Virginia Criminal Sentencing Commission

Annual Report 2000

"The Judicial Department

comes home in its effects

to every man's fireside:

it passes on his property,

his reputation,

his life, his all."

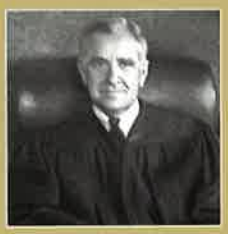
Chief Justice John Marshall

. . . to the delegates at

the 1829-30 Virginia

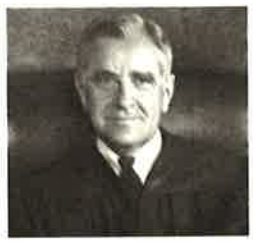
Constitutional

Convention



Virginia Criminal Sentencing Commission

Justice Edmund Pendleton
1st President of the Virginia
Supreme Court, 1779-1803



Justice Harry Lee Carrico
Present Chief Justice of the
Virginia Supreme Court, 1981-

The cover displays five justices of the Virginia Supreme Court during it's 221 year history.
They can be found, along with others, throughout the pages of this report.

2000 Annual Report

December 1, 2000

Virginia Criminal Sentencing Commission Members

Appointed by the Chief Justice of the Supreme Court and Confirmed by the General Assembly
Judge Ernest P. Gates
Chairman, Chesterfield County

Appointments by the Chief Justice of the Supreme Court
Judge Robert W. Stewart, Vice Chairman, Norfolk
Judge F. Bruce Bach, Fairfax County
Judge George E. Honts, III, Fincastle
Judge J. Samuel Johnston, Rustburg
Judge William Newman, Arlington County
Judge Donald A. McGlothlin, Jr., Dickenson County

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

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

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

Governor's Appointments
G. Steven Agee, Roanoke
Jo Ann Bruce, Madison
Judge Henry E. Hudson, Fairfax County
The Honorable William G. Petty, Lynchburg

The Staff of the Commission

Richard P. Kern, Ph.D., Director
Meredith Farrar-Owens, Associate Director

Thomas Y. Barnes, Research Associate
Tama S. Celi, Research Associate
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Jody T. Fridley, Training/Data Processing Unit Manager
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Shirley F. Shepperson, Data Processing Specialist
Carolyn A. Williamson, Data Quality Control Associate

The design and layout of the 2000 Annual Report of the Virginia Criminal Sentencing Commission was created by Judith Ann Sullivan.

Commonwealth of Virginia

Hon. Ernest P. Gates
Chairman

Richard P. Kern, Ph.D.
Director

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Richmond, Virginia 23219
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Supreme Court of Virginia
Virginia Criminal Sentencing Commission

December 1, 2000

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

Section 17.1-803(10) of the Code of Virginia requires the Virginia Criminal Sentencing Commission to report annually upon its work and recommendations. Pursuant to this statutory obligation, we respectfully submit for your review the 2000 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 2000. This report also provides a final report on the research to determine if a sex offender risk assessment instrument can be developed and applied to the guidelines. The Commission's recommendations to the 2001 session of the Virginia General Assembly are also contained within this report.

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

Respectfully submitted,

Ernest P. Gates

Ernest P. Gates, Chairman

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Introduction

Overview

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

Chapter One provides a general profile of the Commission and its various activities and projects undertaken during 2000. Chapter Two includes the results of a detailed analysis of judicial compliance with the discretionary sentencing guidelines system as well as other related sentencing trend data. Chapter Three contains a summary of the final Commission report on its work to develop a sex offender risk of recidivism assessment instrument and to implement it within the sentencing guidelines system. Chapter Four provides a report on the Commission's pilot project involving an offender risk assessment instrument for use with nonviolent felons. Chapter Five presents the Commission's findings based on a review requested by the General Assembly of the sentencing guidelines for drug offenders. Chapter Six presents the results of the Commission's special study on larceny and fraud offenses. Chapter Seven examines the impact of the no-parole/truth-in-sentencing system that has been in effect for any felony committed on or after January 1, 1995. Finally, Chapter Eight presents the Commission's recommendations for 2001.

Commission Profile

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

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

Activities of the Commission

The full membership of the Commission met four times in 2000: April 10, June 12, September 11 and November 6. The following discussion provides an overview of some of the Commission actions and initiatives during the past year that are not discussed in detail elsewhere within this report.

Monitoring and Oversight

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

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

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

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 2000, 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 17 training seminars in 10 different locations across the Commonwealth. This year the Commission staff developed training seminars specifically for the new users of guidelines. These targeted seminars provided participants with a detailed introduction to the guidelines system.

The Commission attempted to offer seminars in sites convenient to the majority of guideline users. The sites for these seminars included: Virginia Beach Fire Training Center, Department of Corrections' Training Academy, Cardinal Criminal Justice Academy, City of Richmond's Police Academy, Alexandria Circuit Court, Fairfax Government Complex, and Mountain Empire Community College. By special request, seminars were also held in specific locations for probation officers, Commonwealth's Attorneys and defense attorneys. In addition, the Commission provided training on the guidelines system to newly elected judges during the pre-bench training program.

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.

In addition to providing training and education programs, the Commission staff maintains a "hot line" phone system (804.225.4398). The phone line 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.

In 2000, the staff of the Commission has responded to thousands of calls through the hot line service.

This year the sentencing guidelines manual was completely redesigned to make the manual more "user friendly." The manual utilizes a loose-leaf notebook that can easily be updated. Tables were combined to simplify the classification of prior record, and additional tabs were added to identify pertinent tables. Changes made this year will enhance the Commission's ability to issue updates to the guidelines manual in a more efficient manner. Many other changes incorporated into the manual were based on user suggestions and comments. As a result, additional instructions were added to clarify user's concerns on a variety of topics relating to completing guideline worksheets. In addition to these, there were several substantive changes to guidelines factors and instructions based on recommendations presented in the Commis-sion's previous annual report and approved by the General Assembly.

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

Community Corrections Revocation Data System

Under §17.1-803(7) of the Code of Virginia, it is the responsibility of the Commission to monitor sentencing practices in felony cases throughout the Commonwealth. While the Commission maintains a wide array of sentencing information on felons at the time they are initially sentenced in circuit court, information on the re-imposition of suspended prison time for felons returned to court for violation of the conditions of community supervision has been largely unavailable and its impact difficult to assess. Among other uses, information on cases involving re-imposition of suspended prison time is critically important to accurately forecast future correctional bed space needs.

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

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

The sentencing revocation form is then submitted to the judge. The judge completes the lower section of the form with his findings in the case and, if the offender is found to be in violation, the specific sanction imposed. The sentencing revocation form also provides a space for the judge to submit any additional comments regarding his or her decision in the case.

The clerk of the circuit court is responsible for submitting the completed and signed original form to the Commission. The form has been designed to take advantage of advanced scanning technology, which enables the Commission to quickly and efficiently automate the information.

The Commission now includes training on the sentencing revocation form as part of the standard training provided to new probation officers at the Department of Corrections' Academy for Staff Development.

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

Substance Abuse Screening and Assessment for Offenders

During its 1998 session, the General Assembly passed sweeping legislation that requires many offenders, both adult and juvenile, to undergo screening and assessment for substance abuse problems related to drugs or alcohol. A goal of this legislation is to provide judges with as much information as possible about the substance abuse problems of offenders they sentence, so that sanctions can be tailored to address both public safety issues and the treatment needs of the offender. The legislature authorized a six-month period (July through December 1999) to pilot test the implementation of the screening and assessment provisions. Statewide implementation began January 1, 2000.

The new law targets all adult felons convicted in circuit court and adults convicted in general district court of any drug crime classified as a Class 1 misdemeanor. Juvenile offenders adjudicated for a felony or any Class 1 or 2 misdemeanor are also subject to the provisions. Under the new law, these offenders must undergo a substance abuse screening. If the screening reveals key characteristics or behaviors likely related to drug use or alcohol abuse, a full assessment must be administered. Assessment is a thorough evaluation. Results of comprehensive assessment can be used for developing treatment plans and assessing needs for services. Different screening and assessment instruments are used for the adult and juvenile populations. For adult felons, screening and assessment is conducted by the Department of Corrections' probation and parole office, while local offices of the Virginia Alcohol Safety Action Program and local community corrections agencies screen and assess adult misdemeanants. Juvenile offenders are screened and assessed by the court service unit serving the Juvenile and Domestic Relations Court.

The Interagency Drug Offender Screening and Assessment Committee was created to oversee the implementation and subsequent administration of this program. The Committee is composed of representatives of the Department of Corrections, the Department of Criminal Justice Services, the Department of Juvenile Justice, the Virginia Alcohol Safety Action Program, and the Department of Mental Health, Mental Retardation and Substance Abuse Services. A Sentencing Commission staff member also serves on the committee. Throughout 1999, the Committee worked to educate judges, prosecutors, public defenders and defense attorneys about the screening and assessment legislation. This year, the Committee oversaw the expansion of the substance abuse screening and assessment program from the pilot sites to localities throughout the Commonwealth. In addition, members of the Committee organized and facilitated training seminars on the utilization of the state-approved screening and assessment instruments. In 2001, the Committee will begin working with evaluators to gauge the impact of this comprehensive program.

Projecting Prison Bed Space Impact of Proposed Legislation

§30-19.1:4 of the Code of Virginia requires the Commission to prepare impact statements for any proposed legislation which might result in a net increase in periods of imprisonment in state correctional facilities. Such statements must include details as to any increase or decrease in adult offender populations and any necessary adjustments in guideline midpoint recommendations.

During the 2000 legislative session, the Commission prepared 144 separate impact analyses on proposed bills. These proposed bills fell into four categories: 1) bills to increase the felony penalty class of a specific crime; 2) proposals to add a new mandatory minimum penalty for a specific crime; 3) legislation that would create a new criminal offense; and 4) bills that increase the penalty class of a specific crime from a misdemeanor to a felony.

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

Prison and Jail Population Forecasting

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

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

Juvenile Sentencing Data Base Study

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

While Virginia is second to none in terms of the ability to study the adult felon population, the same cannot be said for offenders processed through the juvenile justice system. Given the lack of a reliable and comprehensive data system in the juvenile justice system, as well as very recent changes to statutes governing juvenile criminal cases, the Commission's approach is to collect quality, reliable data by constructing an information system to support studies and inquiries.

Presently, the Department of Juvenile Justice (DJJ) is in the process of constructing a parallel data collection system as is maintained by the Department of Corrections (DOC) on adult felons. In this system, called the Juvenile Tracking System (JTS), several modules (individual databases) are combined to keep various records on all juveniles entering the system, from initial intake to final release or termination of jurisdiction over the juvenile by DJJ. The objective is to collect and store comprehensive information on all juveniles within the justice system, according to the juvenile's level and extent of involvement with the juvenile justice system. However, this system was only recently implemented and is still being constructed in some cases. Automation around the Commonwealth has been a gradual process, with some areas still not fully automated and linked with all modules of the JTS.

Previously, a Commission Advisory Committee on this project met and discussed the advantages and disadvantages of developing and implementing the type of data system requested by the Commission. The issues discussed included how broad the data collection should be (e.g., all juveniles, all felonies and/or misdemeanors, etc.), how information will be collected, the specific information to be collected, and how to fund an effort of this magnitude.

In 1998, a survey instrument was designed and distributed to juvenile and domestic relations court judges, Commonwealth's attorneys, public defenders, and court service unit (CSU) regional administrators and directors. The purpose of the survey was to determine judicial perception of the current sentencing system for juveniles. The survey results showed that collectively, respondents were most concerned with sentencing and rehabilitative service options available under statute and through DJJ. The results from this survey may serve as a springboard for the Commission to examine particular areas of interest in the juvenile justice system, as seen through the eyes of its practitioners, once a database system is in place.

Additionally, the legislature passed HJR 688 that mandated DJJ, in cooperation with the Commission and the Supreme Court, to produce a standardized and automated juvenile social history. This history would ostensibly share some similarity with the pre-sentence investigation report as used for adult felons in that the structure and format of the data would be consistent, regardless of which court service unit produced the document. Presently, CSUs produce narrative social histories which vary greatly in content and quality from jurisdiction to jurisdiction. The Commission's project has focused on assisting the Uniform Social History workgroup, comprised of representatives from DJJ, the Supreme Court, and juvenile probation officers to construct a multi-user document which will serve the interests of the juvenile, judges, CSU staff, DJJ and the Commission. The objective is to parallel the adult Pre/Post-Sentence Investigation (PSI) system and collect data in a quantitative form where possible, while retaining descriptive and useful narrative segments to properly represent the juvenile's current situation.

The project has focused on the efforts to draw available and existing data from the three JTS modules: the intake module, the direct care module, and the court-hearing module. The demographic, adjudication and disposition data contained within these three modules is at present somewhat limited, as these modules came on-line starting in 1996 and contain records from that time period forward, as each CSU was automated. However, this data would be sufficient to establish a database system required by the Commission for juvenile justice studies. With the anticipated automation of the uniform juvenile social history and the combined information in the JTS modules, it is expected that the Commission will secure the necessary data with which to carry out future studies.

Over the past year, project staff worked with DJJ and the CSUs to collect information about the number of juvenile felonies for which social histories are prepared (to estimate the availability of this data combined with JTS module holdings) for planning purposes. Staff also received training in appropriate software in order to establish database fields and set up an information framework for the Commission. Staff also worked closely with DJJ Information Systems personnel to develop a data collection and transmission mode.

The Commission's work on this project will be fully detailed in its report to the General Assembly.

Guidelines Compliance

Introduction

On January 1, 2000, Virginia's truth-in-sentencing system reached its five-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% 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 in an effort 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 the nearly 100,000 felony cases sentenced under truth-in-sentencing laws, judges have agreed with guidelines recommendations in three out of every four cases. The most recent data indicate that judges are agreeing with guidelines recommendations to a larger extent than ever before. Thus, the guidelines are continuing to be utilized by Virginia's judges in formulating their sentencing decisions in felony cases around the Commonwealth.

The Commission's last annual report presented an analysis of cases sentenced during fiscal year (FY) 1999. This report will focus on cases sentenced, or "sentencing events," from the most recent year of available data, FY2000 (July 1, 1999 through June 30, 2000). Compliance is examined in a variety of ways in this report, and variations in data over the years are highlighted throughout. Because of the small amount of data available to date, the new guidelines elements introduced by the Commission on July 1, 2000, are not examined in this report.

Case Characteristics

Overall, the number of cases received by the Commission has declined from 19,658 in FY1999 to 18,449 in FY2000. Of the 18,449 sentencing guidelines worksheets received by the Commission during the last fiscal year, 17,719 were submitted on new FY2000 guidelines forms and 730 were submitted on old FY1999 guidelines forms. Several significant changes were made to the FY2000 guidelines worksheets including the addition of new guidelines offenses, adjustments to scoring on various factors, and the inclusion of some new factors. For the purpose of conducting a clear evaluation of sentencing guidelines in effect between July 1, 1999 and June 30, 2000, the following compliance analysis focuses only on those 17,719 cases submitted on FY2000 guidelines forms.

Under the truth-in-sentencing system, five urban circuits have contributed more sentencing guidelines cases each year than any of the other judicial circuits in the Commonwealth. These circuits follow Virginia's "Golden Crescent" of the most populous areas of the state. Virginia Beach (Circuit 2), Norfolk (Circuit 4), Newport News (Circuit 7), the City of Richmond (Circuit 13), and Fairfax (Circuit 19) each submitted between 900 and 1,400 sentencing guidelines cases during FY2000, and collectively they accounted for nearly one-third of all sentencing guidelines cases received by the Commission during the time period (Figure 1). Most of the cir-

Figure 1

Number and Percentage of Cases Received by Circuit – FY2000

Circuit	Number	Percent
1	636	3.6%
2	1,225	6.9
3	767	4.3
4	1,445	8.2
5	379	2.1
6	311	1.8
7	921	5.2
8	405	2.3
9	305	1.7
10	435	2.5
11	409	2.3
12	413	2.3
13	1,160	6.5
14	734	4.1
15	659	3.7
16	553	3.1
17	587	3.3
18	346	2.0
19	1,035	5.8
20	369	2.1
21	286	1.6
22	568	3.2
23	588	3.3
24	681	3.9
25	444	2.5
26	559	3.2
27	459	2.6
28	220	1.3
29	229	1.3
30	114	0.6
31	477	2.7
Total	17,719	100%

cuits, including all five of the largest circuits, reported fewer cases in FY2000 than in FY1999.

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, well over three-quarters of all guidelines cases (84%) were sentenced as guilty pleas (Figure 2). Adjudication by a judge in a bench trial accounted for 14% of all felony guidelines cases sentenced, while less than 2% of felony guidelines cases involved jury trials. For the past three fiscal years, 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. See *Juries and the Sentencing Guidelines* in this chapter for more information on jury trials.

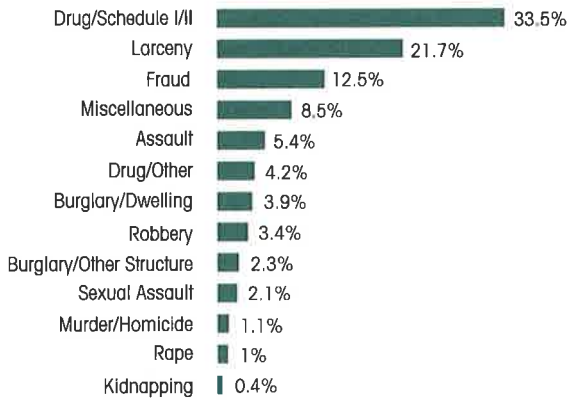
Figure 2

Percentage of Cases Received by Method of Adjudication – FY2000

Sentencing guidelines in effect during FY2000 included worksheets covering 13 distinct offense groups. The offense groupings are based on the primary, or most serious, offense at conviction. Effective July 1, 1999, drug offenses were divided into two separate guidelines worksheets, one for Schedule I/II drug offenses and one for offenses involving other types of narcotics. Consistent with previous years, the Commission received more cases for Schedule I/II drug crimes in FY2000 than any of the other offense groups. Schedule I/II drug offenses represented, by far, the largest share (34%) of the cases sentenced in Virginia's circuit courts during the fiscal year (Figure 3). More than half of the Schedule I/II drug offenses were for one crime alone – possession of a Schedule I/II drug (e.g., cocaine). Overall, one out of every five cases received by the Commission in FY2000 was a conviction for this

Figure 3

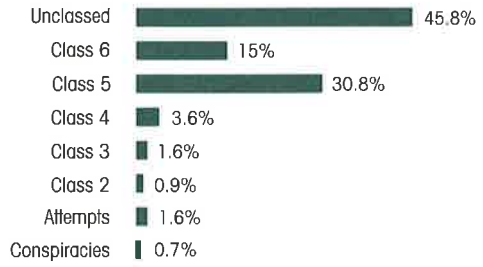
Percentage of Cases Received by Primary Offense Group – FY2000



offense. This pattern, however, has persisted since the truth-in-sentencing guidelines were introduced in 1995. In contrast, only about 4% of guidelines involved offenses listed on the Drug/Other worksheet. Property offenses also represent a significant share of the cases submitted to the Commission in FY2000. Nearly 22% of the FY2000 guidelines cases were for larceny crimes, while the fraud group accounted for another 13% of these sentencing events. Approximately 9% of cases during the past fiscal year were captured in the miscellaneous offense group, which is comprised mostly of habitual traffic offenders and felons convicted of illegally possessing firearms.

