons for, and the outcomes of, community supervision violation proceedings in Virginia's circuit courts. With DOC's assistance, the Commission developed a simple one-page form called the Sentencing Revocation Report (SRR) to capture this information. The Commission has requested that either a probation officer or Commonwealth's attorney prepare an SRR for each hearing related to the violation of probation or other form of community supervision. The Commission has also requested that the clerk of the circuit submit each completed form to the Commission following the violation hearing. However, this process is not mandated by statute.

In 2003, the General Assembly directed the Commission to develop discretionary sentencing guidelines for a special population of offenders not previously covered by the guidelines. Implemented statewide July 1, 2004, these new guidelines apply in cases of felony offenders who violate the conditions of probation but are not convicted of a new crime. The Commission has requested that a Commonwealth's attorney or probation officer complete the new guidelines for each violation hearing involving an offender who returned to court for reasons other than a new criminal conviction. These guidelines are to be attached to the SRR form and given to the court for review. The Commission has asked judges to review the guidelines, enter the disposition, and provide a reason for departure when a sentence outside of the guidelines is given. Once the hearing has taken place, the Commission has requested the clerk to forward the forms to the Commission. This process, however, is not stipulated in the *Code of Virginia*.

While the Sentencing Revocation Report (SRR) yields crucial criminal justice data not otherwise available, it is not required by § 19.2-298.01. Nor does § 19.2-298.01 specifically require the completion and submission of the new probation violation sentencing guidelines, which were developed and implemented in response to a directive from the 2003 General Assembly. The Commission proposes expanding § 19.2-298.01 to cover the SRR and probation violation sentencing guidelines under the provisions of this statute.

Recommendation 5

Revise the nonviolent offender risk assessment instrument to exclude offenders being sentenced for a crime that carries a mandatory minimum term of incarceration from risk assessment evaluation

• Issue

The nonviolent offender risk assessment instrument is designed to identify low-risk property and drug offenders, recommended for incarceration by the sentencing guidelines, for alternative punishment programs in lieu of prison or jail. If the offender is otherwise eligible, the risk assessment instrument is completed, even in cases in which the offender has been convicted of a crime that carries a mandatory penalty. In these cases, the court cannot use an alternative sanction option, even if one is recommended, because the court must impose the mandatory minimum term of incarceration required by law. It is unnecessary to complete the nonviolent offender risk assessment instrument in these cases.

• Discussion

In 1994, as part of the reform legislation that instituted truth-in-sentencing, the General Assembly required the Commission to study the feasibility of using an empirically-based risk assessment instrument to select 25% of the lowest risk, incarceration-bound, drug and property offenders for placement in alternative (non-prison) sanctions. By 1996, the Commission developed such an instrument and implementation of the instrument began in pilot sites in 1997. The National Center for State Courts (NCSC), in 2001, completed an independent evaluation of nonviolent risk assessment. That same year, the Commission conducted a validation study of the original risk assessment instrument to test and refine the instrument for possible use statewide. In July 2002, the nonviolent risk assessment instrument was implemented statewide. By request of the 2003 General Assembly, the Commission revised the instrument to identify additional low-risk offenders for alternatives.

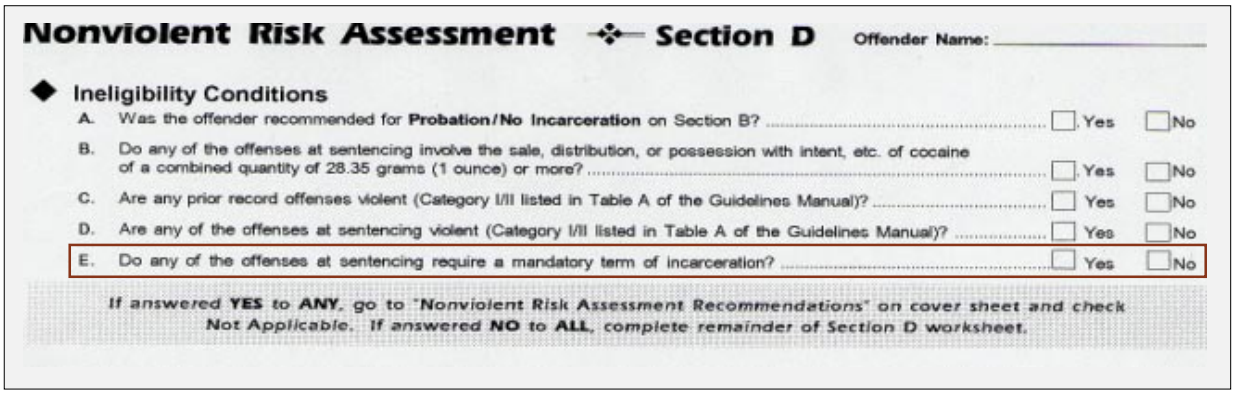
The Risk Assessment Instrument is completed for drug, fraud, and larceny offenders who meet the Commission's eligibility criteria. Offenders who are recommended for probation, offenders who have a current or prior conviction for a violent felony, and offenders who sell 28.35 grams or more of cocaine are excluded automatically from risk assessment consideration. An offender who scores 38 points or less is recommended for an alternative sanction other than traditional incarceration. The specific type of alternative punishment to be used is at the discretion of the judge. Offenders who score 39 points or more are recommended for incarceration based on the standard sentencing guidelines.