Figure 4

Percentage of Cases Received by Felony Class of Primary Offense – FY2000



The violent crimes of assault, robbery, homicide, kidnapping, rape and other sex crimes collectively represent a much smaller share of the FY2000 cases (13%). Assaults were the most common of the person offenses (5%) followed by robbery offenses (3%). The murder and rape offense groups each accounted for approximately 1% of the cases, while kidnappings made up less than one-half of one percent of the cases sentenced during the year. The distribution of offenses among guidelines cases has changed very little since FY1998.

The sentencing guidelines cover a wide range of felonies with varying penalty ranges specified in the Code of Virginia. A felony may be assigned to one of the existing six classes of felony penalty ranges, or the Code may specify a penalty that does not fall into one of the established penalty classes. Class 1 felonies, the most serious, are capital murder crimes and are not covered by the sentencing guidelines. Felonies with penalty structures differing from the Class 1 through Class 6 penalty ranges are called unclassed felonies, and their penalties vary widely, with maximum sentences ranging from three years to life. In FY2000, nearly one-half of guidelines cases (46%) involved unclassed felonies, mainly due to the overwhelming number of unclassed drug offenses (Figure 4). Because possession of a Schedule I/II drug was the single most frequently occurring offense, Class 5

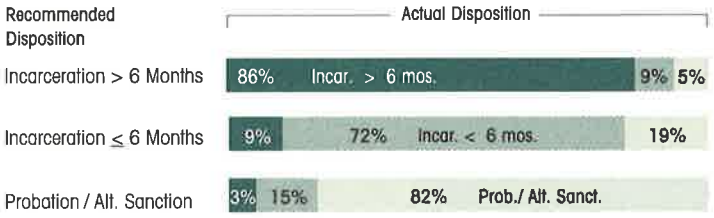
was the most common of the classed felonies (31%). The Commission received cases for the more serious classed felonies (Classes 2, 3, and 4) much less frequently. Convictions for attempted and conspired crimes were rare and together accounted for less than 3% of the cases.

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. For instance, in FY2000, of all felony offenders recommended for more than six months of incarceration, judges sentenced 86% to terms in excess of six months (Figure 5). Some offenders recommended for incarceration of more than six months received a shorter term of incarceration (one day to six months), but very few of these offenders received probation with no incarceration.

Judges have also typically agreed with guidelines recommendations for shorter terms of incarceration. In FY2000, 72% of offenders received a sentence resulting in confinement of six months or less when such a penalty was recommended. In a small portion of cases, judges felt probation to be a more appropriate sanction than the recommended jail term, but very few offenders recommended for short-term incarceration received a sentence of more than six months. Finally, nearly 83% 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, but rarely did offenders recommended for no incarceration receive jail or prison terms of more than six months. Overall, the vast majority of offenders have received the type of sanction recommended by the guidelines.

Figure 5

Recommended Dispositions and Actual Dispositions – FY2000



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. While these 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 Boot Camp program is considered to be four months of confinement (as of January 1, 1999), while the Detention and Diversion Center programs are counted as six months of confinement. In the previous discussion of recommended and actual dispositions, imposition of any one of these programs is categorized as incarceration of six months or less.

Edmund Pendleton was the first "President" of the Virginia Supreme Court of Appeals, serving from 1721 until his death in 1803. Thomas Jefferson wrote of Pendelton, "he was one of the most virtuous and benevolent of men, ... which ensured a favorable reception to whatever came from him."

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, submit to the Commission the reason for departure in each case.

The Commission measures judicial agreement with the sentencing guidelines using two distinct 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. Three types of compliance together make up general compliance: compliance by rounding, time served compliance, and compliance by special exception in habitual traffic offender cases.

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

Compliance by rounding provides for a 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 pre-sentence incarceration time served in a local jail when the guidelines call for a short jail term. Even though the judge does not sentence an offender to post-sentence incarceration time, the Commission typically considers this type of case to be in compliance. 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 by special exception arises as the result of amendments to §46.2-357(B2 and B3) of the Code of Virginia, effective July 1, 1997, and the addition of §§18.2-36.1(F), 18.2-51.4(D), and 46.2-391(D), effective July 1, 1999. These provisions allow judges to suspend the mandatory minimum 12-month incarceration term required for certain felony traffic offenses conditioned upon the offender's participation in a boot camp, detention center or diversion center 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.

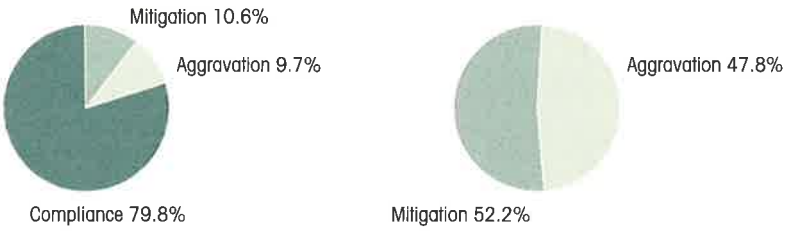
Overall Compliance with the Sentencing Guidelines

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%. In FY1999, the overall compliance rate increased nearly three percentage points to 77.4%. In FY2000, the overall compliance rate increased another 2.4% to 79.8%, its highest rate since the establishment of the no-parole system (Figure 6). This rise in overall compliance is reflected in the many measures by which the Commission examines compliance, and this emerging pattern will be highlighted throughout the chapter.

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 10% for FY2000. The "mitigation" rate, or the rate at which judges sentence offenders to sanctions considered less severe than the guidelines recommendation, was 11% for the fiscal year. Isolating cases that resulted in departures from the guidelines does not reveal a strong bias toward sentencing above or below guidelines recommendations. Of the FY2000 departures, 48% were cases of aggravation while 52% were cases of mitigation. Although the overall compliance rate has increased significantly, the pattern of departures from the guidelines has remained stable from FY1998 to FY2000.

Figure 6

Overall Guidelines Compliance and Direction of Departures – FY2000



Dispositional Compliance

Since the introduction of truth-in-sentencing in 1995, the Commission has studied judicial agreement with Virginia's sentencing guidelines in a variety of ways. Through this type of detailed analysis, the Commission is able to gain perspective on those elements in the guidelines that are functioning well and those that are less accepted among members of the judiciary. One important component of overall compliance is dispositional compliance. Dispositional compliance is defined as the rate at which judges sentence offenders to the same type of disposition that is recommended by the guidelines. The Commission examines dispositional compliance closely because the recommendation for type of disposition is the foundation of the sentencing guidelines system.

In FY2000, the dispositional compliance rate increased approximately three percentage points over FY1999 to its highest rate ever: 87% (Figure 7). Such a high rate of dispositional compliance indicates that, for nearly nine out of every ten cases, judges agreed with the type of sanction recommended by the guidelines (probation/no incarceration, incarceration up to six months, or incarceration in excess of six months). Thus, the vast majority of offenders are sentenced to the type of disposition recommended by the guidelines. Of the relatively few cases not in dispositional compliance in FY2000, mitigations outnumbered aggravations 56% to 44%. Although dispositional compliance increased in FY2000, the pattern of departures remained relatively unchanged.

Figure 7

Dispositional Compliance and Direction of Departures- FY2000

Durational Compliance

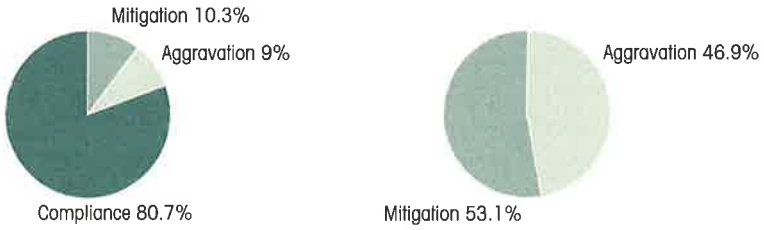
In addition to examining the degree to which judges concur with the type of disposition recommended by the guidelines, the Commission also studies durational compliance, defined as the rate at which judges sentence offenders to terms of incarceration that fall within the recommended guidelines range. 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 FY2000 cases was 81% (Figure 8). The rate of durational compliance is somewhat lower than the rate of dispositional compliance reported above, indicating that judges agree with the type of sentence recommended by the guidelines more often than they agree with the recommended sentence length in incarceration cases. As with the dispositional compliance rate, durational compliance has improved since FY1999, when a durational compliance rate of 79% was reported. For FY2000 cases not in durational compliance, mitigations were slightly more prevalent (53%) than aggravations (47%). This fairly balanced departure pattern has been consistent since FY1998.

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. Analysis of FY2000 cases receiving incarceration in excess of six months that were in durational

Figure 8

Durational Compliance and Direction of Departures* – FY2000



* Cases recommended for and receiving more than six months incarceration.

compliance reveals that almost one-fifth were sentenced to prison terms equivalent to the midpoint recommendation (Figure 9). Overall, 78% of cases in durational compliance were sentenced at or below the guidelines midpoint recommendation. Only 22% 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 have favored the lower portion of the recommended range.

An 81% durational compliance rate means that, when incarceration is recommended by the guidelines, judges chose an incarceration term outside of the guidelines range in only one out of five cases. Offenders receiving more than six months of incarceration, but less than the recommended time, were given "effective" sentences (sentences less any suspended time) short of the guidelines range by a median value of seven months (Figure 10). For offenders receiving longer than recommended incarceration sentences, the effective sentence exceeded the guidelines range by a median value of 10 months. Thus, durational departures from the guidelines are typically only a few months above or below the recommended range, indicating that disagreement with the guidelines recommendation is, in most cases, not of a dramatic nature. The median length of durational departures both above and below the guidelines remained relatively unchanged from FY1998 to FY2000.

Figure 9

Distribution of Sentences within Guidelines Range – FY2000

Figure 10

Median Length of Durational Departures – FY2000

Reasons for Departure from the Guidelines

Compliance with the truth-in-sentencing guidelines is voluntary. Although not obligated to sentence within guidelines recom-mendations, judges are required by §19.2-298.01 of the Code of Virginia to articulate and submit to the Commission their reason(s) for sentencing outside the guidelines range. As the Commission deliberates upon recommendations for revisions to the guidelines, which must be submitted to the General Assembly each December 1 in the Commission's annual report, 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 FY2000, 11% of the 17,719 cases sentenced received sanctions that fell below the guidelines recommendation. An analysis of these mitigation cases reveals that, more than 20% of the time, judges cited as a departure reason the use of an alternative sanction program to punish the offender instead of a traditional term of incarceration (Figure 11). Detention Center, Diversion Center, Boot Camp, intensive supervised probation, day reporting and drug court programs are examples of alternative sanctions available to judges in Virginia. The types and availability of programs, however, vary considerably among localities. Often, these mitigation cases represent diversions from a recommended incarceration term when the judge felt the offender was amenable to such a program.

Figure 11
Most Frequently Cited Reasons for Mitigation* – FY2000

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

Although use of alternative sanctions was the most popular judicial reason for mitigation, factors related to rehabilitation of the offender were cited in one out of every six cases sentenced below the guidelines. For instance, judges may cite the offender's general rehabilitation potential or they may cite more specific reasons such as the offender's progress in a drug rehabilitation program, an excellent work record, the offender's remorse, a strong family background, or restitution made by the offender. An offender's potential for rehabilitation is often cited in conjunction with the use of an alternative sanction. Alternative sanctions and rehabilitation potential were the most frequently cited reasons for mitigation cited in both FY1999 and FY2000.

Other mitigation reasons were prevalent as well. For instance, in more than 15% of the low departures, judges indicated that they sentenced in accordance with a plea

agreement. Judges referred to the offender's cooperation with authorities, such as aiding in the apprehension or prosecution of others, in 9% of the mitigation cases. Somewhat less often (5%), judges noted that the evidence against the defendant was weak or that a relevant witness refused to testify in the case, that the defendant had a minimal prior record, or that the defendant had another sentence to serve. In approximately 4% of the cases, judges recorded that the sentence was handed down on recommendation of the Commonwealth's attorney. Seven of the top eight reasons for mitigation in FY2000 were also among the top eight reasons in FY1999 and in nearly the same proportions. Although other reasons for mitigation were reported to the Commission in FY2000, only the most frequently cited reasons are discussed here.

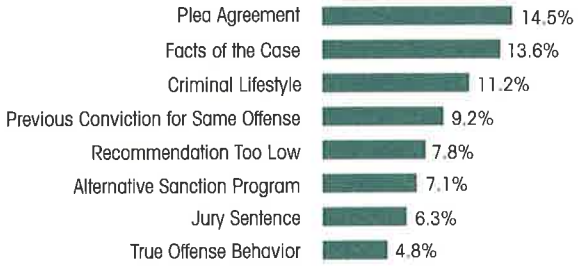
Judges sentenced just over 10% of the FY2000 cases to terms more severe than the sentencing guidelines recommendation, resulting in "aggravation" sentences. In examining these aggravation cases, the Commission found that the most common reason for sentencing above the guidelines recommendation, cited in 15% of the aggravations, was a plea agreement (Figure 12). Often felony cases involve complex sets of events or extreme circumstances for which judges feel a harsher than recommended sentence should be imposed. In nearly 14% of the cases, the judge noted that the "facts of the case" warranted a higher sentence, without identifying the specific circumstances associated with the case.

Only slightly less often, judges reported the offender's criminal lifestyle (11%) or prior convictions for the same or similar offense (9%) as reasons for harsher sanctions. For another 8% of the aggravation cases, judges commented that they felt the guidelines recommendation was too low. In others (7%), judges sentenced above the guidelines by ordering participation in a boot camp, detention center or diversion center program, instead of straight probation as recommended by the guidelines. Since July 1, 1997, these programs have counted as incarceration sanctions under the guidelines. Just over 6% of the upward departures were the result of jury trials. Finally, judges said they sentenced more harshly in 5% of the cases because the actual offense was more serious than the offense at conviction. Other reasons for aggravation sentences were cited with less frequency.

Appendices 1 and 2 contain detailed summaries of the reasons for departure from guidelines recommendations for each of the 13 guidelines offense groups.

Figure 12

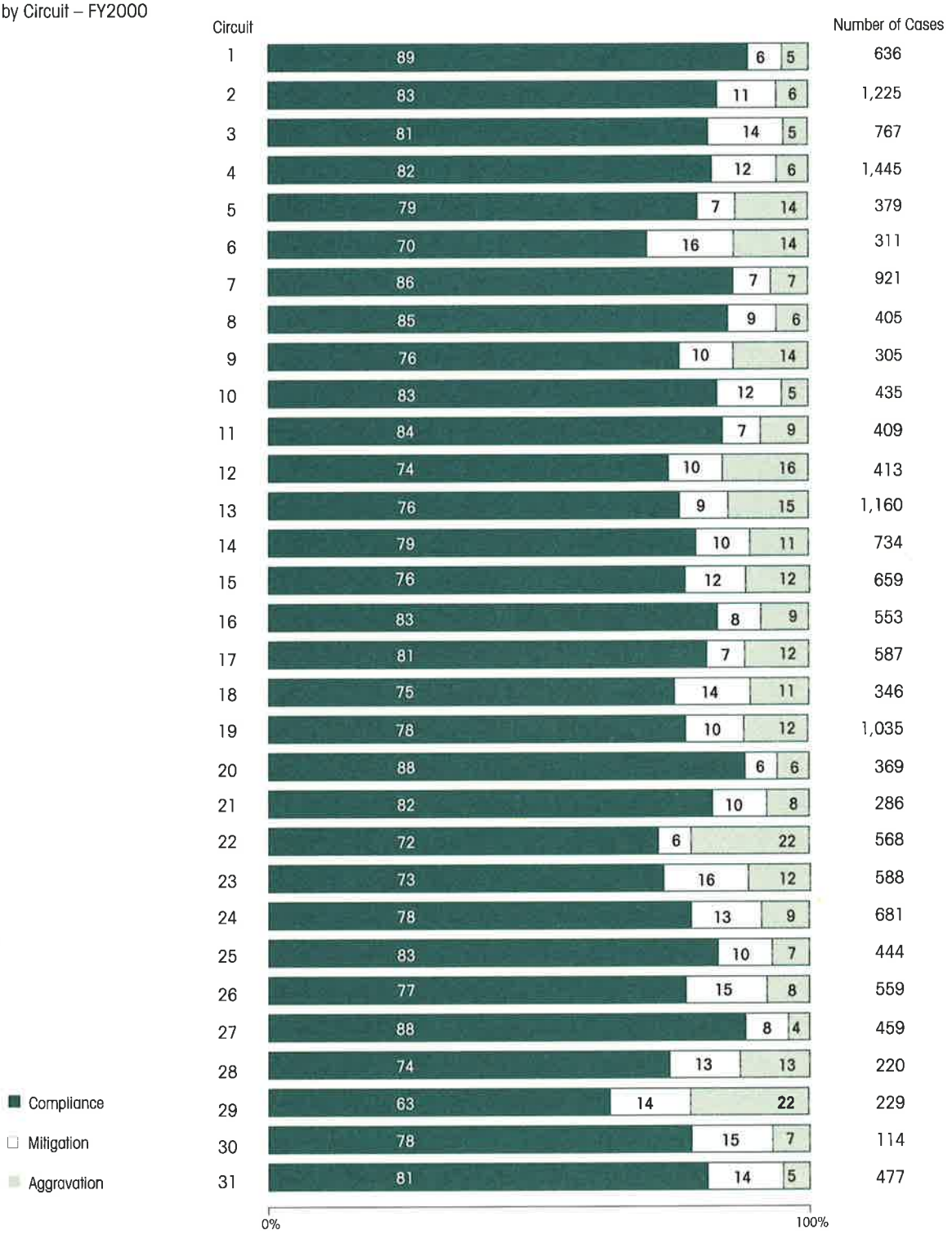
Most Frequently Cited Reasons for Aggravation* – FY2000



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

Figure 13

Compliance by Circuit – FY2000



Compliance by Circuit

Since the onset of truth-in-sentencing, compliance rates and departure patterns have varied significantly across Virginia's 31 judicial circuits. FY2000 continues to show significant differences among judicial circuits in the degree to which judges within each circuit agree with guidelines recommendations (Figure 13). The map and accompanying table on the following pages identify the location of each judicial circuit in the Commonwealth.

In FY2000, nearly half (48%) of the state's 31 circuits exhibited compliance rates at or above 80%, with nearly all others reporting compliance rates between 70% and 79%. Only one circuit had a compliance rate below 70%. This distribution has changed somewhat since the previous fiscal year, when nearly two-thirds of the judicial circuits had compliance rates less than 80%. Overall, nearly three-quarters (74%) of the circuits had higher compliance rates in FY2000 than in FY1999. Compliance rates in the city of Richmond (Circuit 13), as well as the Sussex (Circuit 6), Martinsville (Circuit 21), Roanoke (Circuit 23), and Radford (Circuit 27) areas, increased by more than seven percentage points since FY1999.

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. However, the circuits in the Tidewater area of Virginia typically have maintained compliance rates above the statewide average for several years. Chesapeake (Circuit 1), Virginia Beach (Circuit 2), Portsmouth (Circuit 3), Norfolk (Circuit 4), Newport News (Circuit 7) and Hampton (Circuit 8) all reported compliance rates over 80% in FY2000.

In FY2000, the highest rate of judicial agreement with the sentencing guidelines, 89%, was found in Chesapeake (Circuit 1). During the same time period, four other circuits had compliance rates of at least 85%: Loudoun area (Circuit 20), Radford area (Circuit 27), Newport News (Circuit 7), and Hampton (Circuit 8). Newport News had previously registered the highest compliance rate of all Virginia circuits every year since 1996. However, its compliance rate dropped slightly in FY2000 to 86%. Of those circuits submitting at least 1,000 guidelines cases during FY2000, Virginia Beach (Circuit 2), Norfolk (Circuit 4), and Richmond City (Circuit 13) showed increases in compliance over FY1999, while Fairfax (Circuit 19) showed a slight decrease of 2% percentage points over the previous year.

Virginia Localities and Judicial Circuits

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

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

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

Danville 22
Dickenson 29
Dinwiddie 11

Emporia 6
Essex 15

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

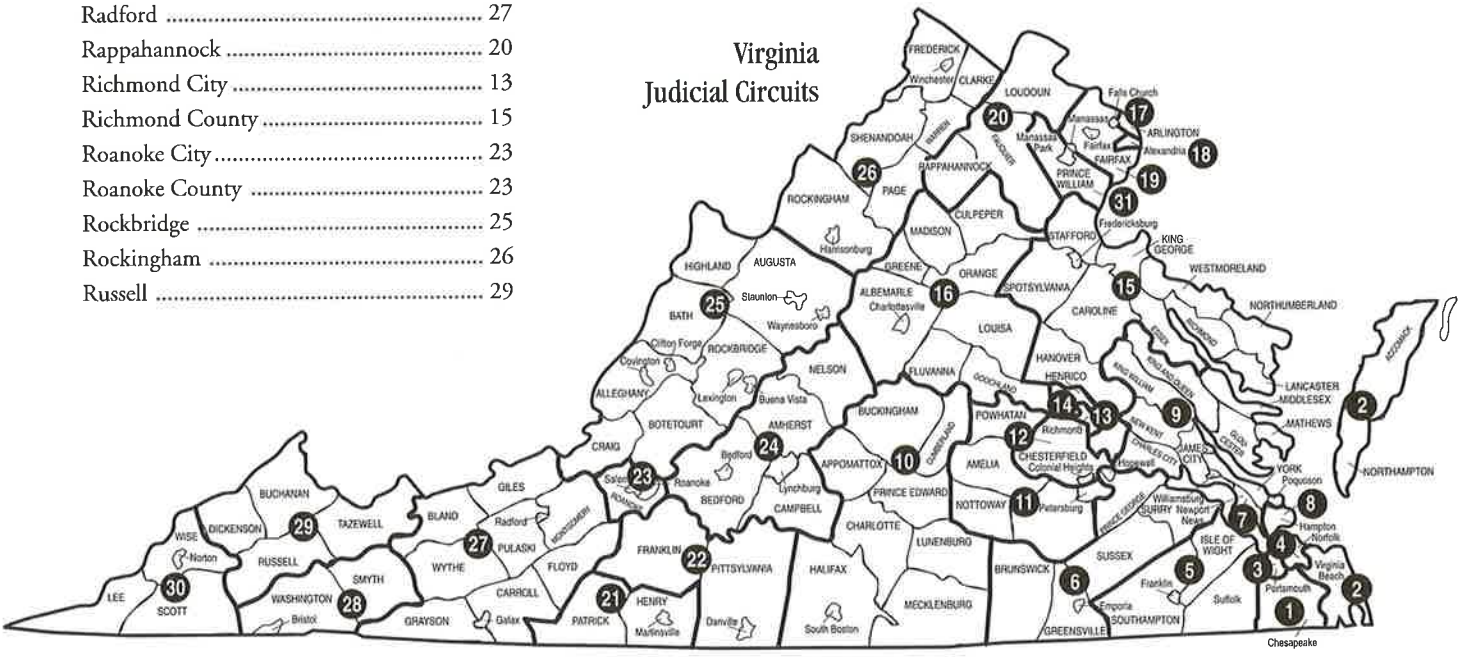
Galax 27
Giles 29
Gloucester 9
Goochland 16
Grayson 27
Greene 16
Greensville 6

Halifax 10
Hampton 8
Hanover 15
Harrisonburg 26
Henrico 14
Henry 21
Highland 25
Hopewell 6
Isle of Wight 5

James City 9
King and Queen 9
King George 15
King William 9

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

Madison 16
Manassas 31
Martinsville 21
Mathews 9



The lowest compliance rates among judicial circuits in FY2000 were reported in Circuit 29 (Buchanan, Dickenson, Russell and Tazewell counties), Circuit 6 (Sussex, Surry, Brunswick and Greensville counties), and Circuit 22 (Danville, Pittsylvania, and Franklin counties). These circuits registered compliance rates of 63%, 70%, and 72% respectively. Circuit 29 and Circuit 6 also had the lowest guidelines compliance rates in FY1999. However, both showed increases over FY1999 rates.

In FY2000, some of the highest mitigation rates were found in the Sussex (Circuit 6), Roanoke (Circuit 23), Lee County (Circuit 30), and Harrisonburg (Circuit 26) areas. Each of these circuits had a mitigation rate of about 15% 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 would appear as mitigations from the guidelines. Inspecting aggravation rates reveals that Danville (Circuit 22) and Buchanan County (Circuit 29), in addition to having some of the lowest compliance rates in the state, reported the highest aggravation rates in FY2000, 23% and 22%, respectively.

Appendices 3 and 4 present compliance figures for judicial circuits by each of the 13 sentencing guidelines offense groups.

Compliance by Sentencing Guidelines Offense Group

Overall, judicial agreement with the sentencing guidelines among FY2000 cases was high, and departures from guidelines recommendations favored neither aggravation nor mitigation. As in previous years, variation exists in judicial agreement with the guidelines, as well as in judicial tendencies toward departure, when comparing the 13 offense groups (Figure 14). Despite these variations in compliance and in departures across offense groups, between FY1999 and FY2000 compliance increased for all offense groups with the exception of two.

For FY2000, compliance rates ranged from a high of 85% in the miscellaneous offense group to a low of 70% among murder and kidnapping offenses. In general, property and drug offenses exhibit rates of compliance higher than the violent offense categories. Since 1995, larceny and fraud offenses have consistently demonstrated the highest compliance rates of all guidelines offense groups. In FY2000, larceny, fraud, and the miscellaneous offense group all had compliance rates above 80%. The violent offense groups (assault, rape, sexual assault, robbery, homicide and kidnapping) had compliance rates between 70% and 78%.

For 11 of the 13 offense categories, compliance was higher in FY2000 than in FY1999. Burglary of other structures had a decrease of 2%, and drug offenses not involving Schedule I/II drugs had a slight decrease of less than one percentage point. FY2000 was the first year that drug offenses were divided into two separate worksheets,

Figure 14
Guidelines Compliance by Offense – FY2000

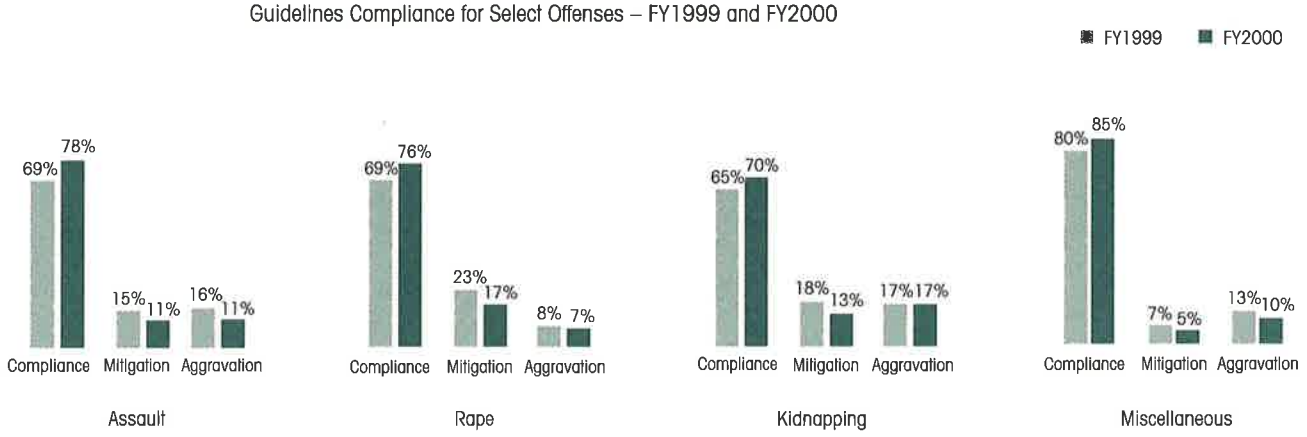
	Compliance	Mitigation	Aggravation	Number of Cases
Assault	77.8%	10.9%	11.3%	962
Burglary/Dwelling	71.0	15.6	13.4	685
Burg./Other Structure	72.9	17.9	9.2	413
Drug/Schedule I/II	78.5	11.1	10.4	5,942
Drug/Other	77.1	7.7	15.2	738
Fraud	82.6	12.2	5.2	2,215
Kidnapping	70.3	12.5	17.2	64
Larceny	84.3	8.0	7.7	3,850
Miscellaneous	85.1	5.3	9.6	1,508
Murder/Homicide	69.8	8.3	21.9	192
Rape	76.0	16.9	7.1	183
Robbery	70.9	18.1	11.0	597
Sexual Assault	71.6	13.0	15.4	370

Drug-Schedule I/II and Drug/Other. When comparing compliance rates for the offenses covered under each of these worksheets, it is apparent that compliance rates in cases involving Schedule I/II drugs is typically higher (79%) than cases involving other types of drug offenses (77%). This pattern was evident in FY1999 before drug offenses were divided into two individual worksheets, and this pattern remained consistent in FY2000 even after worksheet changes were implemented.

The assault, rape, kidnapping and miscellaneous offense groups recorded the largest increases in compliance (Figure 15). Compliance in assault cases increased 9% over FY1999, due largely to the addition of two new assault offenses in FY2000—third or subsequent simple assault of a family member and simple assault of a law enforcement officer. These two offenses alone accounted for 36% of all assault cases received by the Commission in FY2000. Compliance in cases involving third or subsequent simple assault against a family member was at 77% in FY2000, seven percent higher than last year's overall assault compliance rate. Even more importantly, the compliance rate in cases involving simple assault of a law enforcement officer was substantially higher at 91%. Because of the high compliance rates for these two types of assault offenses, and because of their substantial proportion among guidelines assault cases, the overall compliance rate in assault cases has increased greatly in FY2000.

In rape cases, compliance jumped more than seven percentage points from FY1999 to FY2000. The improvement in compliance was derived largely from a decrease in

Figure 15
Guidelines Compliance for Select Offenses – FY1999 and FY2000



the rate of mitigation for this offense. Judicial agreement with the guidelines recommendations in rape cases has increased every year since the inception of truth-in-sentencing. In FY1995, the rape compliance rate was the lowest ever under the no-parole system, at 38%. During this same year, the mitigation rate in rape cases was the highest ever at 53%. Each fiscal year since FY1995 has shown an increase in the proportion of rape cases involving judicial agreement with the guidelines recommendations, and a persistent decline in the proportion of rape cases involving mitigations.

The kidnapping offense group has historically been among the lowest in compliance. While still maintaining a lower compliance rate than all other offense groups except murder, FY2000 kidnapping offenses have displayed a significant 5% increase in compliance over FY1999. Although no changes have been made to the kidnapping worksheet in the past five years, the compliance rate for kidnapping offenses was the highest ever, at 70%, in FY2000.

During the same time period, the miscellaneous offense worksheet showed a 5% increase in compliance over FY1999. Both mitigation and aggravation decreased for the group, and increases in compliance may be attributed to the high compliance rates in habitual traffic offender cases. Because habitual traffic offenses had a compliance rate of 90% and comprised well over half of all offenses on the miscellaneous worksheet, overall compliance with the miscellaneous worksheet showed significant improvement in FY2000.

Since 1995, departure patterns have differed significantly across offense groups, and FY2000 was no exception. Among the property crimes, fraud offenses and burglaries of non-dwellings exhibited a marked mitigation pattern, miscellaneous offense cases favored aggravation, and departures among burglaries of dwellings and larcenies were relatively balanced. With respect to violent crime groups, both rape and robbery departures showed tendencies toward sentences that fell below the guidelines recommendation. This mitigation pattern has been consistent with both rape and robbery offenses since the abolition of parole in 1995.

In contrast, FY2000 murder/homicide offenses show a much greater tendency toward aggravation. Further analysis of specific murder/homicide crimes reveals substantial aggravation rates among felony homicide, second-degree murder and involuntary manslaughter cases where aggravation rates are 71%, 41%, and 36% respectively. The high percentage of aggravations in felony homicide cases was addressed in 1999, when the Commission recommended scoring these offenses the same as second-degree murder.

Adjustments to felony homicide scores went into effect July 1, 2000. The Commission will monitor judicial agreement with adjusted felony homicide guidelines recommendations as data are collected under the new FY2001 guidelines forms. See the *Recommendation* section for further information about aggravation patterns in second-degree murder cases. Other violent crimes of kidnapping, assault, and sexual assault showed little variation between mitigation and aggravation proportions with respect to departures.

Under the guidelines, offenses in the violent crime groups, along with burglaries of dwellings and burglaries with weapons, receive statutorily mandated midpoint enhancements that increase the sentencing guidelines recommendation (§17.1-805 of Code of Virginia). Further midpoint enhancements are applied in cases in which the offender has a violent prior record, resulting in a sentence recommendation in some cases that is up to six times longer than historical time served by violent offenders convicted of similar crimes under the old parole laws. Midpoint enhancements most likely impact compliance rates in very complex ways, and the effect is unlikely to be uniform across guidelines offense groups. For more information on midpoint enhancements, please refer to the section entitled Compliance under Midpoint Enhancements later in this chapter.

Specific Offense Compliance

Studying compliance by specific felony crime assists the Commission in determining those crimes where judges disagree with the sentencing guidelines most often. For convenience, the guidelines are assembled into 13 offense groups, but crimes that exhibit very high guidelines compliance may be collected into the same offense group with those experiencing a much lower rate of compliance. Analyzing compliance by specific crime unmasks the underlying compliance and departure patterns that are of interest to the Commission.

The guidelines in effect during FY2000 covered 178 distinct felony crimes defined in the Code of Virginia, representing about 97% of all felony sentencing events in Virginia's circuit courts. Figure 16 presents compliance results for those offenses that served as the primary offense in at least 100 cases during the most recent fiscal year. These 35 crimes accounted for nearly all (89%) of the FY2000 guidelines cases.

The compliance rates for the crimes listed in Figure 16 range from a high of 91% for bad check offenses and second or subsequent habitual traffic offenses to a low of 63% for offenders convicted of second or subsequent sale of a Schedule I/II drug. The single most common offense, simple possession of a Schedule I/II drug, comprised one out of every five guidelines cases and registered a compliance rate of 82%.

Figure 16

Compliance for Specific Felony Crimes with More Than 100 Cases – FY2000

	Compliance	Mitigation	Aggravation	Number of Cases
Person				
Simple Assault of a Family Member, 3rd/Subsequent	76.6%	15.9%	7.5%	107
Malicious Injury	69.7	10.8	19.5	277
Unlawful Injury	75.0	13.0	12.0	300
Simple Assault of a Law Enforcement Officer	90.8	7.1	2.1	239
Aggravated Sexual Battery, Victim Less than 13 years old	70.9	22.3	6.8	103
Robbery of Business with Gun or Simulated Gun	70.2	22.5	7.3	151
Robbery in Street with Gun or Simulated Gun	68.5	19.7	11.8	127
Robbery in Street,No Gun or Simulated Gun	71.7	18.9	9.4	127
Grand Larceny from a Person	80.0	6.5	13.5	185
Property				
Burglary of Dwelling with Intent to Commmit Larceny, No Deadly Weapon	70.6	16.1	13.3	572
Burglary of Other Structure with Intent to Commmit Larceny, No Deadly Weapon	72.1	18.0	9.9	344
Credit Card Theft	82.4	12.5	5.1	255
Forgery of Public Record	83.0	14.3	2.8	399
Forgery	78.8	14.5	6.7	643
Uttering	82.9	10.1	7.0	228
Bad Check, Valued $200 or More	91.2	8.1	0.7	136
Obtain Money by False Pretenses, Value $200 or More	83.5	11.4	5.1	237
Shoplifting Goods Valued Less than $200 (3rd conviction)	87.0	7.6	5.3	131
Shoplifting Goods Valued $200 or More	87.3	3.6	9.1	110
Grand Larceny, Not from Person	84.3	7.4	8.3	1,745
Petit Larceny (3rd conviction)	83.1	12.8	4.1	538
Grand Larceny Auto	85.2	8.6	6.2	210
Unauthorized Use of Vehicle Valued $200 or More	84.8	10.3	4.9	204
Embezzlement of $200 or More	85.8	4.1	10.1	466
Receive Stolen Goods Valued $200 or More	83.4	8.6	7.9	151
Drug				
Obtain Drugs by Fraud	88.1	2.3	9.6	218
Possession of Schedule I/II Drug	82.4	6.4	11.2	3,767
Sale of .5 oz - 5 lb of Marijuana	74.3	9.0	16.7	424
Sale of Schedule I/II Drug for Accomodation	74.2	16.1	9.7	155
Sale, etc. of Schedule I/II Drug	72.0	20.0	8.0	1,794
Sale, etc. of Schedule I/II Drug — 2nd/Subsequent	62.7	21.8	15.5	110
Sale, etc. of Imitation Schedule I/II Drug	75.2	8.8	15.9	113
Other				
Habitual Traffic Offense with Endangerment to Others	89.4	0.4	10.3	282
Habitual Traffic Offense - 2nd Offense, No Endangerment to Others	91.3	1.7	7.0	633
Possession of Firearm or Concealed Weapon by Convicted Felon	78.5	16.5	5.1	237

Compliance for this offense increased one percentage point in FY2000 over the previous fiscal year. In fact, compliance rates for all but three of the crimes listed in Figure 16 have risen between FY1999 and FY2000.

Nine crimes against the person surpassed the 100-case threshold. Compliance in unlawful injury cases historically has been higher than compliance for malicious injury cases, and this was again true in FY2000. When departing from the guidelines, judges are more likely to exceed the guidelines in malicious injury cases, whereas in unlawful injury cases they are no more likely to sentence below the guidelines as they are above. Person crimes typically exhibit lower compliance than property and drug crimes, but the compliance rate for simple assault of a law enforcement officer was 91%, one of the highest of all offenses. Grand larceny from a person yielded a much higher compliance rate (80%) than the robbery crimes.

Nearly half of the offenses listed in Figure 16 are property crimes, including two burglaries. Burglary of other structure (nondwelling) with intent to commit larceny (no weapon) demonstrated a slightly higher compliance rate than the same burglary committed in a dwelling (72% vs. 71%). Every fraud and larceny offense listed in the table had a compliance rate over 80%, with the exception of forgery at 79%.

Among the property crimes, mitigations were more common than aggravations with the exception of shoplifting goods valued over $200, grand larceny (not from person), grand larceny auto, and embezzlement.

Although simple possession of a Schedule I/II drug was the most common offense among FY2000 guidelines cases, six other drug offenses had more than 100 sentencing guidelines cases during the same time period. The highest judicial agreement rate among the select drug offenses in Figure 16 involved obtaining drugs by fraud, which had an 88% compliance rate. In FY2000, sentences for the sale or distribution of a Schedule I/II drug (including possession of a Schedule I/II drug with intent to distribute) complied with guidelines only 72% of the time, but this is a significant improvement from the 65% compliance rate reported in FY1998. In these sales-related cases involving Schedule I/II drugs, one-fifth of the offenders received a sentence below the guidelines recommendation. In many of these mitigation cases, judges have deemed the offender amenable for placement in an alternative punishment program such as Boot Camp or Detention Center, programs the General Assembly intended to be used for nonviolent offenders who otherwise would be incarcerated for short jail or prison terms. Among the select drug offenses in Figure 16, offenses involving second or subsequent distribution of a Schedule I/II drug had by far the lowest compliance rate of all the drug offenses at

only 63%. Although mitigations were slightly more prevalent at 22%, aggravations involving second or subsequent distribution of a Schedule I/II drug were almost as common.