Currently, being convicted of an offense that carries a mandatory term of incarceration does not automatically preclude an offender from risk assessment evaluation. In fiscal years (FY) 2003 and 2004, 209 risk assessment worksheets were completed in cases when the judge had to impose a mandatory minimum sentence. In 66 of the cases, risk assessment resulted in a recommendation for an alternative punishment. In the other 143 cases, risk assessment did not recommend an alternative. However, the judge could not utilize an alternative punishment in the 66 cases in which one was recommended because of the mandatory term required by law.

Completion of the risk assessment worksheet is unnecessary in cases involving an offense with a mandatory minimum penalty. Adding this criterion to the existing ineligibility conditions at the top of the risk assessment form will eliminate the preparation of risk worksheet in cases that require mandatory incarceration. This is illustrated in Figure 84.

Figure 84

Proposed Ineligibility Condition for the Nonviolent Offender Risk Assessment Instrument



Nonviolent Risk Assessment — Section D Offender Name: _____

Ineligibility Conditions

A.	Was the offender recommended for **Probation/No Incarceration** on Section B?	☐ Yes	☐ No
B.	Do any of the offenses at sentencing involve the sale, distribution, or possession with intent, etc. of cocaine of a combined quantity of 28.35 grams (1 ounce) or more?	☐ Yes	☐ No
C.	Are any prior record offenses violent (Category I/II listed in Table A of the Guidelines Manual)?	☐ Yes	☐ No
D.	Are any of the offenses at sentencing violent (Category I/II listed in Table A of the Guidelines Manual)?	☐ Yes	☐ No
E.	Do any of the offenses at sentencing require a mandatory term of incarceration?	☐ Yes	☐ No

*If answered **YES** to **ANY**, go to "Nonviolent Risk Assessment Recommendations" on cover sheet and check Not Applicable. If answered **NO** to **ALL**, complete remainder of Section D worksheet.*

Recommendation 6

Perform a thorough reanalysis of the sanctioning practices for offenders convicted of crimes covered by the Miscellaneous Sentencing Guidelines

• Issue

Overall, the sentencing guidelines cover approximately 95% of felony convictions in the Commonwealth each year. For several arson, vandalism and weapons felonies, the Commission has assembled enough cases to develop sentencing guidelines. Although these types of offenses would normally be added to the Miscellaneous Sentencing Guidelines, analysis suggests that historical sentencing patterns for the specific offenses identified do not fit well within the structure of the current guidelines.

• Discussion

The arson, vandalism and offense categories are subsumed under the Miscellaneous offense group for the purposes of guidelines. The Miscellaneous Sentencing Guidelines presently cover two arson, one vandalism and six weapons felonies. The Commission has identified ten additional arson, vandalism and weapons offenses for which there are enough cases to analyze for the development of sentencing guidelines (Figure 85).

Historical sentencing patterns for these felonies have been examined. Sentencing models for these offenses do not fit well within the current structure of

Figure 85

Felony Offenses Identified for Addition to the Miscellaneous Sentencing Guidelines

Statute	Crime	Penalty	FY2001-FY2003 Cases
§ 18.2-77(A,ii)	Burn occupied dwelling/church	5y - Life	92
§ 18.2-77(B)	Burn unoccupied dwelling/church	2y - 10y	36
§ 18.2-80	Arson of unoccupied building - $200 or more	2y - 10y	29
§ 18.2-85	Manufacture/possession of firebomb	1y - 10y	25
§ 18.2-154	Shoot etc. at train/car/etc without malice	1y - 5y	49
§ 18.2-137(B,ii)	Intentionally damage/destroy property - $1000 or more	1y - 5y	202
§ 18.2-279	Unlawful discharge of firearm in/at occupied bldg	1y - 5y	73
§ 18.2-286.1	Discharge firearm from motor vehicle	1y - 10y	26
§ 18.2-308	Carry concealed weapon - 2nd conviction	1y - 5y	51
§ 18.2-308.2:2(K)	False statement on firearm crim. history consent form	1y - 10y	169

the Miscellaneous Sentencing Guidelines. The Miscellaneous offense group is composed of a wide array of offenses such as: felon in possession of a firearm, burning personal property, making bomb threats, failure to appear, perjury, child abuse, maliciously discharging a firearm into an occupied building, and maliciously shooting at a train or car.

A complete reanalysis of the Miscellaneous Sentencing Guidelines, including the newly identified felonies, may provide better results. With such a disparate set of offenses aggregated for the purposes of sentencing guidelines, it is important to examine the crimes to be added, in a holistic fashion, with the offenses already contained in the guidelines. Such a reanalysis may suggest that one or more offense categories should be separated from the Miscellaneous group to create a new guidelines offense group. For example, the Commission could separate weapons crimes into a distinct category and establish Weapon Sentencing Guidelines, should the results of the analysis support this change. The results of the reanalysis are expected to yield guidelines recommendations more finely tuned to judicial sentencing practices for these offenses.

7 APPENDICES

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 Struct.	Sch. I/II	Other Drugs	Fraud	Larceny	Misc.	Traffic
No reason given	2.2%	2.2%	1.5%	1.8%	1.7%	1.4%	2.4%	1.6%
Minimal property or monetary loss	0.1	0.2	0.3	0	0.2	0.1	0	0
Minimal circumstances/facts of the case	0.7	0.6	0	0.3	0.5	0.4	0.4	0.5
Offender not the leader	0.2	0.2	0.1	0	0	0.1	0.2	0
Small amount of drugs involved in the case	0.1	0	0.2	0.1	0	0	0	0
Offender and victims are relatives/friends	0.2	0	0	0	0.2	0.1	0.2	0
Little or no injury/offender did not intend to harm; victim requested lenient sentence	0.4	0	0	0	0.2	0.1	0	0
Offender has no prior record	0.1	0	0	0	0	0	0	0
Offender has minimal prior record	0.9	0.2	0.3	0.5	0.3	0.1	0.2	0.1
Offender's criminal record overstates his degree of criminal orientation	0.1	0	0.2	0.4	0.1	0.1	0	0.1
Offender cooperated with authorities	1.7	2.1	0.9	0.9	0.6	0.6	0.2	0
Offender is mentally or physically impaired	0.1	0.4	0.2	0.1	0.4	0.4	0.4	0.1
Offender has emotional or psychiatric problems	0.2	0.2	0.1	0	0.2	0.2	0.2	0
Offender has drug or alcohol problems	0	0.2	0.1	0	0	0.1	0.4	0
Offender needs counseling	0	0.2	0.1	0	0	0	0	0
Offender has good potential for rehabilitation	1.8	2.4	0.7	0.7	2.4	1.1	1.1	0.3
Offender shows remorse	0.5	0.6	0	0.1	0.2	0.1	0	0
Age of Offender	1.1	0.6	0.2	0.3	0.2	0.1	0	0
Jury sentence	0.2	0	0	0	0	0.1	0	0
Multiple charges are being treated as one criminal event	0.2	0.4	0.4	0	0.1	0	0	0
Sentence recommended by Commonwealth Attorney or probation officer	1.1	0.7	0.2	0	0.6	0.2	0.5	0.3
Weak evidence or weak case	0.6	0.9	1.5	0.4	0.3	0.2	0.2	0
Plea agreement	2.2	2.2	0	1.4	1.8	1.4	2.4	0.9
Sentencing consistency with co-defendant or with similar cases in the jurisdiction	0.2	0.6	0.1	0	0	0.1	0.2	0
Time served	0.2	0.9	0.2	0.1	0.3	0.2	0.7	0
Offender already sentenced by another court or in previous proceeding for other offenses	0.5	0.7	0	0.3	0.8	0.2	0.5	0.1
Offender will likely have his probation revoked	0	0	1.0	0	0	0	0.2	0.1
Offender is sentenced to an alternative punishment to incarceration	3.4	1.1	0	0	0.8	0.8	0.4	0
Guidelines recommendation is too harsh	0.6	0.7	0.1	0	0.5	0.1	0	0
Judge rounded guidelines minimum to nearest whole year	0.4	0.4	0.2	0.3	0.2	0.1	0.2	0.1
Other mitigating factors	0.2	0.2	0.2	0	0.2	0.1	0.2	0

Note: Percentages indicate the percent of all guideline offense cases in which the judge cites a particular reason for the mitigation (or aggravation) departure. The percentages will not add to the offense's mitigation (or aggravation) rate 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 Struct.	Sch. I/II	Other Drugs	Fraud	Larceny	Misc.	Traffic
No reason given	2.8%	1.9%	2.1%	1.3%	0.5%	1.3%	3.3%	2.1%
Extreme property or monetary loss	0.5	0.6	0	0	0.1	0.5	0	0
The offense involved a high degree of planning	0.1	0.9	0	0	0.2	0.2	0.2	0
Aggravating circumstances/flagrancy of offense	4.8	1.1	0.3	0.4	0.5	0.9	1.8	0.9
Offender used a weapon in commission of the offense	0.1	0.2	0	0.1	0	0	0.5	0
Offender was the leader	0.1	0.2	0	0.1	0	0.1	0	0
Offender's true offense behavior was more serious than offenses at conviction	0.6	0.9	0.5	0.1	0.1	0.4	1.3	0.1
Extraordinary amount of drugs or purity of drugs involved in the case	0	0	0.3	1.3	0	0	0	0
Aggravating circumstances relating to sale of drugs	0	0	0.2	0.7	0	0	0	0
Offender immersed in drug culture	0	0	0.1	0.3	0	0	0	0
Community drug problem	0	0	0	0.1	0	0	0	0
Victim vulnerability	0.7	0	0	0	0.1	0.1	1.1	0
Victim request	0.5	0	0	0	0	0.1	0.5	0.1
Victim injury	0.4	0	0	0	0	0	2.7	0.3
Previous punishment of offender has been ineffective	0.2	0.4	0.2	0.5	0.1	0.3	0.5	0.2
Offender was under some form of legal restraint at time of offense	0	0.2	0.5	0.5	0.2	0.2	0.2	0.5
Offender's criminal record understates the degree of his criminal orientation	0.5	0.7	0.7	0.5	0.3	0.8	0.5	1.2
Offender has previous conviction(s) or other charges for the same type of offense	0.5	0.9	0.7	1.4	0.3	0.9	0.2	2.9
New crime committed after current offense	0.2	0.2	0.4	0.1	0	0.1	0	0
Offender failed to cooperate with authorities	0.4	0	0.4	0.1	0.2	0.3	0.5	0.4
Offender has mental health problems	0	0	0	0	0	0	0.2	0
Offender has drug or alcohol problems	0	0	0.2	0	0	0.2	0.4	0.5
Offender has poor rehabilitation potential	0.7	1.1	0.6	0.1	0.1	0.6	0.9	0.7
Offender shows no remorse	0.5	0.2	0.1	0	0.1	0.2	0.4	0.2
Jury sentence	0.9	0.4	0.2	0	0	0.4	1.1	0.4
Sentence recommend by Commonwealth Attorney or probation officer	0.1	0.2	0.1	0	0	0.1	0.4	0
Plea agreement	2.3	1.3	1.6	1.3	0.7	1.3	2.4	0.8
Community sentiment	0.4	0.2	0.2	0.3	0.1	0.1	0.2	0.0
Sentencing consistency with codefendant or with other similar cases in the jurisdiction	0.1	0.2	0.1	0.3	0	0.1	0	0
Offender is sentenced to an alternative punishment to incarceration	0.6	0.7	0.9	1.3	0.2	0.6	0.4	0.9
Guidelines recommendation is too low	1.5	0.4	0.5	0.5	0.2	0.4	1.6	0.6
Mandatory minimum penalty is required in the case	0.1	0.0	0.2	0	0	0.1	0.2	0.1
Judge rounded guidelines minimum to nearest whole year	0.2	0.2	0.2	0	0.1	0.1	0.2	0.3
Other reason for aggravation	0.2	0.4	0.1	0.3	0.1	0.1	0.4	0