The "Other" offenses in Figure 16 are listed on the miscellaneous guidelines worksheet—both types of felony habitual traffic offender violations and possession of a firearm by a convicted felon. Habitual traffic offenders almost always receive a sentence within the guidelines recommendation (89% and 91%). For felons possessing a firearm or concealed weapon, judges complied with the guidelines at a lower rate (79%) and handed down sentences short of the guidelines recommendation in nearly all of the remaining cases. This offense had an increase in compliance of nearly nine percentage points over FY1999, due primarily to a decline in the percentage of mitigations. Currently, sentencing guidelines recommendations for possession of a firearm by a convicted felon take into consideration mandatory minimum penalties that became effective for offenses committed on or after July 1, 1999, legislation otherwise known as Virginia Exile. Thus, because judges may not suspend any part of the mandatory minimum sentences in these cases, and because guidelines recommended ranges include these statutorily mandated penalties, it is not surprising that judicial agreement in these cases is increasing.

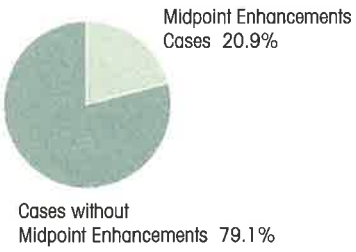
Compliance under Midpoint Enhancements

Section 17.1-805, formerly §17-237, of the Code of Virginia describes the framework for what are known as "midpoint enhancements," significant increases in guidelines scores for violent offenders that elevate the overall guidelines sentence recommendation in those cases. 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 offenders fitting similar profiles under the parole system. Midpoint enhancements are triggered for homicide, rape, or robbery offenses, most assaults and sexual assaults, and certain burglaries, when any one of these offenses is the 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 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 FY2000 cases, 79% of the cases did not involve midpoint enhancements of any kind (Figure 17). 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 five years.

Figure 17
Application of Midpoint Enhancements – FY2000



Of the FY2000 cases in which midpoint enhancements applied, the most common midpoint enhancement was that for a Category II prior record. Approximately 42% of the midpoint enhancements in FY2000 were of this type, applicable to offenders with a nonviolent instant offense but a violent prior record categorized as Category II (Figure 18). Midpoint enhancement cases involving Category II prior records alone have shown a consistent increase in proportion since FY1998, yielding a total increase of about eight percentage points. In FY2000, 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 26% of the midpoint enhancements in FY2000, a percentage that has decreased each year since FY1998. The most substantial midpoint enhancements target offenders with a combination of instant and prior violent offenses. Over 11% qualified for enhancements for both a current violent offense and a Category II prior record. Only a small percentage of cases (6%) were targeted for the most extreme midpoint enhancements given to offenders with both 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 FY2000, compliance was only 72% when enhancements applied, significantly lower than compliance in all other cases (82%). Although compliance in midpoint enhancement cases was relatively low in FY2000, it has increased consistently since FY1997. Despite the increase in compliance over the last year, compliance in midpoint enhancement cases is suppressing the overall compliance rate. When departing from enhanced guidelines recommendations, judges are choosing to mitigate in nearly three out of every four departures.

Guidelines recommendations for incarceration in excess of six months are provided as ranges to allow judges discretion in sentencing while still remaining in compliance with guidelines. Despite this, when sentencing offenders to incarceration periods in midpoint enhancement cases in FY2000, judges departed from the low end of the guidelines range by an average of nearly two years (22 months), with the median mitigation departure at 11 months (Figure 19). In fact, one in five midpoint enhancement mitigations involved offenders who were recommended for a term of incarceration but who actually received probation/no incarceration as a sentence. Given the lower than average compliance rate and overwhelming mitigation pattern, this is evidence that judges feel the midpoint enhancements are too extreme in certain cases.

Figure 18

Type of Midpoint Enhancement Received – FY2000

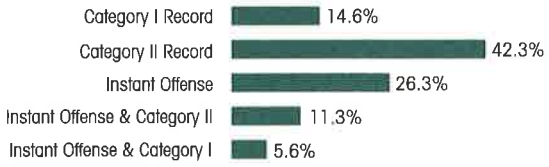


Figure 19

Length of Mitigation Departures in Midpoint Enhancement Cases – FY2000

Compliance, while generally lower in midpoint enhancement cases than in other cases, varies across the different types and combinations of midpoint enhancements (Figure 20). In FY2000, as in previous years, enhancements for a Category II prior record generated the highest rate of compliance of all the midpoint enhancements (75%). Compliance in cases receiving enhancements for a Category I prior record was significantly lower (67%). Enhancements for a current violent offense have exhibited the largest increase in compliance over the years, jumping from 60% in FY1998 to 72% in the most recent fiscal year. The most severe midpoint enhancements, those involving a combination of a current violent offense and a Category I prior record, yielded a compliance rate of 71%, while those cases with both a violent instant offense and a Category II prior record yielded a lower compliance rate of 67%. Between FY1999 and FY2000, compliance improved across all types of midpoint enhancements, and the majority also saw decreases in the percentage of mitigation departures.

The tendency for judges to impose sentences below the sentencing guidelines recommendation in midpoint enhancement cases is readily apparent. Analysis of departure reasons in cases involving

Figure 20

Compliance by Type of Midpoint Enhancement* - FY2000

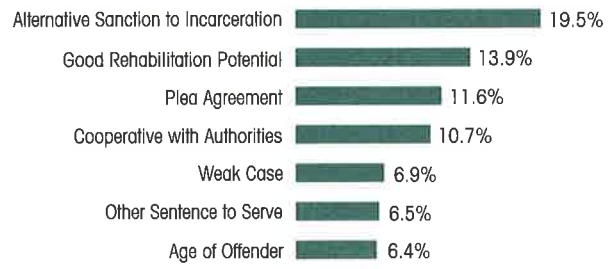
	Compliance	Mitigation	Aggravation	Cases
None	81.9%	7.8%	10.3%	14,013
Category II Record	74.6	20.6	4.8	1,567
Category I Record	67.4	27.4	5.2	541
Instant Offense	71.6	17.0	11.4	974
Instant Offense & Category II	67.4	21.8	10.8	418
Instant Offense & Category I	70.9	20.9	8.2	206

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

midpoint enhancements, therefore, is focused on downward departures from the guidelines (Figure 21). Such analysis reveals that in FY2000 the most frequent reason for mitigation in these cases was based on the judge's decision to use alternative sanctions to traditional incarceration (20%). This reason for mitigation includes, but is not limited to, alternative sanctions ranging from the Boot Camp, Detention Center, and Diversion Center Incarceration programs to substance abuse treatment, intensive supervised probation or a day reporting program. In nearly 14% of the mitigation cases, the judge sentenced based on the perceived potential for rehabilitation of the offender. In more than one out of every ten cases, judges cited a plea agreement or the defendant's cooperation with authorities as reasons for mitigating below the guidelines recommendation. Among other most frequently cited reasons for mitigating, judges indicated that the evidence against the defendant was weak, that the defendant had another sentence to serve, or that the defendant's age was a factor in the decision to mitigate.

Figure 21

Most Frequently Cited Reasons for Mitigation in Midpoint Enhancement Cases* – FY2000



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

Juries and the Sentencing Guidelines

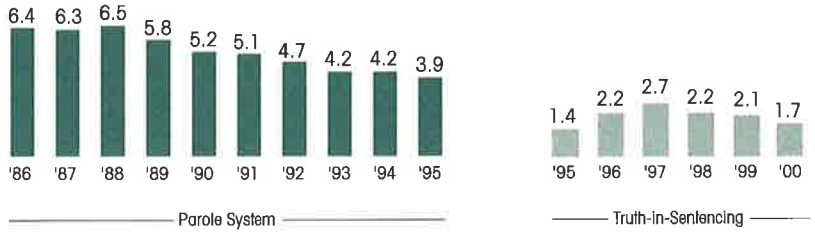
Virginia is one of only six states that allow juries to determine sentence length in non-capital offenses. Since the implementation of the truth-in-sentencing system, Virginia's juries have typically handed down sentences more severe than the recommendations of the sentencing guidelines. In fact, in FY2000, as in previous years, a jury sentence was far more likely to exceed the guidelines than fall within the guidelines range. Some have speculated that many citizens may be unaware of the abolition of parole and Virginia's conversion to truth-in-sentencing, with its 85% minimum time served requirement. As the result, jurors may be inflating sentences, under the assumption that only a portion of the term will be served because of parole release. Moreover, juries are not allowed by law to receive any information regarding the sentencing guidelines to assist them in their sentencing decisions.

Since FY1986, there has been an overall declining trend in the percentage of jury trials (Figure 22). Under the parole system in the late 1980s, jury trial rates were 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 the bifurcated trials became effective on July 1,1994 (FY1995), jurors in Virginia, for the first time, were presented with information on the offender's prior criminal record to assist them in making a sentencing decision. During the first year of the bifurcated trial process, the overall rate of jury trials dropped slightly to just under 4%, the lowest rate since the data series began.

Among the early cases subjected to the new truth-in-sentencing provisions, implemented during the last six months of FY1995, the jury trial rate sank to just over 1%.

Figure 22

Rate of Jury Trials FY1986 – FY2000
Parole System v. Truth-in-Sentencing (No Parole) System

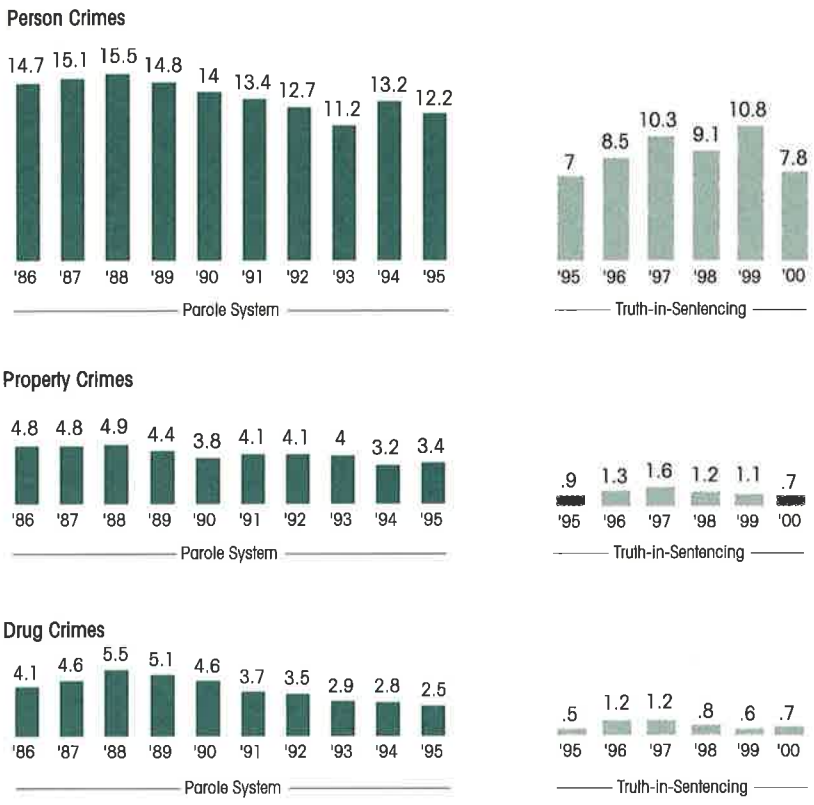


During the first complete fiscal year of truth-in-sentencing (FY1996), just over 2% of the cases were resolved by jury trials, half the rate of the last year before the abolition of parole. Seemingly, the introduction of truth-in-sentencing, as well as the introduction of a bifurcated jury trial system, appears to have contributed to the significant reduction in jury trials. The rate of jury trials rose in FY1997 to nearly 3%, but since has decreased to a low of 1.7% in FY2000.

Inspecting jury trial rates by offense type reveals very divergent trends for person, property and drug crimes. From FY1986 through FY1995 parole system cases, the jury trial rate for crimes against the person (homicide, robbery, assault, kidnapping, rape and sexual assault) was typically three to four times the rates for property and drug crimes, which were roughly equivalent to one another (Figure 23). However, with the implementation of truth-in-sentencing, jury trial rates for all

Figure 23

Rate of Jury Trials by Offense Type FY1986 – FY2000
Parole System v. Truth-in-Sentencing (No Parole) System



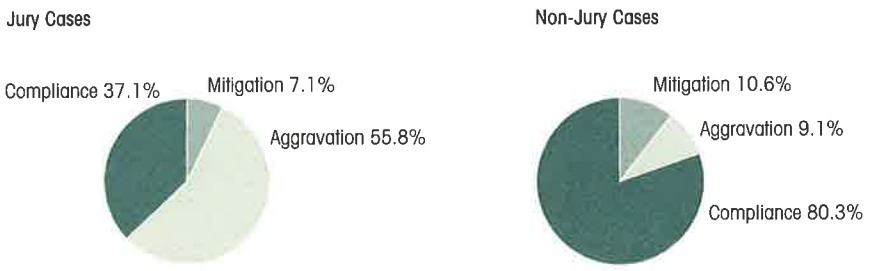
crime types dropped. Under truth-in-sentencing, jury trial rates involving person crimes have varied from 7% to nearly 11%, and FY2000 data show a decrease of about three percentage points since FY1999. On the contrary, rates for property and drug crimes have remained fairly consistent under truth-in-sentencing, at approximately 1%.

Of the 17,719 FY2000 cases under analysis for this report, the Commission received 283 cases tried by juries. While the compliance rate for cases adjudicated by a judge or resolved by a guilty plea exceeded 80% during the fiscal year, sentences handed down by juries fell into compliance with the guidelines only 37% of the time (Figure 24). In fact, jury sentences fell above the guidelines recommendation in 56% of the cases, more than six times that of non-jury cases. Although compliance decreased and aggravation increased in FY2000 jury cases when compared to FY1999 jury cases, this pattern of low compliance and high aggravation from the guidelines in jury trial cases has been consistent since the truth-in-sentencing guidelines became effective in 1995.

Judges, although permitted by law to lower a jury sentence they feel is inappropriate, typically do not amend sanctions imposed by juries. Judges modified jury sentences in just over one-fourth of the FY2000 cases in which juries found the defendant guilty. Of the cases in which the judge modified the jury sentence, judges brought a high

Figure 24

Sentencing Guidelines Compliance in Jury Cases and Non-Jury Cases – FY2000



jury sentence into compliance with the guidelines recommendation in only four out of ten modifications. In nearly five out of ten modification 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 about one and one-half years (Figure 25). In cases where the ultimate sentence resulted in a sanction more severe than the guidelines recommendation, the sentence exceeded the guidelines maximum recommendation by a median value of more than four years.

Between FY1999 and FY2000, the median length of departure in mitigating jury cases decreased by five months, while the median length of departure in aggravating jury cases increased by more than one year, thus illustrating the ongoing tendency for juries to sentence above guidelines recommendations.

Figure 25
Median Length of Durational Departures in Jury Cases – FY2000

Sex Offender Risk Assessment

Introduction

Risk assessment occurs both formally and informally throughout the various stages of the criminal justice system. Judges, for instance, make sentencing decisions based on the perceived risk an offender poses to public safety in terms of new offense behavior. In those states with parole, the parole board must also make a decision based on what is believed to be the risk posed by the offender should he be released on parole supervision. In recent years, risk assessment, particularly for sex offenders, has become a more formalized process. In large part, this is due to legislative trends that have singled out sex offenders for special provisions not extended to other types of offenders. Sex offender registry, community notification and civil commitment laws have brought formal risk assessment for sex offenders to the forefront (Epperson, Kaul, and Hesselton 1999).

In 1999, the Virginia General Assembly requested the Commission to develop a sex offender risk assessment instrument, based on the risk of re-offense, which can be integrated into the state's sentencing guidelines system. Such a risk assessment instrument can 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 responded to the legislative mandate by designing and executing a research methodology to study a sample of felony sex offenders convicted in Virginia. The Commission's objective was to develop a reliable and valid predictive instrument, specific to the population of sex offenders in the Commonwealth, that could be a valuable tool for the judiciary when sentencing sex offenders.

The Commission's findings and its proposals for integrating sex offender risk assessment into the Virginia sentencing guidelines system are presented in the Commission's report entitled Assessing Risk among Sex Offenders in Virginia. This chapter of the 2000 Annual Report is a summary of that document.

SENATE JOINT RESOLUTION NO. 333

Requesting the Virginia Criminal Sentencing Commission to develop a risk assessment instrument for utilization in the sentencing guidelines for sex offenses.

WHEREAS, research indicates that certain sex offenders are at high risk for reoffense; and

WHEREAS, such sex offenders typically prey on vulnerable populations, such as children; and

WHEREAS, it is important to identify and incapacitate, to the extent possible, these predatory sex offenders; and

WHEREAS, the Sentencing Commission has developed and piloted a risk assessment instrument for certain offenses for purposes of providing alternatives to incarceration; and

WHEREAS, a similar assessment instrument could be used to determine the range of sentences which should be imposed upon a convicted sex offender based upon the risk for reoffending; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, that the Virginia Criminal Sentencing Commission be requested to develop a risk assessment instrument for utilization in the sentencing guidelines for sex offenses. In developing the risk assessment instrument, the Commission shall consider the impact of treatment interventions on the reduction of sex offenses. The Commission shall collaborate with the Department of Corrections in the development of such instrument. All agencies of the Commonwealth shall provide assistance to the Commission, upon request.

The Commission shall complete its work in time to submit its findings and recommendations to the Governor and the 2000 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems.

The Nature of Risk Assessment

In essence, criminal risk assessment is the estimation of an individual's likelihood of repeat criminal behavior and the classification of offenders in terms of their relative risk of such behavior. Typically, risk assessment is practiced informally throughout 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.

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 in 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. No risk assessment research can ever predict a given outcome with 100% accuracy. Rather, the goal is to produce an instrument that is broadly accurate and provides useful additional information to decision makers. The standard used to judge the success of risk classification is the degree to which decisions made with a risk assessment tool improve upon decisions made without the tool.

Failure, in the criminal justice system, is typically referred to as recidivism. Offender recidivism, however, can be measured in several ways. Potential measures vary by the act defined as recidivism. 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 likely will 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 a 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 being 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 presence or absence of certain combinations of factors determine the risk group of the offender.

Utilization of risk assessment in criminal justice decision making has withstood constitutional challenges. According to Witt, DelRusso, Oppenheim, and Ferguson (1996), the federal courts found that the "...likelihood of future criminality and the potential for danger to society are determinations implicit in sentencing decisions" and every court of appeals that has considered the question "has rejected the claim that prediction of future conduct is unconstitutionally vague" (p. 350). Similarly, Janus and Meehl (1997) have concluded that, while there are statutory and evidentiary standards limiting prediction testimony, "it seems well established that there is no constitutional impediment to using predictions of dangerousness in legal proceeding" (p. 36; see also Epperson, Kaul, and Hesselton 1999).

Predicting risk to commit violence in general, and sexual aggression in particular, is a challenging task. Nonetheless, there is evidence to suggest empirically-based risk assessment outperforms purely clinical assessment by mental health professionals in terms of predicting future dangerousness. Indeed, research over the last two decades has consistently demonstrated the general superiority of actuarial, or empirically-based, risk assessment over clinical prediction in virtually every decision-making situation that has been studied (Epperson, Kaul, and Hesselton 1999; Harris, Rice, and Quinsey 1993; Gottfredson 1987). Improving violence prediction, then, may rely in large part on the increased use of actuarial (statistical) methods (Monahan 1996).

Prior Research

Although little has been done heretofore to study factors associated with recidivism among sex offenders convicted in Virginia, there is a growing body of work in the field of recidivism research related to this population. Some research efforts, particularly in the area of the efficacy of specialized sex offender treatment, are ongoing.