Note: Percentages indicate the percent of all guideline offense cases in which the judge cites a particular reason for the mitigation (or aggravation) departure. The percentages will not add to the offense's mitigation (or aggravation) rate 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	Sex. Assault
No reason given	1.9%	0.8%	1.1%	3.8%	2.6%	1.7%
Minimal property or monetary loss	0	0	0	0	0	0
Minimal circumstances/facts of the case	0.8	1.6	0	1.4	2.1	1.2
Offender was not the leader or active participant in offense	0	1.2	0	2.1	0	0
Offender and victim are related or friends	0.5	0	1.1	0.3	1.3	0.2
Little or no victim injury/offender did not intend to harm; victim requested lenient sentence	1.8	0.4	3.2	0.8	2.1	1.7
Victim was a willing participant or provoked the offense	0.5	0.4	0	0.4	0	0
Offender has no prior record	0.2	0	0	0.1	0.9	0
Offender has minimal prior criminal record	0.3	0	1.1	1.7	0.9	0.7
Offender's criminal record overstates his degree of criminal orientation	0.2	0.4	0	0.4	0.4	0
Offender cooperated with authorities or aided law enforcement	0.3	2.8	2.1	5.2	0	0.7
Offender has emotional or psychiatric problems	0.3	0	0	0.8	0.4	0.0
Offender is mentally or physically impaired	0.4	0.4	1.1	0.4	0.4	1.2
Offender has drug or alcohol problems	0.2	0	0	0.4	0	0.2
Offender needs counseling	0	0	0	0	0	0
Offender has good potential for rehabilitation	0.9	0.4	0	1.8	3.4	1.7
Offender shows remorse	0.3	0.4	1.1	0.3	0	0
Age of offender	0.4	0.8	0	2.0	1.7	0.2
Multiple charges are being treated as one criminal event	0	0	0	0.3	0	0
Guilty plea	0.1	0	0	0	0.4	0
Jury sentence	0.2	4.8	0	0.1	3.0	0.5
Sentence was recommended by Commonwealth's attorney or probation officer	0.4	0.4	0	1.7	0.9	0.7
Weak evidence or weak case against the offender	0.9	1.6	1.1	1.0	4.3	1.7
Plea agreement	2.4	0.8	1.1	2.7	3.4	1.9
Sentencing consistency with codefendant or with other similar cases in the jurisdiction	0.1	0.4	0	0.4	0	0
Time served	0.3	0	0	0.4	0	0.2
Offender already sentenced by another court or in previous proceeding for other offenses	0.3	0	0	1.1	0.4	0.2
Offender will likely have his probation revoked	0.1	0	1.1	0.3	0	0
Offender is sentenced to an alternative punishment to incarceration	0.5	0	0	2.4	2.1	0
Guidelines recommendation is too harsh	0	0	0	0.3	0.4	0
Attempt, not a completed act	0	0	0	0	0	0.2
Judge rounded guidelines minimum to nearest whole year	0.7	0.4	0	1.0	0	0.5
Other reasons for mitigation	0.2	0.4	0	0.3	0.4	0

Note: Percentages indicate the percent of all guideline offense cases in which the judge cites a particular reason for the mitigation (or aggravation) departure. The percentages will not add to the offense's mitigation (or aggravation) rate 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	Sex. Assault
No reason given	2.0%	1.6%	4.2%	1.7%	0.4%	1.2%
The offense involved a high degree of planning	0.1	0	0	0	0	0.2
Aggravating circumstances/flagrancy of offense	1.4	2.4	1.1	2.2	0	1.7
Offender used a weapon in commission of the offense	0.5	0	0	0.7	0	0
Offender was the leader	0.1	0	0	0.1	0	0
Offender's true offense behavior was more serious than offenses at conviction	0.4	0.8	2.1	0.4	0	0.9
Offender is related to or is the caretaker of the victim	0	0.4	0	0	1.3	1.7
Offense was an unprovoked attack	0.1	0.8	0	0	0	0
Offender knew of victim's vulnerability	0.8	0.8	2.1	0.1	1.3	2.6
The victim(s) wanted a harsh sentence	0.5	0.8	2.1	0.8	0	0.9
Extreme violence or severe victim injury	3.1	2.0	4.2	2.0	0.9	0
Previous punishment of offender has been ineffective	0.1	0	0	0.6	0	0
Offender was under some form of legal restraint at time of offense	0	0	1.1	0.3	0	0
Offender has a serious juvenile record	0.1	0	0	0	0	0
Offender's record understates the degree of his criminal orientation	0.5	0.8	1.1	0.4	0.4	0.5
Offender has previous conviction(s) or other charges for the same offense	0.8	1.2	0	0.4	0	0.5
New crime committed after current offense	0.1	0	1.1	0.1	0	0
Offender failed to cooperate with authorities	0.3	0	1.1	0	0	0
Offender has drug or alcohol problems	0.1	1.2	0	0.1	0	0
Offender has poor rehabilitation potential	0.8	1.2	2.1	0.8	0.4	0.5
Offender shows no remorse	0.6	1.6	1.1	0.8	1.3	0
Age of offender	0.1	0	0	0	0	0
Jury sentence	1.2	5.2	1.1	1.1	0.4	1.7
Sentence was recommended by Commonwealth's attorney or probation officer	0.2	0	1.1	0.1	0	0
Plea agreement	1.1	1.6	0	0.4	0	2.4
Sentencing consistency with codefendant or with other similar cases in the jurisdiction	0	0	0	0.1	0	0
Community sentiment	0.2	0.4	0	0.1	0	0.2
Offender is sentenced to an alternative punishment to incarceration	0.2	0	0	0	0	0
Guidelines recommendation is too low	0.3	1.6	0	0.7	0.4	1.2
Mandatory minimum penalty is required in the case	0.1	0	1.1	0.8	0	0
Judge rounded guidelines minimum to nearest whole year	0.2	0	0	0.4	0	0
Other reasons for aggravation	0.3	0	0	0.3	0.4	1.2

Note: Percentages indicate the percent of all guideline offense cases in which the judge cites a particular reason for the mitigation (or aggravation) departure. The percentages will not add to the offense's mitigation (or aggravation) rate since more than one departure reason may be cited in each case.

Appendix 3

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

BURGLARY-DWELLING

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	82.4%	8.8%	8.8%	34
2	62.1	24.1	13.8	58
3	76.7	10.0	13.3	30
4	65.0	22.5	12.5	40
5	77.8	16.7	5.6	18
6	86.4	0	13.6	22
7	85.7	4.8	9.5	21
8	58.8	29.4	11.8	17
9	70.6	5.9	23.5	17
10	66.7	20.0	13.3	30
11	61.5	23.1	15.4	13
12	61.3	16.1	22.6	31
13	60.0	16.0	24.0	25
14	62.1	27.6	10.3	29
15	55.8	23.1	21.2	52
16	69.2	7.7	23.1	26
17	52.4	4.8	42.9	21
18	66.7	8.3	25.0	12
19	72.7	12.1	15.2	33
20	80.0	0	20.0	5
21	61.1	22.2	16.7	18
22	62.2	13.5	24.3	37
23	60.0	10.0	30.0	10
24	64.1	30.8	5.1	39
25	75.0	16.7	8.3	36
26	58.6	24.1	17.2	29
27	84.6	7.7	7.7	39
28	57.1	28.6	14.3	14
29	38.1	14.3	47.6	21
30	71.4	14.3	14.3	14
31	72.2	16.7	11.1	18
Missing	66.7	0	33.3	3
Total	**66.9**	**16.6**	**16.5**	**812**

BURGLARY-OTHER

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	90.9%	9.1%	0%	11
2	91.7	5.6	2.8	36
3	55.6	22.2	22.2	9
4	86.4	13.6	0	22
5	85.7	7.1	7.1	14
6	43.8	18.8	37.5	16
7	68.4	21.1	10.5	19
8	81.3	6.3	12.5	16
9	84.6	7.7	7.7	13
10	70.0	30.0	0	20
11	77.8	11.1	11.1	9
12	71.4	9.5	19.0	21
13	75.0	15.0	10.0	20
14	90.9	9.1	0	11
15	59.1	13.6	27.3	44
16	94.1	5.9	0	17
17	55.6	27.8	16.7	18
18	64.3	14.3	21.4	14
19	68.0	16.0	16.0	25
20	100.0	0	0	8
21	66.7	25.0	8.3	12
22	60.0	10.0	30.0	10
23	63.6	27.3	9.1	11
24	77.3	18.2	4.5	22
25	72.2	16.7	11.1	18
26	79.2	12.5	8.3	24
27	86.7	13.3	0	30
28	76.5	17.6	5.9	17
29	53.8	15.4	30.8	13
30	85.7	14.3	0	7
31	42.9	28.6	28.6	7
Missing	50.0	0	50.0	2
Total	**73.9**	**14.6**	**11.6**	**536**