All recidivism studies share significant shortcomings (Doren 1998). The true rate of sex offense behavior is unknown since not all offenses come to the attention of law enforcement, social services or other official agencies. Therefore, all recidivism research underestimates the actual rate at which these acts are committed. Additionally, a large share of recidivism research defines recidivism as reconviction, which may further limit that portion of re-offense behavior that is captured for study. Reconviction rates have been shown to seriously underestimate the extent of recidivism among sex offenders (Romero and Williams 1985; see also Doren 1998; Prentky, Lee, Knight, and Cerce 1997). Moreover, recidivism research is limited by time constraints. Some offenders may actually recidivate after the conclusion of the study and yet be considered a "success" in terms of the research because they did not recidivate during the study's window of data collection.

At present, there are no standards or universal criteria for conducting recidivism research (Furby, Weinrott, and Blackshaw 1989; Marshall and Barbaree 1990; Quinsey, Khanna, and Malcolm 1998). Investigation of recidivism has occurred in a variety of settings on a wide array of sex offender populations. Researchers in the field have not adopted a uniform measure for differentiating recidivists and non-recidivists. Previous studies have utilized a variety of measures to identify recidivists, such as a new arrest, new conviction, supervision failure, probation revocation or recommitment to prison. Therefore, the extent of sex offender recidivism detected across research studies varies considerably. The length of follow-up, the period of time for which an offender is tracked in an effort to detect new offense behavior, is also widely disparate, with some studies following offenders for a relatively brief period of time (e.g., a year or two) while other studies have documented follow-ups as long as two decades. In addition, recidivism researchers have studied diverse groups of subjects. Because there are no standards or uniform practices for studying recidivism among sex offenders, it is difficult to directly compare studies in this field to one another. Taken as a whole, however, patterns emerge which shed light on not only the extent of recidivism among this particular population but also those offender and offense characteristics which seem to be most often associated with recidivist behavior.

Based on the Commission's review of the literature in this area, factors reflecting the marital status of the offender and factors capturing the offender's history of arrests and/or convictions for sex offenses were identified more frequently than other factors as being important in the prediction of recidivism among sex offenders. This body of research indicates that offenders who have never been married (or in some studies not currently married) are more likely to recidivate than offenders who have been or are currently married. As a whole, existing research also indicates that offenders who have a history of prior sexual crimes are more likely to recidivate than offenders for whom the crime under study represents the first sex offense. An offender's prior record of non-sexual offenses and other measures of criminal history, most notably juvenile record, were also found to be relevant in predicting recidivist behavior in numerous studies. Overall, the findings suggest that offenders who commit their crimes against persons who are unrelated to them are more likely to recidivate, particularly if the offender selects a victim who is a stranger. Younger offenders and offenders who victimized males were found to recidivate at higher rates in approximately half of the analyses that included such parameters, while unemployment also proved to be an indicator of recidivism in some studies. It is interesting to note that most of the studies which included factors relating to an offender's deviant sexual preferences, degree of psychopathy or personality (e.g., anti-social) disorders and the offender's paraphilias, found these factors to contribute significantly to prediction of sex offender recidivism. These measures may be captured as a part of a clinical assessment of the offender, in conjunction with a treatment program or a risk evaluation conducted by a mental health professional.

Reviewing previous research on sex offender recidivism in this way highlights those findings that have been found repeatedly to be significant across multiple professional research studies. While the predictive strength of these parameters relative to one another cannot be deduced using this approach, such a review serves as a basis for current and future research.

Sex Offender Treatment and Recidivism

Determining the extent to which treatment may reduce recidivism among convicted sex offenders is of particular interest to researchers, clinicians and criminal justice decision makers. For researchers, it is an ongoing challenge to design and execute studies with the power to demonstrate a treatment effect if, indeed, one exists. For criminal justice decision makers, the answer to the treatment question has major implications for how best to utilize correctional resources and how best to protect public safety.

Addressing the question of whether treatment works is extremely complex. Certainly, not all treatment programs are the same. With tremendous diversity in treatment programs and treatment participants, an answer to the global question of "Does treatment work?" is unlikely to be forthcoming. Moreover, approaches to sex offender treatment have evolved over the decades, with current approaches typically focusing largely on cognitive-behavioral methods and relapse prevention.

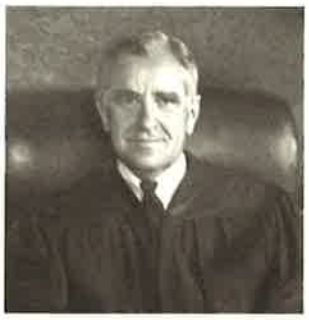
Another reason the treatment question is so difficult to address lies in the challenges researchers face in the design and execution of scientifically rigorous studies to evaluate sex offender treatment programs. Rigorous scientific standards are very difficult to accommodate outside of research laboratories in actual program settings (English 1996). According to English (1996), methodological problems common to scientific studies on the effectiveness of sex offender treatment programs include, but are not limited to:

- Difficulty in adequately capturing the exact treatment delivered;
- Lack of comparison/control groups to measure the difference between the outcome for those who received treatment and the outcome of a comparable group who did not receive treatment;
- Ethical problems involved in random assignment to study/comparison groups (related to withholding treatment for research purposes);
- Poor or limited outcome data or use of unreliable measures;
- Samples that are not representative of a correctional population or of the population of interest (e.g., treatment participants comprised of only volunteers, who may be more amenable to treatment);
- Samples that exclude offenders who refuse treatment or drop out (treatment dropouts have been found to recidivate at significantly higher rates than those who complete treatment);
- Samples so small that a treatment effect, if one exists, cannot reach the level of statistical significance;
- The lack of comparable follow-up periods across studies.

When outcome studies do not adequately address these issues, it is "difficult to draw conclusions with confidence" and it is even more "difficult to generalize the findings to other sex offender treatment settings" (English 1996, p.18-4).

Nevertheless, determining whether or not treatment, or a specific type of treatment, is effective in reducing recidivism among sex offenders is of utmost concern to clinicians and criminal justice decision makers. To try to address questions about the efficacy of treatment programs, researchers have searched for general themes or overarching patterns revealed through previous research efforts. Figure 26 summarizes nine publications released since 1989. These studies are not themselves outcome studies but, rather, reviews of sex offender treatment studies compiled by the authors.

From Figure 26, it is clear that at least three groups of researchers are optimistic about the evidence of a treatment effect linked to specific types of programs (Marshall and Barbaree 1990; Marshall, Jones, Ward, Johnston, and Barbaree 1991; Marshall and Pithers 1994). After reviewing four outcome studies published between 1988 and 1993 that compared treated and untreated offenders, Marshall and Pithers (1994) believe "there are clearly, on all indices of treatment outcome, good grounds for optimism about the value of the more recent comprehensive cognitive-behavioral treatment programs" for sex offenders. Two of the publications listed in Figure 26 have taken a more quantitative approach to reviewing existing studies. One (Hall 1995) is based on meta-analysis, a statistical technique that integrates the results of several independent studies, of 12 sex offender treatment studies published since 1989 considered by the author to be methodologically adequate for such an analysis. Hall (1995) reports a small but consistent effect of treatment in reducing sexual recidivism. In another quantitative examination of existing research studies, Alexander (1999)



Chief Justice Harry Lee Carrico has presided over the Virginia Supreme Court since his appointment in February of 1981. He created the Commission on the Future of Virginia's Judicial System in 1987 which presented 132 recommendations in its 1989 report for improving the Commonwealth's judicial system.

uses an exploratory technique to search or patterns across 79 recidivism studies. Among the studies analyzed, Alexander (1999) found that 13% of treated sexual offenders recidivated compared to 18% of untreated offenders, but the data suggest that treatment may lower recidivism rates for some sexual offenders and be less effective for others (treatment effects appeared greater for child molesters and exhibitionists than rapists).

For other researchers cited in Figure 26, the effectiveness of treatment cannot be pronounced in the absence of more rigorous scientific research. Because of the methodological deficiencies found in nearly all sex offender treatment studies, Furby et al. (1989) and Quinsey et al. (1993) conclude that the effectiveness of treatment in reducing sex offender recidivism has not yet been scientifically demonstrated. The United States' General Accounting Office and the Washington State Institute for Public Policy have concurred. The U.S. General Accounting Office (1996), Congress' watchdog agency, found that "most research reviews identified methodological problems with sex offender research as a key impediment to determining the effectiveness of treatment programs. As a result, little is certain about whether, and to what extent, treatments work with certain types of offenders, in certain settings, or under certain conditions" (p. 3). According to the Washington State Institute for Public Policy (1999), "given the small number of rigorous studies on this subject, scientific conclusions about the effectiveness of sex offender treatment are likely to remain ambiguous for a number of years" (Phipps et al. 1999, p. 107).

As shown in Figure 26, it appears that researchers who have reviewed sex offender treatment outcome studies have not reached a consensus as to whether or not such treatment has been demonstrated to be effective in reducing the prevalence of recidivism among sex offenders. There does appear, however, to be agreement among researchers that rigorous scientific study of sex offender treatment outcomes is a desirable goal. After examining 22 qualitative and quantitative reviews of research on sex offender treatment previously published, the U.S. General Accounting Office (1996) found that "most reviewers, even those who were quite positive about the promise of sex offender treatment programs, felt that more work was needed before firm conclusions could be reached" (p. 7).

Figure 26

Reviews of Sex Offender Treatment Outcome Studies, 1989-1999

Furby, Weinrott and Blackshaw (1989) reviewed 42 sex offender recidivism studies conducted between 1953 and 1989.

- "The variety and gravity of methodological problems in existing recidivism studies... often undermines confidence in their results." (p. 4)
- "The fact that treated and untreated groups differ in ways other than whether they received treatment makes these already ambiguous results even more difficult to interpret." (p. 25)
- "We must consider the possibility that treatment is effective for only some types of offenders." (p. 25)
- "Treatment models have been evolving constantly, and many of those evaluated in the studies reviewed here are now considered obsolete." (p. 25)
- "There is as yet no evidence that clinical treatment reduces rates of sex re-offenses in general and no appropriate data for assessing whether it may be differentially effective for different types of offenders." (p. 27)

Marshall and Barbaree (1990) examined studies of four comprehensive outpatient programs.

- "While the data on institutionally based programs encourage limited optimism with respect to the value of cognitive-behavioral programs, it cannot be said that these data are more than tentative." (p. 373)
- "Outpatient treatment of sex offenders by cognitive-behavioral procedures, then, seems to be effective." (p. 379)
- "It is worth noting here that what limited evidence there is indicates that rapists are the least responsive to cognitive-behavioral interventions, and further development of programs for those men is warranted." (p. 382)

Marshall, Jones, Ward, Johnston and Barbaree (1991) reviewed treatment outcome studies to examine the value of different treatment approaches.

- "In examining the value of the different approaches, we concluded that comprehensive cognitive/ behavioral programs (at least for child molesters, incest offenders and exhibitionists) are likely to be effective, although there is a clear value for the adjunctive use of antiandrogens with those offenders who engage in excessively high rates of sexual activities." (p. 465)
- "We believe that the evidence provides an unequivocally positive answer" to the question of treatment effectiveness, "although clearly, not all programs are successful and not all sex offenders profit from treatment." (p. 480)
- "At the moment, there is insufficient data to identify in advance those patients who will profit the least (except of course rapists), and this topic urgently needs research." (p. 481)

Quinsey, Harris, Rice and LaLumiere (1993) assessed methodologies used to study sex offender recidivism.

- "The effectiveness of treatment in reducing sex offender recidivism has not yet been scientifically demonstrated." (p. 512)
- "Only truly randomized assignment [to treatment and non-treatment groups] can allow a strong test to be made..." (p. 514)
- "The second difficulty in making inferences from the outcome literature... involves a potential overestimate of treatment effectiveness caused by not considering those who refuse treatment and dropouts when comparing the outcomes of those who complete treatment with outcomes of untreated men... Treatment refusers and treatment dropouts should not be ignored in considering treatment efficacy." (p. 514)
- "In general, statistical significance is a necessary criterion for clinical and economic significance." (p. 521)
- "In the end, there is no substitute for scientific rigor... Meta-analyses offer the field of sex offender treatment the opportunity of drawing definitive quantitative conclusions by combining the results of many studies, none of which alone would be decisive." (p. 521)

Marshall and Pithers (1994) reviewed treatment outcome studies on four sex offender treatment programs that compared the outcome of treated sex offenders with a group of untreated offenders.

- "Non-familial child molesters who were treated had significantly lower re-offense rates than did their untreated counterparts. The same was true for father-daughter incest offenders and exhibitionists." (p. 20)

Marshall and Pithers (1994) continued

- Three studies found that "specialized treatment programs result in diminished recidivism rates for child abusers and rapists in comparison to untreated samples, but the reduction in recidivism rates is consistently greater for child abusers than for rapists." (p. 20)
- "There are clearly, on all indices of treatment outcome, good grounds for optimism about the value of the more recent comprehensive cognitive-behavioral treatment programs." (p. 21)

Hall (1995) performed a meta-analysis, or statistical integration, on 12 studies of treatment with sexual offenders published since 1989 considered by the author to be methodologically adequate for inclusion.

- "A small, but robust, overall effect size was found for treatment versus comparison conditions [alternative treatment or no treatment]." (p. 802)
- Treatment effects were larger "in studies that had higher base rates of recidivism, had follow-up periods longer than five years, included out-patients, and involved cognitive behavioral or hormonal treatments." (p. 802)
- "Of the sexual offenders who completed treatment in the studies in the present meta-analysis, 19% committed additional sexual offenses, whereas over 27% of sexual offenders in comparison conditions committed additional offenses." (p. 806)

The United States General Accounting Office (1996) examined 22 qualitative and quantitative summaries of research on sex offender treatment and reported its findings to Congress.

- "Most research reviews identified methodological problems with sex offender research as a key impediment to determining the effectiveness of treatment programs. As a result, little is certain about whether, and to what extent, treatments work with certain types of offenders, in certain settings, or under certain conditions." (p. 3)
- "There seemed to be little consensus among reviewers about what an optimal indicator of recidivism would be. As a result, it was difficult to determine whether, and by how much, sex offender treatment reduced recidivism." (p. 10)
- "Most reviewers, even those who were quite positive about the promise of sex offender treatment programs, felt that more work was needed before firm conclusions could be reached." (p. 7)

Margaret Alexander (1999) analyzed data from 79 sexual offender treatment outcome studies to identify patterns for examination in greater detail.

- "Data from multiple studies suggest that treatment may lower recidivism rates, at least for some sexual offenders [treatment effects appeared greater for child molesters and exhibitionists than rapists]."
- Overall, 13% of treated sexual offenders recidivated compared to 18% of untreated offenders.
- "The elimination of the data on dropouts could have skewed the results" since "studies such as that by Miner and Dwyer (1995) point to a differential effect that treatment may have in completers as opposed to dropouts. "
- Recidivism rates decreased in studies conducted after 1980, suggesting that newer treatment approaches may be more effective or evaluation methods have improved or both.

Washington State Institute for Public Policy (Phipps, Korinek, Aos, and Lieb 1999) reviewed research findings for eight prison-based and five community-based adult sex offender treatment programs in the United States and Canada.

- "The United States' General Accounting Office concluded in 1996 that the research results are inconclusive regarding the effectiveness of sex offender treatment in reducing recidivism. We have reached the same conclusion for both in-prison and community-based treatment." (p. 107)
- "Given the small number of rigorous studies on this subject, scientific conclusions about the effectiveness of sex offender treatment are likely to remain ambiguous for a number of years." (p. 107)

Several recent research efforts (1995-1999) examining the efficacy of sex offender treatment have been produced. Although a portion of these recent studies have reported findings of a positive treatment effect for certain sex offenders in particular program settings (Looman, Abracen, and Nicholaichuk 2000; Minnesota Department of Corrections 2000; Mander et al. 1996; McGrath, Hoke, and Vojtisek 1998), these studies are not without many of the methodological weaknesses discussed earlier in this chapter. Moreover, each evaluation study targets a specific program (e.g., a program for sex offenders in prison who volunteer to participate in treatment) which may limit the applicability of the results to other sex offenders and those in different correctional settings. Because of the methodological limitations of these studies and the specificity of the programs, the results of these studies are likely not generalizable to the population of sex offenders who come in contact with the criminal justice system. See the Commission's full report, Assessing Risk among Sex Offenders in Virginia, for additional detail.

True controlled experiments on the effects of sex offender treatment are difficult to achieve. Random assignment to treatment and non-treatment study groups is required to scientifically assess treatment effects. Ethical concerns have been raised concerning the withholding of treatment for research purposes from offenders who desire and may need therapy. In the mid-1980s, however, the California Department of Corrections and the California Department of Mental Health initiated a controlled experiment using prisoner populations (Marques, Day, Nelson, and Miner 1989; Marques, Day, Nelson, and West 1994; Marques and Day 1998). Researchers are evalu-ating treatment efficacy by comparing recidivism rates for a treatment group (sex offenders who volunteer and are randomly selected for treatment), a volunteer non-treatment group (those who volunteer but are not randomly selected for treatment), and a non-volunteer control group (subjects who refused the opportunity for treatment). The California program, known as the Sex Offender Treatment and Evaluation Program or SOTEP, is based on a cognitive-behavioral treatment method that uses a relapse prevention framework to help offenders identify factors that place them at risk for re-offense and to develop coping responses to these risks. For this study, recidivism has been defined as a new arrest for either a sex crime or a violent non-sex crime. The 1998 progress report did not demonstrate a statistically significant difference between treated and untreated offenders in re-arrest for sex offenses or other crimes against the person. The study is ongoing, thus the results could change over time.

Research Methodology

The Virginia General Assembly requested the Commission to develop a risk assessment instrument, based upon the risk of re-offense, for integration into Virginia's sentencing guidelines for sex offenses. The Commission's goal was to develop a reliable and valid predictive instrument, specific to the population of sex offenders in the Commonwealth, that could be a valuable tool for the judiciary when sentencing sex offenders. The Commission responded to the legislative mandate by designing and executing a research methodology to study a sample of felony sex offenders convicted in Virginia. This is very similar to the approach taken in Minnesota, which currently utilizes its risk assessment instrument as a screening tool for referring offenders for commitment under the Sexual Psychopathic Personality and Sexually Dangerous Persons law and for assigning sex offenders to one of three reporting levels as required by that state's Community Notification Act.

The Commission tracked 579 felony sex offenders who were released from incarceration (or sentenced to probation without an active term of incarceration) during fiscal years (FY) 1990 through 1993. Selecting offenders returning to the community from FY1990 to FY1993 allowed for a minimum five-year follow-up for all offenders in the sample, with some offenders followed for as long as ten years. On average, offenders in the Commission's study were tracked for eight years. The offenders were selected in such a way that the overall sample reflects the characteristics of a random sample of sex offenders sentenced in Virginia's circuit courts in calendar years (CY) 1996 and 1997. This design enables the Commission to generalize the results of the study to sex offenders sentenced in circuit courts in the Commonwealth.

Automated data was supplemented through manual data collection. Through examination of narrative accounts found in pre/post-sentence investigation (PSI) reports, rich contextual detail of the sex offenses committed by offenders in the sample was gathered. Criminal history "rap sheets" from the Virginia Criminal Information Network (VCIN) system maintained by the Virginia State Police and from the FBI's Central Criminal Records Exchange (CCRE) system provided recidivism data and supplemented prior record information.