DRUG-OTHER

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	100.0%	0%	0%	11
2	81.6	10.5	7.9	76
3	100.0	0	0	9
4	85.7	14.3	0	42
5	76.9	7.7	15.4	13
6	68.4	21.1	10.5	19
7	81.8	9.1	9.1	11
8	100.0	0	0	15
9	78.6	7.1	14.3	14
10	68.8	12.5	18.8	16
11	83.3	0.0	16.7	6
12	84.4	6.3	9.4	32
13	85.7	11.4	2.9	35
14	92.5	2.5	5.0	40
15	74.4	5.1	20.5	39
16	84.4	6.7	8.9	45
17	86.7	6.7	6.7	15
18	85.7	14.3	0	7
19	85.5	4.3	10.1	69
20	78.6	0	21.4	14
21	88.9	0	11.1	9
22	64.3	7.1	28.6	14
23	72.2	16.7	11.1	18
24	64.0	12.0	24.0	25
25	85.3	2.9	11.8	34
26	80.0	3.3	16.7	30
27	83.3	8.3	8.3	24
28	87.1	9.7	3.2	31
29	55.6	0	44.4	9
30	92.3	7.7	0	13
31	93.3	3.3	3.3	30
Missing	0	0	0	0
Total	**82.7**	**7.3**	**9.9**	**765**

SCHEDULE I/II DRUGS

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	89.6%	2.0%	8.4%	249
2	84.7	8.2	7.1	477
3	78.1	9.6	12.2	384
4	82.8	14.4	2.9	627
5	83.3	5.9	10.8	102
6	67.8	10.7	21.5	121
7	92.5	2.9	4.6	373
8	85.0	7.5	7.5	133
9	86.6	4.7	8.7	127
10	84.4	7.4	8.1	135
11	90.0	2.2	7.8	180
12	80.1	4.0	15.9	226
13	85.1	7.1	7.7	504
14	79.1	11.2	9.8	215
15	69.1	7.3	23.7	262
16	75.2	8.5	16.3	153
17	82.3	7.2	10.5	181
18	82.1	10.3	7.7	117
19	84.4	7.5	8.1	334
20	84.1	6.8	9.1	88
21	82.1	6.0	11.9	84
22	74.9	6.4	18.7	171
23	77.8	7.8	14.4	167
24	77.0	11.2	11.8	187
25	85.5	5.7	8.8	159
26	76.3	13.2	10.5	190
27	84.6	4.9	10.5	162
28	85.8	6.2	8.0	113
29	56.4	9.0	34.6	78
30	89.3	0	10.7	28
31	88.4	6.6	5.1	198
Missing	93.3	0	6.7	15
Total	**82.2**	**7.8**	**10.0**	**6540**

FRAUD

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	93.7%	4.5%	1.8%	111
2	91.5	5.6	2.8	142
3	76.7	16.7	6.7	30
4	78.9	21.1	0	133
5	88.9	8.3	2.8	72
6	90.6	6.3	3.1	32
7	84.7	10.2	5.1	59
8	87.5	9.4	3.1	32
9	87.5	7.5	5.0	40
10	92.2	4.7	3.1	64
11	88.6	8.6	2.9	35
12	93.1	3.4	3.4	87
13	90.4	2.7	6.8	73
14	87.1	10.7	2.1	140
15	81.0	12.4	6.5	153
16	95.1	3.7	1.2	82
17	83.1	5.6	11.3	71
18	90.5	7.9	1.6	63
19	81.1	14.3	4.6	196
20	94.4	3.7	1.9	54
21	85.4	10.4	4.2	48
22	86.1	9.7	4.2	72
23	77.6	19.6	2.8	107
24	67.7	28.1	4.2	96
25	84.4	11.5	4.1	122
26	87.3	9.7	3.0	134
27	90.0	8.3	1.7	120
28	83.1	15.6	1.3	77
29	75.9	10.3	13.8	58
30	91.7	8.3	0	36
31	93.4	6.6	0	76
Missing	80.0	0	20.0	5
Total	**85.9**	**10.5**	**3.6**	**2620**

LARCENY

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	91.7%	2.9%	5.3%	206
2	86.1	7.2	6.7	345
3	81.5	9.2	9.2	119
4	83.0	14.5	2.6	352
5	85.7	7.5	6.8	133
6	77.9	2.9	19.1	68
7	91.2	4.9	3.9	102
8	84.3	9.3	6.5	108
9	80.4	6.5	13.0	92
10	89.8	2.3	8.0	88
11	92.9	3.6	3.6	56
12	79.9	6.7	13.4	224
13	83.7	6.6	9.7	196
14	86.6	8.6	4.9	409
15	73.1	7.9	19.0	279
16	82.8	5.4	11.8	93
17	82.2	7.0	10.8	213
18	85.0	3.9	11.0	127
19	80.1	9.8	10.1	306
20	92.8	5.2	2.1	97
21	80.3	16.7	3.0	66
22	76.8	3.3	19.9	151
23	88.7	7.2	4.1	97
24	79.0	16.9	4.0	124
25	82.7	11.8	5.5	127
26	85.5	5.8	8.7	138
27	89.0	6.2	4.8	145
28	86.7	6.0	7.2	83
29	76.9	1.5	21.5	65
30	97.2	2.8	0	36
31	90.1	5.0	5.0	141
Missing	90.0	0	10.0	10
Total	**83.9**	**7.6**	**8.5**	**4796**

TRAFFIC

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	84.9%	4.1%	11.0%	73
2	80.7	4.5	14.8	176
3	66.7	0	33.3	27
4	86.6	6.2	7.2	97
5	86.4	6.8	6.8	44
6	95.1	2.4	2.4	41
7	90.8	1.5	7.7	65
8	86.2	6.9	6.9	29
9	70.0	2.9	27.1	70
10	92.9	1.2	6.0	84
11	81.6	7.9	10.5	38
12	90.6	4.2	5.2	96
13	87.2	7.7	5.1	39
14	89.5	5.3	5.3	95
15	82.1	4.6	13.2	151
16	90.4	1.4	8.2	73
17	73.7	5.3	21.1	38
18	90.5	0	9.5	21
19	73.8	5.7	20.5	122
20	91.1	0	8.9	56
21	71.4	14.3	14.3	35
22	86.8	0	13.2	68
23	87.0	1.9	11.1	54
24	88.3	5.0	6.7	120
25	88.4	2.3	9.3	86
26	83.8	10.0	6.3	80
27	91.0	6.0	3.0	67
28	89.2	5.4	5.4	37
29	68.0	4.0	28.0	25
30	82.4	5.9	11.8	17
31	86.7	5.0	8.3	60
Missing	100.0	0	0	3
Total	**84.8**	**4.4**	**10.8**	**2087**

MISCELLANEOUS

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	75.0%	16.7%	8.3%	12
2	58.8	8.8	32.4	34
3	100.0	0	0	16
4	69.4	13.9	16.7	36
5	90.0	0	10.0	20
6	53.8	38.5	7.7	13
7	95.0	0	5.0	20
8	88.2	5.9	5.9	17
9	77.8	11.1	11.1	9
10	88.9	0	11.1	18
11	75.0	8.3	16.7	12
12	60.9	8.7	30.4	23
13	68.0	8.0	24.0	25
14	83.3	0	16.7	36
15	55.0	22.5	22.5	40
16	75.0	6.3	18.8	16
17	33.3	33.3	33.3	3
18	60.0	0	40.0	5
19	100.0	0	0	12
20	91.7	0	8.3	12
21	76.9	7.7	15.4	13
22	58.1	3.2	38.7	31
23	81.8	9.1	9.1	11
24	77.3	0	22.7	22
25	68.8	12.5	18.8	16
26	73.1	11.5	15.4	26
27	82.4	11.8	5.9	17
28	55.6	44.4	0	9
29	73.3	20.0	6.7	15
30	71.4	28.6	0	7
31	33.3	16.7	50.0	6
Total	**73.2**	**9.6**	**17.2**	**552**

Appendix 4

Sentencing Guidelines Compliance by Judicial Circuit: Offenses Against the Person

ASSAULT

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	87.2%	5.1%	7.7%	39
2	82.5	7.5	10.0	80
3	80.0	15.6	4.4	45
4	74.6	11.9	13.4	67
5	84.5	3.4	12.1	58
6	61.1	27.8	11.1	36
7	83.3	8.3	8.3	60
8	87.1	3.2	9.7	31
9	76.9	15.4	7.7	26
10	85.0	7.5	7.5	40
11	73.1	7.7	19.2	26
12	79.1	7.0	14.0	43
13	80.0	13.3	6.7	75
14	73.8	9.5	16.7	42
15	68.4	19.7	11.8	76
16	68.4	18.4	13.2	38
17	70.0	15.0	15.0	20
18	81.3	9.4	9.4	32
19	75.0	12.5	12.5	56
20	95.2	4.8	0	21
21	58.3	16.7	25.0	24
22	70.0	10.0	20.0	50
23	57.7	30.8	11.5	26
24	64.3	22.9	12.9	70
25	81.1	16.2	2.7	37
26	56.1	14.6	29.3	41
27	72.7	15.9	11.4	44
28	84.2	10.5	5.3	19
29	91.3	8.7	0	23
30	64.7	17.6	17.6	17
31	66.7	7.4	25.9	27
Missing	100.0	0.0	0.0	2
Total	**75.4**	**12.7**	**11.9**	**1291**

KIDNAPPING

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	50.0%	50.0%	0%	2
2	75.0	0	25.0	8
3	75.0	0	25.0	4
4	100.0	0	0	10
5	71.4	14.3	14.3	7
6	0	0	0	0
7	100.0	0	0	5
8	0	100.0	0	2
9	0	100.0	0	1
10	50.0	50.0	0	2
11	100.0	0	0	1
12	50.0	0	50.0	4
13	100.0	0	0	3
14	50.0	0	50.0	2
15	80.0	0	20.0	5
16	66.7	0	33.3	3
17	42.9	14.3	42.9	7
18	100.0	0	0	1
19	57.1	14.3	28.6	7
20	100.0	0	0	4
21	0	0	100.0	1
22	0	0	0	0
23	100.0	0	0	1
24	33.3	0	66.7	3
25	100.0	0	0	1
26	75.0	0	25.0	4
27	66.7	33.3	0	3
28	0	100.0	0	1
29	66.7	0	33.3	3
30	0	0	0	0
31	0	0	0	0
Total	**69.5**	**10.5**	**20.0**	**95**