Measuring recidivism is difficult, particularly among sex offenders. First, evidence suggests that sexual victimization is far more extensive than official records indicate. Abel et al. (1987) conducted a breakthrough study which provided an important clue as to the frequency and variety of sexual offending behaviors. By receiving a federal certificate of confidentiality to assure confidentiality of the data revealed to researchers, persons participating in the study could admit to current and prior offending behaviors without fear that the information would be reported to law enforcement. Subjects were seen in the context of an evaluation and treatment program for sex offenders voluntarily seeking assessment and/or treatment in a psychiatric setting. Abel et al. (1987) found that the group of 561 sex offenders had committed an average of 520 crimes and had an average 348 victims each. These crimes included hands-on offenses as well as hands-off sex offenses such as exposing, peeping and obscene phone calls. Very striking is the fact that 126 rapists admitted to 907 rapes and that 377 non-incest pedophiles admitted to over 48,000 acts against children. Another study (Freeman-Longo and Blanchard 1998) on 23 rapists and 30 child molesters engaged in an institutional forensic mental health sex offender program also revealed sex offending behavior far beyond official records of arrests and convictions. Although the rapists had an average of less than two arrests each, they collectively admitted to more than 5,000 offenses including 319 child molestations and 178 rapes (Freeman-Longo and Blanchard 1998). While in treatment, the 30 child molesters, with an average of only 1.5 arrests each, admitted to over 20,000 acts, including nearly 6,000 child molestation offenses and 213 rapes of adult women. Findings such as these underscore the extent to which official records underestimate the true rate of recidivism among sex offenders.

Not only are sex offenses under-reported to law enforcement, those offenses reported to police do not always result in arrest and conviction of the perpetrator. A recent study using National Incident-Based Reporting System (NIBRS) data found that an arrest was made in 27% of all sexual assault victimizations reported to law enforcement (Snyder 2000). Sex offense cases can be particularly difficult to prosecute as well. Victims and witnesses may refuse to come forward to testify and, often, evidentiary problems exist, particularly when the victim is very young. These and other obstacles hinder the prosecution of sex offense cases and often mean that charges must be dropped or reduced in a plea agreement.

From the information above, it is clear that measuring recidivism using official records most likely seriously underestimates the actual rate at which sex offenders commit new crimes. Reconviction, in particular, is a diluted measure of re-offending (Romero and Williams 1985; Marques et al. 1994; Doren 1998; Prentky, Lee, Knight, and Cerce 1997). Prentky, Lee, Knight, and Cerce (1997) found a marked underestimation of recidivism when the criterion was based on conviction. After five years of being "at-risk" for re-offending, 19% of the rapists had been re-arrested but only 11% had been reconvicted. For child molesters, after five years, 19% had been arrested while 14% were subsequently convicted (Figure 27).

Figure 27

Cumulative Failure Rates for Sex Offenders

	Rate after years at-risk (%)		
Disposition	3 years	5 years	10 years
Rapists			
Charge	15%	19%	26%
Conviction	8	11	16
Prison	7	10	14
Child Molesters			
Charge	14	19	30
Conviction	10	14	23
Prison	9	13	21

Data source: Prentky, Lee, Knight and Cerce (1997)

In order to avoid the underestimation of recidivism that is inherent with measurement based solely on reconviction, the Commission elected to define recidivism using official records of arrests. The Commission believes that measuring recidivism by a new arrest more closely approximates the true rate of re-offense behavior among sex offenders. Although some portion of the people charged with a new sexual crime may be innocent both of the charge and of any other recidivist acts, this portion is likely far smaller than the number of re-offenders who are never caught and charged (Doren 1998). To the extent that sex offenders go on to commit other types of violent crimes, re-arrests for new sex offenses will underestimate the predatory nature of these offenders.

The Commission, therefore, chose as its operational definition of recidivism a new arrest for a sex offense or any other crime against the person.

SJR 333 requests the Commission to consider the impact of treatment interventions on the reduction of recidivism among this particular population of offenders. The Commission, however, determined that assessing the effectiveness of post-conviction treatment services among offenders in the study sample would be extremely difficult. In 1992, the Joint Legislative Audit and Review Commission (JLARC) determined that, during the time in which the offenders under study were incarcerated, "DOC had not promulgated any standards to govern the development of treatment programs in the prisons and field units" (p. iii). JLARC found no agency specific requirements for the service providers, no minimum qualifications for counselors conducting group therapy and no guidelines outlining the basic elements of therapeutic counseling (p. iv-v). Moreover, only half (53%) of imprisoned sex offenders received any treatment services prior to reaching their first parole eligibility date (JLARC 1992, p. iv). Of those receiving treatment services when they became eligible for parole, a large share (40%) were provided only sex offender education programming, and not sex offender therapy. Furthermore, little consistent documentation about participation in prison-based sex offender treatment programs was available in files at the headquarters of the Department of Corrections. Given these serious limitations, the Commission concluded that the impact of post-conviction treatment and its effect on rates of recidivism among sex offenders in Virginia could not be accurately assessed as part of the current study.

The Commission utilized three different statistical techniques to analyze the recidivism data. The three methods were performed independently by different analysts. The preliminary models generated by each method were compared. Differences in results were identified, assessed and tested. In this way, the Commission can be assured that the final model does not reflect spurious results associated with a particular technique or with the style of any individual analyst.

One of the statistical methods used by the Commission (called logistic regression) requires that all offenders be tracked for the same length of time after release. When applying this method, the Commission used a five-year follow-up period in determining recidivism. Any offender re-arrested for a person or sex crime within five years of release was defined as a recidivist. A second method often used in recidivism studies (known as survival analysis) allows researchers to utilize and control for varying follow-up periods. This meant that Commission staff could utilize the entire study

period (through July 1999) to look for recidivist behavior, even if some offenders were tracked for only five years while others were tracked for as long as ten years. Both statistical methods allow multiple factors to be included in the model simultaneously as predictors. As a result, an offender's re-arrest probability can be determined using the unique contribution of several factors to that offender's overall likelihood of recidivism.

A third method (called classification tree analysis) was used to assist researchers in examining the relationships among the variables under analysis. This technique is used to create classification systems which help to reveal interactions between two or more variables and to dissect complex relationships. The results of this analysis provided researchers with additional insight into the data, which they could then utilize in the development of the recidivism models using the two primary analytical techniques.

See Appendix B of the full report, Assessing Risk among Sex Offenders in Virginia, for additional technical detail on the Commission's methodology.

Offender/Offense Characteristics and Recidivism Rates

In order to study recidivism among sex offenders in Virginia, the Commission tracked 579 sex offenders released from incarceration (or given probation without incarceration) from FY1990 to FY1993. Commission staff examined a variety of offender and offense characteristics in order to gain a better understanding of the circumstances surrounding sex offenses committed in Virginia and the individuals convicted for these crimes.

Study cases can be categorized based on the most serious sex crime for which the offender was convicted, sentenced and subsequently released (or given probation). This offense, the current or "instant" offense, is the basis for inclusion in the Commission's study. Of the 579 study cases, the most common instant offense was aggravated sexual battery, which carries a 20-year statutory maximum penalty (Figure 28).

Figure 28

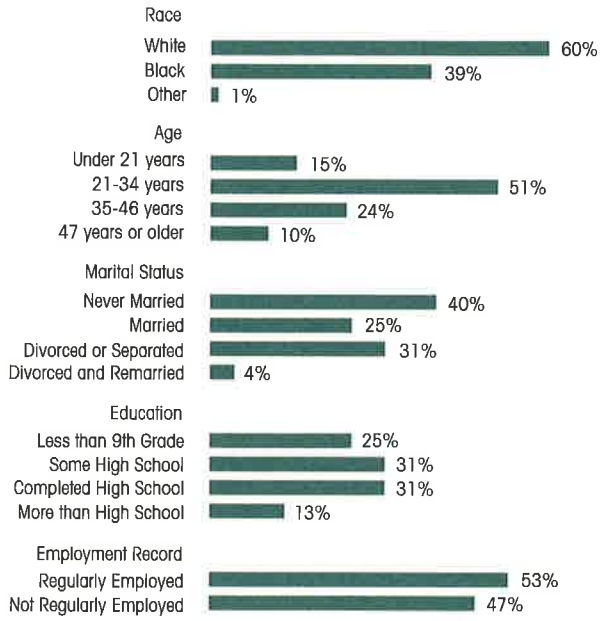
Number and Percentage of Cases by Most Serious Sex Offense

	Cases	Percent
Aggravated Sexual Battery	176	30.4%
Rape/Object Sexual Penetration	165	28.5
Indecent Liberties	83	14.4
Forcible Sodomy	76	13.1
Carnal Knowledge	69	11.9
Other	10	1.7

Nearly one-third of the offenders in the study were convicted of this offense. More than 28% of offenders were convicted of a rape or object sexual penetration, but another 13% were convicted of forcible sodomy. Rape, forcible sodomy and object sexual penetration offenses carry a maximum penalty of life in prison. Over 14% of the study cases were based on a conviction for indecent liberties with a child, a Class 6 felony with a five-year maximum penalty. Carnal knowledge of a child, a Class 4 felony if the offender is an adult and a Class 6 felony if the offender is a minor at least three years older than the victim, is the instant offense in 12% of the study cases.

Figure 29

Characteristics of Sex Offenders



Of the 579 offenders in the Commission's study, nearly two-thirds (60%) are white. More than half were between the ages of 21 and 34 at the time of conviction for the offense under study (Figure 29). Few offenders (15%) committed the offense prior to age 21. One-quarter of the offenders were between 35 and 46 years of age. Only 10% of sex offenders in the study were over age 46 at the time the offense occurred. Nearly 40% of the offenders had never been married at the time they were convicted of the instant offense. Several recidivism studies reviewed by Commission staff found that younger offenders and offenders who had never been married recidivated at higher rates than older offenders and offenders who were or had been married.

Of the sex offenders being studied, over half (56%) had not completed high school (Figure 29). In fact, one in four of the offenders had less than a ninth grade education. At the time of the offense, about 20% were unemployed, but nearly half (47%) had not been regularly employed (defined as being employed 75% of the time) for the two years prior to committing the offense or had only maintained part-time work during that period. A court-appointed attorney represented about three of five offenders in the study. This is generally indicative of the offender's income level. In 1996, an offender living alone must have had less than $9,675 in average annual funds in order to qualify for an attorney appointed by the court.

Nearly half (46%) of the offenders had never participated in treatment of any kind at the time they were convicted for the sex offense under study (Figure 30). More than one-quarter, however, had experienced some type of sex offender or general mental health treatment prior to the instant offense. It is striking that nearly one in five (19%) of the offenders had been previously treated as part of a mental health commitment. Only 8% of the offenders had undergone some type of alcohol or drug treatment.

The majority of sex offenders examined by the Commission had some type of prior criminal record at the time they were convicted of the sex crime under study. Most of the offenders (62%) had at least one prior adult conviction and more than one-fourth had known juvenile delinquency adjudications (Figure 31). Over half (51%) of the sampled offenders had previously been arrested for a felony, and nearly three out of four had a prior arrest for a misdemeanor. Although 18% of the offenders had been arrested previously for a felony sex crime, only about half of those (10%) had been convicted of a felony sex offense. Four out of ten sex offenders being studied had served an incarceration term prior to the instant offense.

Figure 30

Prior Treatment

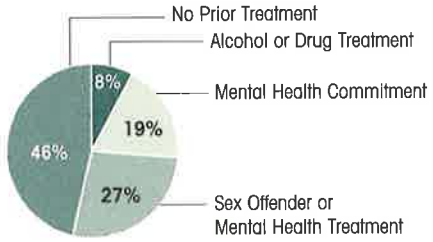
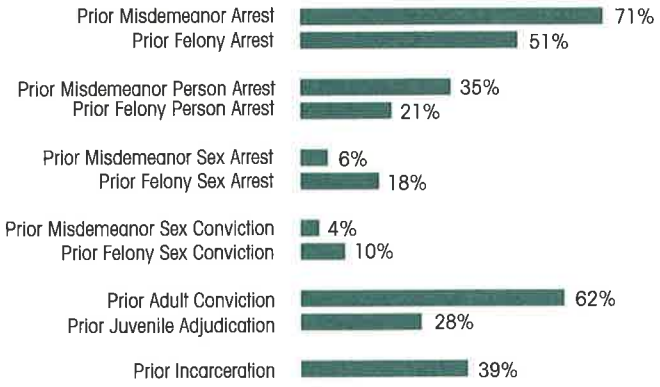


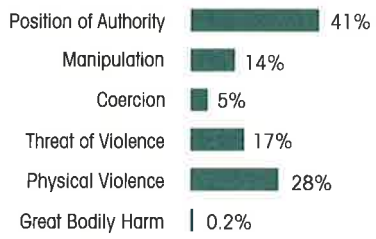
Figure 31

Prior Criminal Record of Sex Offenders



Hard copies of the PSI reports for the study cases were obtained and Commission staff extracted rich offense detail from the reports' narrative sections. The Commission was particularly interested in details relating to the offense behavior and the victim not available on the automated data systems. Through its supplemental data collection efforts, the Commission attempted to discover the mode or approach used by the offender to commit the sex offense (narrative file information examined by the Commission varied in the depth and quality of the detail provided). The Commission's supplemental data reveal that offenders in the study sample were most likely to use a position of authority as the mode of committing the sex offense. Approximately 41% of the offenders in the study used their position of authority in relation to the victim to facilitate the offense (Figure 32). This mode was recorded if the offender did not use or threaten to use physical force, but the offender was responsible for the health, welfare or supervision of the victim at the time of the offense. Offenses committed through a position of authority typically involved a young child and a step-parent or other relative. Nearly 14% of the offenders manipulated one or more victims into the offense. Manipulation was coded in the supplemental data if the offender engaged in sexual activity while the victim was impaired, if the offender used some type of deception, trickery or bribery (such as video games or candy), or if the offender threatened to withdraw love and affection. Only 5% of the offenders coerced a victim. For this study, coercion was defined as forcing the victim to act in a given manner by pressure, non-physical threats, intimidation or domination without physical force. More than one-fourth (28%) of the victims experienced physical violence during the offense, but another 17% were threatened with physical violence if they did not submit to the assault.

Figure 32
Mode of Offense

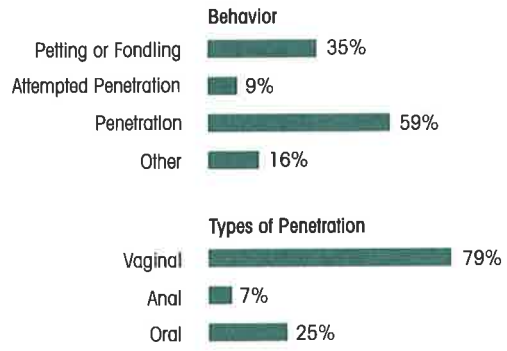


Analysis is based on cases for which supplemental offense data is available. These percentages do not sum to 100% because offenders could have committed multiple sex offenses using more than one mode.

For the 579 sex offenders in the study, the Commission was able to identify 670 victims related to the instant offenses. However, PSI narratives provided sufficient detail for only 647 victims. Well over half (59%) of the victims experienced some kind of sexual penetration during the assault (Figure 33). When penetration was reported, it most often related to vaginal penetration (79%), although one-quarter of the penetrations were committed orally. Multiple types of penetration were recorded in some cases. For nearly one in ten victims, penetration was attempted but not achieved. Well over one-third of the victims (35%) were petted or fondled by the offender. For nearly 16% of the victims, the offense involved some other form of behavior, such as exposure. The Commission attempted to collect data on as many types of sex offense behaviors as could be identified in the PSI narrative.

Figure 33

Type of Sex Offense Behavior and Penetration

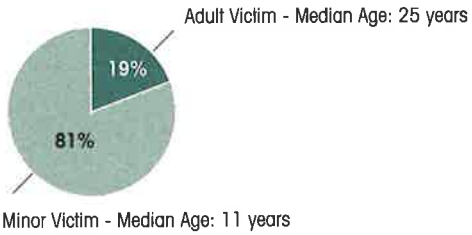


Analysis is based on cases for which supplemental victim data is available. These percentages do not sum to 100% because offenders could have committed multiple assaults against the same victim. Type of penetration data includes only those cases involving penetration or attempted penetration.

The majority of victims of the sexual assaults committed by offenders in the study were minors. About 81% of the victims were under age 18 at the time of the assault (Figure 34). When the age of a minor victim was identified, the median age was 11 years. However, 197 of the 556 victims (35%) for which age-specific data is available were under age 10 when the assault occurred. The median age for an adult victim was 25 years. Overall, one out of ten victims in the study was identified as male.

Figure 34

Age of Victims



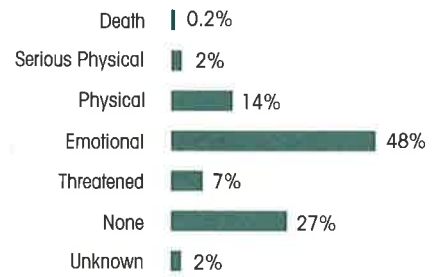
Analysis is based on cases for which supplemental victim data is available.

The Commission is very interested in the types of injuries sustained by the victims of the sexual assaults under study. Based on PSI data, half of the victims were reported as having suffered emotional injury (Figure 35). Emotional injury is recorded by the probation officer if the officer is aware that the victim met with some type of counselor, psychologist or psychiatrist as the result of the assault. Also, probation officers often record emotional injury if the parents, guardians or other person with knowledge of the victim reports some type of continuing trauma in the victim's life (e.g., bad dreams, behavioral problems, anxiety attacks), even if formal counseling is not pursued. The probation officer, however, must complete the PSI based on knowledge of victim injury documented at the time the PSI report is prepared. The probation officer writing the report may not be aware of certain types of injuries, particularly emotional injury, sustained by the victim. More than 7% of the victims reported having been threatened with injury. Physical injury (injury leaving visible bruising or abrasions or requiring first-aid, broken bones, etc.) was sustained by 14% of the victims. For only 2% of the victims, the assault resulted in serious physical injury (injury was life-threatening or resulted in the loss or impairment of any limb or organ) or death.

The supplemental data collection revealed that only 15% of the victims did not know the offender at the time of the assault. For over 80% of the victims, the offender was known to the victim at the time of the offense (Figure 36). For one-third of the victims, the offender was a member of the family, such as a step-parent. More than one in five of the victims were minors assaulted by an adult friend of the family, but another 6% of the victims were assaulted specifically by their mother's boyfriend.

Figure 35

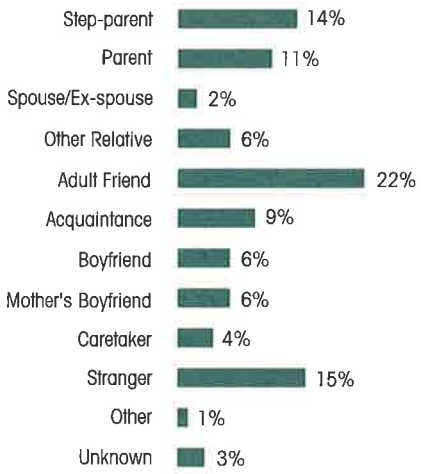
Most Serious Type of Victim Injury Sustained



Analysis is based on cases for which supplemental victim data is available. These percentages do not sum to 100% due to rounding.

Figure 36

Offender's Relationship to Victim



Analysis is based on cases for which supplemental victim data is available.

The Commission tracked sample offenders using rap sheets from the Virginia Criminal Information Network (VCIN) system maintained by the Virginia State Police and from the FBI's Central Criminal Records Exchange (CCRE) system so that new arrests both in Virginia and outside the Commonwealth could be detected. Each offender was tracked for five to ten years. The Commission found that nearly 31% of offenders in the sample recidivated, as measured by re-arrest for a new sex offense or other crime against the person, within five years of being returned to the community (Figure 37). Using data for the entire study period, in which some offenders were tracked for up to ten years, reveals a recidivism rate of nearly 37%.

Figure 37

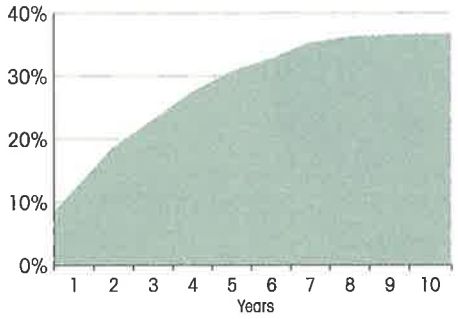
Recidivism Rates

Recidivism with	
Five Year Follow-up	30.6%
Five to Ten Year Follow-up	36.6%

Although some recidivists were re-arrested in the first year after being released to the community, a few recidivists were not re-arrested until the tenth and final year of the study. Only 8% of the offenders in the sample who recidivated did so in the first year of follow-up (Figure 38). By the end of the second year of follow-up, the overall recidivism rate jumped to nearly 19%. The recidivism rate continued to grow in each successive year and did not level off until after year seven. This finding underscores the need for a follow-up period for sex offenders that is considerably longer than the three-year window utilized by many general recidivism studies. The overall recidivism rate for the study (36.6%) was achieved in year 10.

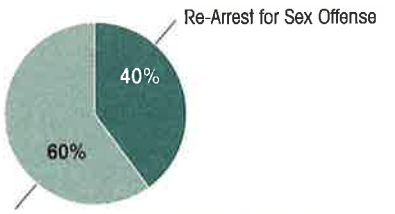
Figure 38

Cumulative Recidivism Rate by Year of Follow-up



Of the offenders in the study who recidivated, data revealed that 40% had been re-arrested for a new sex offense (Figure 39). Nearly all of the new sex offenses were felony level crimes. The remaining 60% of the recidivists were re-arrested for non-sexual crimes against the person. Of the recidivists arrested for non-sex crimes against the person, nearly half of the new crimes were felonies, most typically a felony assault, but also including kidnapping, murder, robbery, and shooting into a vehicle with malice. The other half of the non-sexual recidivists were re-arrested for misdemeanor person crimes, such as assault and battery, assault against a family member and stalking.

Figure 39
Type of Recidivist Offense



Re-Arrest for Non-Sex Offense Against Person

Felony Assault	14%
Kidnapping	4
Murder	3
Robbery	3
Shooting into Vehicle with Malice	2
Hit and Run with Injury	1
Misdemeanor Assault	19
Misd. Assault against Family Member	9
Stalking or Threatening	4
Other	1

Development of a Risk Assessment Instrument

To examine the correlates of recidivism among sex offenders in Virginia, the Commission developed and implemented a methodology that would promote thorough analysis of the available data and reduce the chance that the final results would contain spurious findings related to the particular sample data used, a specific method, or an individual analyst. The results from the three statistical methods were compared and differences were investigated. This "reconciliation" process provided additional insight and yielded information for additional analysis and improvement of the models.

As described in the *Research Methodology* section, one of the techniques (logistic regression) required a consistent follow-up period on every offender in the sample, which for the Commission's study was five years. The second technique (survival analysis) allowed for variable follow-up periods on the offenders. Research in the field of sex offender recidivism has documented that sex offenders often re-offend many years after their initial offense (Prentky et al. 1997). In the Commission's study, the second method provides a longer follow-up period than the first method for many offenders, up to ten years in some cases, and more accurately predicts recidivist behavior over the entire study period. For these reasons, the Commission selected the model produced by the latter method (survival analysis) for development of its risk

assessment instrument. Figure 40 displays the significant factors in predicting recidivism, based on the selected model, by the relative degree of importance.

The selected model contains factors related to the offender's age at time of conviction, prior history of arrests for sex offenses and other crimes against the person, the offender's relationship with the victim in conjunction with the victim's age, the location in which the offense occurred, prior history of sex offender or substance abuse treatment, prior history of incarceration, level of education achieved by the offender, and an indicator for cases resulting in conviction for aggravated sexual battery that actually involved penetration or attempted penetration of the victim.

The Commission's findings revealed that younger offenders, particularly those under age 35, recidivate at higher rates than older offenders, all other circumstances being equal. Furthermore, analysis indicated that offenders with less than a ninth grade education recidivate at higher rates than offenders who completed education beyond the ninth grade. An offender's record of employment is also indicative of the likelihood of recidivism among the offenders in the study sample. Those offenders who were unemployed at the time of the offense and those who had not been regularly employed for the previous two years (i.e., employed with a full-time job at least 75% of the time) were found to recidivate at higher rates than offenders who experienced stable employment.

Figure 40

Significant Factors in Predicting Recidivism by Relative Degree of Importance

The importance of the offender's relationship to the victim in predicting recidivism is dependent on the age of the victim at the time of the offense. In cases with victims under age ten, offenders who were step-parents to their victims recidivated at highest rates, followed by offenders who were strangers or acquaintances to the young child. Blood relatives who committed a sex offense against a family member were the least likely to recidivate among offenders who committed their offenses against young children. For victims age ten or more, offenders who were strangers to their victims recidivated at rates higher than acquaintances or relatives, including step-parents.

The model revealed that certain offenders convicted of aggravated sexual battery were more likely to recidivate than other sex offenders. More detailed analysis showed that when an offense involved sexual penetration or attempted penetration but resulted in a conviction for aggravated sexual battery, the offender was at higher risk of re-offense than other offenders in the study. This circumstance may arise in situations where the charge is pled down from a more serious charge, such as rape, due to evidence problems or the reluctance of witnesses or victims to testify.

The Commission's research showed that the location in which the offender committed the sex crime appears to be associated with recidivism. Offenses committed in the offender's residence or another (but not the victim's) residence were committed by offenders who were more likely to be re-arrested for a new sex crime or other crime against the person, all other circumstances being equal. Offenders who committed their crimes in the victim's residence, in a motor vehicle, outdoors or in a residence shared by the offender and the victim were somewhat less likely to recidivate, while offenders who assaulted in the victim's place of employment were the least likely to be re-arrested for a person or sex crime.

An offender's prior history of arrests for sex crimes or other crimes against the person was highly indicative of the likelihood of recidivism. A more extensive record of such arrests was associated with higher recidivism rates for the offenders in the sample. In addition, offenders who had served a term of incarceration in jail or prison prior to committing the sex offense were more likely to go on to be arrested for a new sex or person crime than those offenders who had never served an incarceration term.

An offender's history of mental health, sex offender and substance abuse treatment was found to influence recidivism after controlling for all other factors in the model. Offenders in the sample who had never had any type of mental health, sex offender or substance abuse treatment were linked with higher recidivism rates than offenders who had experienced any of these forms of treatment prior to committing the sex crime under study. When considering treatment, offenders who had undergone a prior mental health commitment recidivated at lowest rates. This factor reflects treatment received by the offender prior to the sex offense studied by the Commission. As noted in the *Research Methodology* section of this chapter, the Commission concluded it could not accurately assess the effect of treatment received after conviction for the offense under study due to serious limitations in sex offender treatment programming available during that period and inconsistent documentation of treatment participation.

Using the results of statistical modeling, the Commission devised an instrument that contains all the factors found in the selected model, with points assigned to the factors based on their relative importance in predicting recidivism. The proposed risk assessment instrument is displayed in Figure 41.

Figure 41

Proposed Risk Assessment Instrument

Sex Offender Risk Assessment

Offender's Age at Time of Offense

- Younger than 35 years 12
- 35 to 46 years 4
- Older than 46 years 0

Less Than 9th Grade Education — **If YES, add 4**

Not Regularly Employed — **If YES, add 5**

Offender's Relationship with Victim

Victim under Age 10		Victim Age 10 or more	
Relative	0	Relative/Step-parent	2
Known to victim (not relative or step-parent)	4	Known to victim (not relative or step-parent)	3
Stranger	4	Stranger	8
Step-parent	9		

Aggravated Sexual Battery (Primary Offense §18.2-67.3)

- No penetration or attempted penetration of victim 0
- Penetration or attempted penetration of victim 4

Location of Offense

Place of employment	0	Victim's residence (not offender's)	5
Shared victim/offender residence	3	Offender's residence or other residence	9
Outdoors	3	Location other than listed	3
Motor vehicle	4		

Prior Felony/Misdemeanor Arrests for Crimes Against Person

0 Felonies		1 Felony		2+ Felonies	
1-3 Misd	1	0-2 Misd	5	0-3 Misd	8
4+ Misd	8	3+ Misd	8	4+ Misd	15

Prior Incarcerations/Commitments — **If YES, add 3**

Prior Treatment

Prior mental health commitment	0	Prior alcohol or drug treatment	3
Prior mental health or sex offender treatment	2	No prior treatment	4

Risk Score

Application of Risk Assessment Instrument to Study Sample

The application of the proposed risk assessment instrument to offenders in the Commission's study sample yields some additional insight into the utility of the instrument as a screening tool to gauge risk of future dangerousness.

The average risk assessment score for offenders in the sample is 27.1 points. The median score (middle value) received by offenders is 27 points. More offenders in the sample of 579 cases received 27 points than any other score (Figure 42). Half of the offenders scored from 21 to 34 points. Only one-fourth of the offenders scored 20 points or less and only one-fourth of the offenders scored 35 points or more.

Given the results of the analysis which led to the construction of the risk assessment instrument, offenders who score in the low end of the scale are the least likely to recidivate, while offenders who score at the upper end of the scale are the most likely to recidivate. Figure 43 presents the rates of recidivism for offenders by risk assessment score. Overall, as the risk assessment score increases, the rate of recidivism attributable to offenders scoring at that level also increases, although this is not a perfect linear relationship. The most notable exceptions to the increasing function of recidivism rates with risk assessment scores can be seen at the very lowest levels of risk assessment scores (less than 15 points), where rates appear to vary from 0% to 50%. While this appears to be a dramatic fluctuation, it should be noted that, for the most part,

Figure 42
Distribution of Risk Assessment Scores

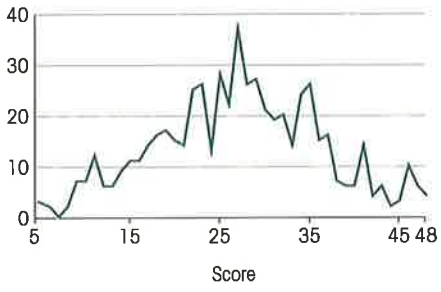
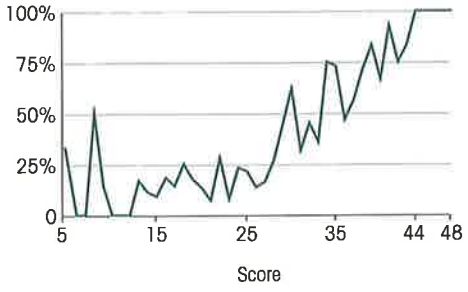


Figure 43
Recidivism Rates by Risk Assessment Score



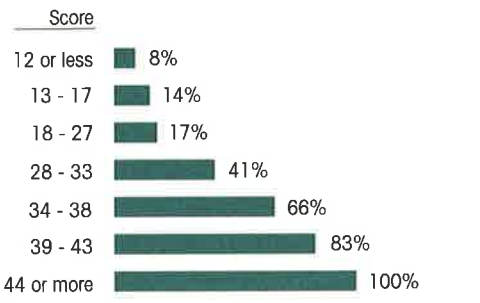
there are very few cases that score out at these particular point levels. For instance, 33% of the offenders who scored five points actually recidivated, but this is based on only three offenders. While 50% of the offenders scoring eight points recidivated, only two offenders received this point total (one of the two recidivated). In general, the higher the score computed from the risk assessment instrument, the higher the rate of recidivism among offenders who scored at each successive level. If more and more sex offenders were scored out on the instrument, it is likely that the fluctuations in the line representing the rate of recidivism at each score would lessen considerably. Overall, however, the instrument's scores reflect the level of risk associated with offenders.

Certainly for groups or ranges of scores, the actual rate of recidivism rises with the range of score (Figure 44). Offenders scoring 12 or less recidivated at an aggregate rate of less than 8%. Offenders scoring 13 to 17 points recidivated at a rate of 14% overall. A slightly higher rate of recidivism (17%) was detected for those with scores of 18 through 27. Offenders with scores 28 and above tended to recidivate at much higher rates overall than offenders with scores less than that threshold. Recidivism rates jump dramatically to 41% among offenders scoring 28 through 33 points. Two-thirds of offenders with 34 to 38 points were found to have recidivated. For those scoring 39 through 43, however, the aggregate rate exceeded 83%. Finally, every offender scoring 44 points or more on the risk assessment instrument devised by the Commission recidivated within the study period.

For its study of sex offender recidivism, the Commission elected to use a measure which would capture any new arrest for a sex offense or other crime committed against the person. Scoring offenders on the proposed risk assessment instrument reveals that offenders falling into the highest risk categories were among the most likely to be re-arrested for a felony.

Figure 44

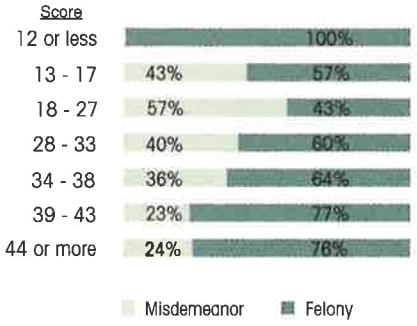
Recidivism Rates by Range of Risk Assessment Score



Of offenders scoring above 38 points, more than three out of four were re-arrested for a felony, with only one in four arrested for a misdemeanor charge (Figure 45). Among offenders scoring in the lower ranges of the risk scale, the rate of felony arrest was slightly lower. The exception, offenders who scored 12 or less, reflects the fact that only three offenders scoring in that range recidivated, but all three were re-arrested for a felony. The risk assessment instrument developed by the Commission was designed to estimate an offender's relative risk of being re-arrested upon return to the community. Overall, it appears that the instrument also identifies those offenders most at risk for recidivating with the more serious type of charge.

Figure 45

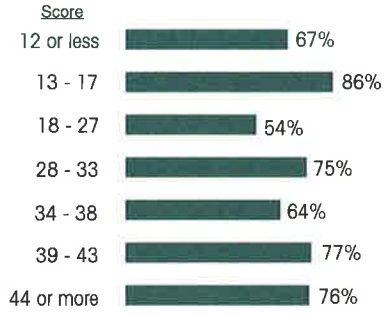
Type of Recidivist Event by Range of Risk Assessment Score



While the Commission's recidivism measure focused on re-arrest, the Commission also tracked the rate of new convictions. Analysis reveals that the majority of sex offenders under study who were re-arrested were subsequently convicted of one or more of the charges (Figure 46). The rates presented in Figure 46 are likely underestimations of the true rate at which recidivist offenders were actually re-convicted because they capture only those convictions which occurred on or before July 31, 1999. This is the date on which the Commission's supplemental data collection ended. Some number of offenders in the study had been re-arrested but were still awaiting trial at the end of the study period. These offenders may have since been convicted of those charges. The resulting convictions, however, are not included in the rates shown in Figure 46.

Figure 46

Recidivist Events Resulting in Conviction by Range of Risk Assessment Score



Proposals for Integrating Risk Assessment and Virginia Sentencing Guidelines

Discussion of the sex offender risk assessment instrument was a significant component of the Commission's agenda during 1999 and 2000. 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 sex offenders who come before the circuit court. The Commission concluded that the risk assessment instrument developed under SJR 333 would be a useful tool for the judiciary in Virginia. Therefore, the Commission approved the risk assessment instrument and developed proposals for integrating risk assessment into Virginia's sentencing guidelines system. These proposals are described in detail in the chapter of this report entitled *Recommendations of the Commission* (Recommendation 1 through Recommendation 5).

Implementation

The Commission's proposals relating to sex offender risk assessment and integration of the proposed instrument into the sentencing guidelines are among the recommendations presented in this report. Per §17.1-806 of the Code of Virginia, any modifications to the sentencing guidelines adopted by the Commission and contained in its annual report shall, unless otherwise provided by law, become effective on the following July 1.

Nonviolent Offender Risk Assessment

Introduction

In 1994, the General Assembly charged the Commission to study the feasibility of using an empirically-based risk assessment instrument to select 25% of property and drug offenders for alternative (non-prison) sanctions (§17.1-803). Such an instrument can be used to identify those offenders who are likely to present the lowest risk to public safety. After analyzing the characteristics and historical patterns of recidivism of larceny, fraud and drug offenders, the Commission developed a risk assessment tool for integration into the existing sentencing guidelines system. The risk assessment instrument identifies offenders recommended by the guidelines for a term of incarceration who have the lowest probability of being reconvicted of a felony crime. These offenders are then recommended for sanctions other than traditional incarceration in prison. Risk assessment can increase the efficient utilization of alternative punishments for nonviolent offenders while minimizing threat to public safety and reserving the most expensive correctional space for violent offenders. The risk assessment component of the guidelines is currently being pilot tested in several circuits around the Commonwealth.

Development of the Risk Assessment Instrument

To develop the risk assessment instrument for nonviolent offenders, the Commission studied a random sample of over 2,000 fraud, larceny and drug offenders who had been released from incarceration between July 1, 1991, and December 31, 1992. Recidivism was defined as reconviction for a felony within three years of release from incarceration. Sample cases were matched to data from the Pre/Post-Sentence Investigation (PSI) database to determine which offenders had been reconvicted of a felony crime during the three-year follow-up period.

Construction of the risk assessment instrument was based on statistical analysis of the characteristics, criminal histories and patterns of recidivism of the fraud, larceny and drug offenders in the sample. The factors proving 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. The Commission, however, chose to remove the race of the offender from the risk assessment

instrument. Although it emerged as a statistically significant factor in the analysis, the Commission viewed race as a proxy for social and economic disadvantage and, therefore, decided to exclude it from the final risk assessment worksheet. The total score on the risk assessment worksheet represents the likelihood that an offender will be reconvicted of a felony within three years. Offenders who score the lowest number of points on the worksheet are less likely to be reconvicted of a felony than offenders who have a higher total score.

The Commission adopted a scoring threshold of nine points on the risk assessment scale. In the analysis used to construct the scale, offenders who scored nine points or less on the risk assessment instrument had a one chance in eight of being reconvicted for a felony crime within three years. Moreover, the Commission's analysis suggested that a threshold of nine points would satisfy the legislative goal of diverting 25% of nonviolent offenders from incarceration in a state prison facility to other types of sanctions.

Implementation of Risk Assessment

The risk assessment instrument has been implemented in six judicial circuits that have agreed to participate as pilot sites. On December 1, 1997, Circuit 5 (cities of Franklin and Suffolk and the counties of Southampton and Isle of Wight), Circuit 14 (Henrico), and Circuit 19 (Fairfax) became the first circuits to use the risk assessment instrument. Three months later, Circuit 22 (city of Danville and counties of Franklin and Pittsylvania) joined the pilot project. In the spring of 1999, Circuit 4 (Norfolk) and Circuit 7 (Newport News) began using the instrument, bringing the number of pilot sites to six. The circuits pilot testing risk assessment represent large and small jurisdictions, urban and rural areas and different geographic regions of the state.

The risk assessment worksheet is completed for fraud, larceny and drug offenders who are recommended for some period of incarceration by the guidelines and who satisfy the eligibility criteria established by the Commission. Offenders with any current or prior convictions for violent felonies (defined in §17.1-803) and offenders who

sell an ounce or more of cocaine are excluded from risk assessment consideration. When the risk assessment instrument is completed, offenders scoring nine points or less on the scale are recommended for sanctions other than traditional incarceration. The instrument itself does not recommend any specific type or form of alternative punishment. That decision is left to the discretion of the judge and may depend on program availability. In these cases, judges are considered in compliance if they sentence within the recommended incarceration range or if they follow the recommendation for alternative punishment. For offenders scoring over nine points, the original recommendation for incarceration remains unchanged.