HOMICIDE

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	100.0%	0%	0%	2
2	25.0	37.5	37.5	8
3	76.9	15.4	7.7	13
4	72.5	12.5	15.0	40
5	50.0	25.0	25.0	4
6	75.0	0	25.0	4
7	60.0	20.0	20.0	5
8	16.7	16.7	66.7	6
9	71.4	14.3	14.3	7
10	66.7	33.3	0	3
11	100.0	0	0	2
12	83.3	0	16.7	6
13	67.9	14.3	17.9	28
14	77.8	11.1	11.1	9
15	77.8	11.1	11.1	9
16	62.5	12.5	25.0	8
17	50.0	0	50.0	4
18	100.0	0	0	1
19	77.8	11.1	11.1	9
20	75.0	25.0	0	4
21	57.1	14.3	28.6	7
22	66.7	16.7	16.7	6
23	50.0	40.0	10.0	10
24	56.3	25.0	18.8	16
25	50.0	40.0	10.0	10
26	100.0	0	0	5
27	60.0	20.0	20.0	5
28	75.0	0	25.0	4
29	100.0	0	0	1
30	80.0	0	20.0	5
31	72.7	9.1	18.2	11
Total	**66.7**	**15.9**	**17.5**	**252**

ROBBERY

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	75.7%	24.3%	0%	37
2	63.6	23.6	12.7	55
3	63.6	18.2	18.2	22
4	51.8	42.9	5.4	56
5	69.2	23.1	7.7	26
6	66.7	33.3	0	15
7	88.0	8.0	4.0	25
8	62.9	25.7	11.4	35
9	89.5	5.3	5.3	19
10	75.0	12.5	12.5	8
11	50.0	50.0	0	18
12	62.9	22.9	14.3	35
13	50.0	33.9	16.1	56
14	66.7	31.7	1.7	60
15	54.8	33.3	11.9	42
16	0	0	100.0	5
17	64.7	0	35.3	17
18	45.8	50.0	4.2	24
19	48.0	36.0	16.0	25
20	71.4	28.6	0	7
21	43.8	6.3	50.0	16
22	71.4	19.0	9.5	21
23	60.0	33.3	6.7	15
24	40.0	40.0	20.0	20
25	66.7	0	33.3	6
26	71.4	28.6	0	14
27	77.8	11.1	11.1	9
28	100.0	0	0	3
29	75.0	0	25.0	4
30	75.0	25.0	0	4
31	66.7	33.3	0	15
Total	**61.8**	**27.3**	**10.9**	**714**

RAPE

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	80.0%	20.0%	0%	5
2	62.5	31.3	6.3	16
3	0	0	0	0
4	66.7	20.0	13.3	15
5	71.4	28.6	0	7
6	25.0	75.0	0	4
7	88.2	11.8	0	17
8	80.0	20.0	0	5
9	50.0	33.3	16.7	6
10	40.0	60.0	0	5
11	66.7	33.3	0	6
12	80.0	20.0	0	5
13	63.6	36.4	0	11
14	33.3	66.7	0	9
15	66.7	27.8	5.6	18
16	100.0	0	0	9
17	75.0	0	25.0	4
18	100.0	0	0	3
19	61.1	27.8	11.1	18
20	100.0	0	0	3
21	100.0	0	0	4
22	33.3	66.7	0	6
23	25.0	62.5	12.5	8
24	50.0	37.5	12.5	8
25	83.3	8.3	8.3	12
26	70.0	30.0	0	10
27	100.0	0	0	6
28	66.7	33.3	0	3
29	50.0	50.0	0	2
30	0	100.0	0	2
31	50.0	50.0	0	6
Total	**66.1**	**29.2**	**4.7**	**233**

SEXUAL ASSAULT

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	88.9%	0%	11.1%	9
2	78.3	4.3	17.4	23
3	72.7	18.2	9.1	11
4	68.2	27.3	4.5	22
5	66.7	11.1	22.2	9
6	88.9	11.1	0	9
7	86.7	6.7	6.7	15
8	62.5	25.0	12.5	8
9	46.2	23.1	30.8	13
10	83.3	16.7	0	12
11	100.0	0	0	7
12	77.8	5.6	16.7	18
13	78.6	7.1	14.3	14
14	80.0	20.0	0	10
15	73.9	8.7	17.4	23
16	77.8	7.4	14.8	27
17	83.3	0	16.7	6
18	100.0	0	0	5
19	72.0	0	28.0	25
20	50.0	33.3	16.7	6
21	33.3	33.3	33.3	6
22	61.1	11.1	27.8	18
23	100.0	0	0	6
24	68.8	6.3	25.0	16
25	76.7	16.7	6.7	30
26	60.0	30.0	10.0	20
27	82.4	11.8	5.9	17
28	62.5	25.0	12.5	8
29	85.7	0	14.3	7
30	66.7	16.7	16.7	6
31	82.4	17.6	0	17
Total	**74.2**	**12.5**	**13.2**	**423**