Sentencing and Risk Assessment

Between December 1, 1997, and July 31, 2000, the Commission received 8,187 fraud, larceny and drug guidelines cases from pilot circuits (Figure 47). Over one-quarter of the cases took place in Circuit 19 (Fairfax). Circuit 14 (Henrico) and Circuit 4 (Norfolk) each accounted for 20% of all risk assessment cases received by the Commission during the time period. Circuit 7 (Newport News), added as a pilot circuit along with Circuit 4 (Norfolk) in the spring of 1999, contributed over 1,000 risk assessment cases, or approximately 12% of all cases received by the Commission during the time period. Of the risk assessment worksheets received, drug cases represent nearly half of all offenses, with the large

Figure 47

Number and Percentage of Cases Received by Circuit

Circuit	Cases	Percent
4	1,635	20.0%
5	733	8.9
7	1,007	12.3
14	1,711	20.9
19	2,219	27.1
22	882	10.8

majority (45%) consisting of Schedule I/II drug offenses (Figure 48). Just over one-third of all risk assessment cases sentenced during the time period were larceny offenses, while fraud offenses accounted for about 17% of the risk assessment cases.

Not all fraud, larceny and drug offenders are eligible for risk assessment. Offenders recommended by the guidelines for probation with no active incarceration term are excluded, since the instrument was designed to assess the risk of offenders recommended for confinement. Of the fraud, larceny and drug cases received, 5,164 of the 8,187 (63%) were recommended for some period of incarceration by the guidelines. Offenders who do not satisfy the Commission's eligibility criteria are also excluded. Offenders who have current or prior convictions for violent felonies or whose current offense involves the sale of an ounce or more of cocaine are not eligible for risk assessment. Between December 1, 1997, and July 31, 2000, 3,972 offenders satisfied the Commission's eligibility criteria and were deemed eligible for risk assessment screening. It should be noted that for 673 of the eligible offenders the risk assessment worksheet was not completed, despite the offenders' eligibility to participate in the assessment project.

Figure 48

Number and Percentage of Cases Received by Primary Offense

Offense	Cases	Percent
Drug/Schedule I/II	3,701	45.2%
Drug/Other	354	4.3
Fraud	1,416	17.3
Larceny	2,716	33.2

Offenders scoring nine points or less on the risk assessment worksheet are recommended for sanctions other than traditional incarceration. Among the eligible offenders screened with the risk assessment instrument to date, 24% have scored at or below the nine-point threshold and, therefore, have been recommended for alternative punishments. The average risk score for screened offenders was 13 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, 13% were recommended for and sentenced to an alternative punishment (Figure 49). Another 11% were sentenced to a traditional term of incarceration despite being recommended for an alternative sanction by the risk assessment instrument. In 19% of the screened cases, the offender was not recommended for an alternative punishment but was sentenced to one. Approximately 40% of the cases that fell into this category, however, scored just over the nine-point threshold (10 to 12 points). This indicates that judges felt a portion of offenders scoring just over the threshold were also good candidates for alternative sanctions. Nearly 56% of the screened offenders were not recommended for an alternative and judges concurred in these cases by utilizing traditional incarceration.

Judges are not obligated to follow the recommendation of the risk assessment instrument. When offenders are recommended for an alternative but not sentenced to one, judges are asked to communicate their reasons for not choosing an alternative punishment. The reasons cited by judges may help the Commission to identify circumstances in which judges disagree with the risk assessment recommendation most often. This information may be useful in improving the instrument as a sentencing tool. In nearly three-quarters of these cases, however, judges do not cite a reason for choosing traditional incarceration instead of an alternative sanction.

Among those cases where a reason is cited, nearly 12% of the time judges cite a defendant's refusal to participate in an alternative sanction program. Virginia law permits offenders to refuse certain programs. In 10% of cases where offenders are recommended for an alternative but sentenced to an incarceration period, the judge notes the involvement of significant monetary loss on the part of the victim. Other reasons cited by judges for sentencing offenders to incarceration periods rather than alternative sanctions include the offender's criminal record (9%), the large quantity of drugs involved in the case (9%), the defendant's immersion in drug culture (7%), or previous or pending charges against the defendant for similar offenses (7%).

Figure 49

Recommended and Actual Dispositions to Alternative Sanctions

Risk Recommendation	Received Alternative	Did Not Receive Alternative
Recommended for Alternative	13.0%	11.4%
Not Recommended for Alternative	19.3%	56.3%

Independent Evaluation of Risk Assessment

The National Center for State Courts (NCSC), with funding from the National Institute of Justice, is conducting an independent evaluation of the development and impact of the risk assessment instrument. The purpose of this evaluation is to help the Commission decide whether to expand the risk assessment program statewide. The evaluation has three goals: 1) to clarify the rationale for risk assessment in Virginia and to evaluate the development and overall design; 2) to evaluate the implementation, use and effectiveness of the risk assessment instrument; and 3) to conduct a recidivism analysis to determine which offenders fail or succeed after being diverted. Evaluation results will help the Commission determine if the instrument, as currently designed, can effectively distinguish offenders more or less likely to succeed on alternative sanctions. In addition, the evaluation is using a benefit-cost analysis to measure the public cost implications of the greater use of alternative sentencing options. The evaluation project is in progress. The remainder of this chapter discusses preliminary findings of the evaluation.

Judges, Attorneys, and Probation Interviews

During the summer of 2000, evaluators visited the pilot sites to speak with judges, Commonwealth attorneys, defense counsel, and probation officers about the design and use of the risk assessment instrument (some judges and attorneys still remain to be interviewed, as well as officials from the Department of Corrections and the Legislative branch). Respondents answered questions about the appropriate use of alter-native sanctions, the mechanics of the risk assessment instrument, effects on local legal cultures, recommendations for improvements to the program, and whether they support expansion of the pilot project statewide. Although responses and recommendations varied by locality and occupation, some common themes emerged.

The judges and probation officers interviewed generally support the idea of offender risk assessment and are comfortable with how the instrument was developed. However, one of the larger concerns for this group is that it is difficult for many young males to qualify for alternative punishment. An unemployed, unmarried, male under the age of 20 begins with a score right at the recommendation threshold, and any additional scoring makes them ineligible for a diversion recommendation. While they were aware that past

research shows this profile to be associated with higher recidivism rates, they also felt this was the group most in need of services. Many respondents felt that the balance between offender *risk* and offender *need* should be examined further by the Commission.

As a group, judges recommended that the risk assessment be taken statewide if the instrument is found effective during the evaluation and if the demographic factors (age, gender, etc.) are re-examined for evidence that they remain linked with higher recidivism rates. Judges also felt that it would be useful to get feedback from the Department of Corrections concerning which state and local alternative programs work best for different offender types.

Probation officers felt that the instrument would be useful statewide if the demographic scoring factors were re-examined. Probation officers liked the idea of an objective tool to assess offenders for diversion. They felt the instrument helped "level the playing field," encouraging judges to use similar factors when considering offenders for diversion. Probation officers reported that the instrument presented no significant increase in workload, especially if a pre-sentence report was ordered.

Prosecutors did not generally support programs intended to divert offenders recommended for prison under the guidelines. Prosecutors believed alternative sanctions were best suited for offenders needing a first chance, usually in combination with straight probation.

Defense attorneys supported the greater use of alternative sanctions. However, some suggested that more care was needed to ensure that the sanction fit the offender and that judges not indiscriminately enhance sentences by adding an alternative to a jail or short prison sentence. Defense attorneys also stressed that their clients like the idea of "date certainty." That is, offenders can typically predict when they will be released from jail or prison, but have greater uncertainty about release dates from state alternative programs like boot camp, detention or diversion centers.

St. George Tucker served as justice of the Virginia Supreme Court from 1804-1811. His son, Henry St. George Tucker also became a justice of the court. They were one of three father-son combinations among the roster of justices in the history of the court. He resigned at age 59 overwhelmed by the workload.

Offender Follow-Up

The purpose of the risk assessment instrument is to identify nonviolent offenders recommended for jail or prison by the guidelines who are good candidates for an alternative sanction. The strength of the instrument is measured by whether the individuals identified by the instrument are (1) more likely to successfully complete their imposed sanction and (2) less likely to recidivate. The utility of the risk assessment instrument is being evaluated by following a group of diverted offenders for at least one year following their sentence to an alternative. A sample of offenders, including those recommended and those not recommended for diversion by the risk assessment instrument, was drawn from 5,158 drug, fraud and larceny cases resolved in the six pilot sites between December 1997 and September 1999.

Not all drug, fraud, and larceny offenders are eligible for diversion through risk assessment. Ineligibility is automatic when the offender has a violent prior conviction (655 cases in the sample) or is charged with a concurrent violent offense (62 cases in the sample). In addition, a guideline recommendation of probation excludes an offender from consideration for risk assessment—true for 1,920 offenders in our sample. Finally, 478 offenders were excluded from study because of problems or inconsistencies found on the completed risk assessment score sheets (including missing information, errors and question marks found on the form, etc.).

Forty percent (2,043 offenders) were found potentially eligible for screening on the risk assessment instrument. Figure 50 shows the distribution of eligible offenders recommended for diversion and whether or not they received an alternative sanction. Of these 2,043 eligible offenders, nearly 24% were recommended for diversion by the risk assessment instrument. According to the Commission's data, 674 persons received a diversionary sentence. These 674 offenders comprise 33% of the 2,043 cases eligible for risk assessment screening. Of the 674 offenders who received diversion, 40% had been recommended based on their risk assessment score.

Figure 50

Recommendations and Alternative Sanctions Received by Eligible Offenders

	Alternative Sanctions		
Result of risk assessment	Received	Not Received	Total
Recommended	13.2%	10.5%	23.7%
Not recommended	19.8%	56.5%	76.3%
Total	33.0%	67.0%	100%

To generate a sample that could be used to evaluate risk assessment, those offenders with missing files, offenders who received a prison sentence, and offenders with incomplete information were removed. In addition, seventy-five randomly selected offenders from Fairfax County were excluded from the sample to reduce the data collection costs while maintaining a representative follow-up group. Therefore, the final sample for evaluation consisted of 555 offenders eligible for risk assessment who received an alternative punishment. An overview of this data selection process and the types of offenses these offenders were convicted of can be seen in Figures 51 and 52.

Figure 51

Selection of Follow-up Group

Pilot site	
Danville	559
Fairfax	1,594
Henrico	1,262
Newport News	404
Suffolk	573
Norfolk	766
Drug, fraud, & larceny cases sentenced in pilot sites 12/97 - 9/99	5,158

Reasons for diversion ineligibility	
Offender received probation	1,920
Problems/errors on worksheets	478
Violent prior record	655
Violent additional offense	62
Total ineligible	3,115

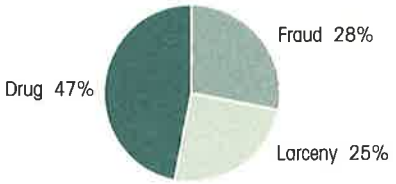
Remaining cases eligible for diversion: 5,158 - 3,115 = 2,043

Eligible offenders who received a diversion on guidelines	674
All diverted offenders who could be tracked (removing cases for Fairfax sample, missing files, prison sentences, etc.)	555

Evaluators traveled to the six pilot sites to collect and code data on all 555 offender files housed within local probation offices. Local probation staff were extremely helpful in pulling files, defining acronyms, interpreting entries, and providing support during the entire data collection process. The Department of Corrections management was instrumental in facilitating this intensive part of the project.

Figure 52

Type of Primary Offense for the 555 Follow-up Cases



Data collection involved gathering information about alternatives recommended, alternatives received, failure and success rates, reasons for failure, critical dates, and post-sanction criminal involvement. The transience of these offenders, especially in northern Virginia and the Tidewater area, often complicated the follow-up process.

In addition to probation officer records, staff examined criminal history "rap sheets" for all offenders in the sample. Data collectors reviewed in-state and out-of-state rap sheets to measure recidivism throughout the evaluation period. Recidivism was measured as a new arrest or conviction across several levels of severity and types of crimes. A comprehensive picture of diverted offenders has been prepared by merging the data collected from probation officer files and the sentencing guidelines database with the recidivism results.

Preliminary Results from Offender Follow-Up

Each offender in the sample received a combination of state and/or local sanctions. Some form of probation was part of every package of sanctions. For example, all offenders sent to a diversion center are placed on probation for a period of time following the first program. With respect to state programs, the type of sanctions most often received were diversion and detention centers (36 offenders received sanctions that included both). The most frequently imposed local sanction was jail with the second most prevalent local sanction being outpatient drug or alcohol treatment. The different sanction types diverted offenders received are shown in Figure 53.

Figure 53

Sanctions Received by Diverted Offenders

State Sanctions	
Probation	387
Unsupervised Probation	125
Diversion Center	78
Detention Center	77
Day Reporting	34
ISP	14
Boot Camp	11

Local Sanctions	
Jail	244
Outpatient Drug/Alcohol	133
Work Release	44
Indefinite Probation	39
Inpatient Drug/Alcohol	36
Jail Farm	26
Outpatient Mental Health	12
Drug Court	7
Inpatient Mental Health	12

Of the 555 offenders tracked in the sample 320 (58%) were successful in completing their package of alternative sanctions (Figure 54). Failures were due to technical vio-lations (17%) and new crimes (25%) committed during the sanction time period. While program failure is only measured during the actual alternative sanction time period, an investigation into re-arrest rates covers the time during and after the completion of the alternative program. As seen in Figure 55, 33% of offenders were re-arrested for any crime type. New non-felony arrests represented 16% of the diverted offenders in our sample, new felony arrests 20%, and probation revocations 10%. These figures do not sum to the total percent of new arrests (33%) because it was possible for an individual to be re-arrested for a non-felony, a felony, and have their probation revoked.

Figure 54

Success and Failure During Alternative Program Period

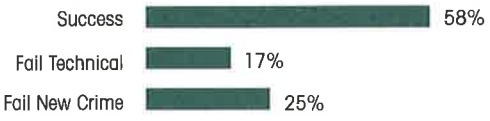
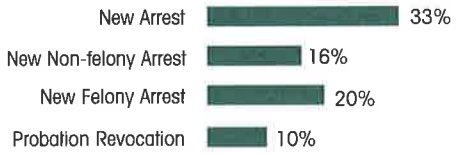


Figure 55

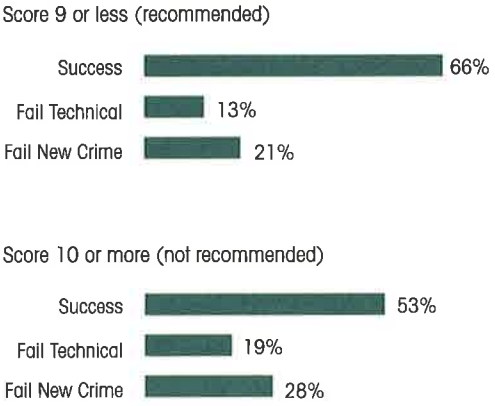
Re-arrest During or After the Alternative Program



Preliminary analysis reveals that program success and recidivism rates vary by risk assessment recommendation. Figure 56 shows that offenders who were recommended for an alternative sanction—scored nine or less on the risk assessment instrument—were more likely to be successful (66%) than those offenders not recommended—scored ten or more (53%). Offenders scoring ten or more were more likely to fail for both technical reasons and for involvement in a new crime during their sanction period.

Figure 56

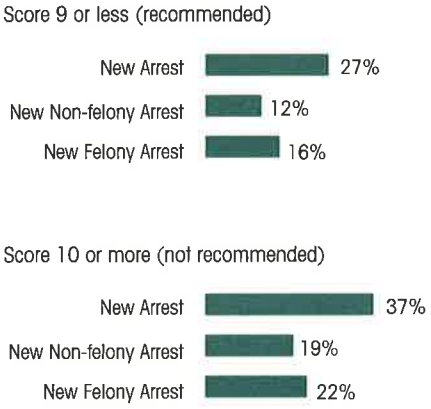
Success and Failure During Alternative Program Period by Risk Assessment Recommendation



There are also noticeable differences in overall recidivism rates depending on whether an offender scored above or below the diversion threshold (Figure 57). Offenders recommended for diversion are less likely to have a new arrest (27%) as compared to offenders not recommended (37%). As such, offenders scoring ten or more on the risk assessment instrument had higher incidences of new non-felony arrests and new felony arrests.

Figure 57

Recidivism Rates by Risk Assessment Recommendation



Continued Evaluation

The central question of this evaluation is whether risk assessment should be recommended for implementation statewide. There have been a number of questions raised during field interviews and by the Commission concerning possible modifications to the instrument before any statewide expansion occurs. How appropriate is the current diversion threshold? Why are some offenders succeeding on alternatives while others are failing? Should the threshold be moved to ensure 25% (or more) of incarceration bound offenders are recommended for diversion? How much can the threshold be moved before recidivism rates begin to increase? Does age and prior record play an important role in determining program success? The next few months of analysis will address these questions and a final report will be made available by the Fall of 2001.

SABRE and the Sentencing Guidelines

Introduction

The Substance Abuse Reduction Effort (SABRE) was a legislative initiative of Governor Gilmore passed by the General Assembly which became Chapters 1020 and 1041 of the *Acts of the Assembly 2000.* There were three major components to final version of this legislation: (1) identification of drug abusers to help ensure treatment when applicable; (2) mandatory minimum sentences for certain offenders involved with the sale, distribution, manufacture, or transport of controlled substances; and (3) lengthy sentences for dealers in large drug quantities. A part of this legislation, the third enactment clause, directs the Commission to review Virginia's sentencing guidelines regarding repeat drug offenders, with special attention to the adequacy of the guidelines recommendations in deterring recidivism and ensuring that substance abuse screening and assessment and criminal justice sanctions are integrated with substance abuse treatment services.

Chapters 1020 & 1041 of The Acts of the Assembly 2000

That the Virginia Criminal Sentencing Commission shall review the minimum discretionary felony sentencing guideline midpoint and the sentencing recommendation for convictions related to possessing, manufacturing, selling, giving, distributing, or possessing with intent to distribute a Schedule I or II drug or marijuana when the defendant has previously been convicted of such an offense. The Commission's review shall include an examination of whether the minimum midpoint and the sentencing recommendation are adequate in deterring recidivism and insuring that substance abuse screening and assessment and criminal justice sanctions are integrated with substance abuse treatment services available through the Department of Corrections and local corrections agencies and facilities. The Commission's review shall be completed in time to make recommendations to the General Assembly on or before December 1, 2000.

This chapter is organized into five parts. The chapter begins with a review of actions that have been taken by the Commission with respect to the sentencing guidelines for drug offenders. The second part considers whether sentencing guidelines recommendations are adequate in deterring recidivism. The third part discusses whether sentencing guidelines recommendations are adequate to ensure the opportunity for treatment. The fourth part considers whether substance abuse screening and assessment, criminal justice sanctions, and substance abuse treatment options are structured to work in an integrated manner. The final part addresses a related inquiry from the Northern Virginia Regional Drug Task Force. The Task Force requested that the Commission review the sentencing guidelines recommendation for offenses involving large amount of methamphetimine.

Albertis S. Harrison, Jr., is one of two former governors of Virginia who sat on the court. He served as justice of the Supreme Court from 1967-1982. Harrison was the governor of Virginia from 1962 to 1966. Harrison was also one of two Virginia attorneys general appointed to the bench.

Actions by the Virginia Criminal Sentencing Commission

The Commission was concerned that some policy makers may not be fully cognizant of the range or scope of actions that the Commission has taken with respect to drug offenders. Since 1996, the Commission has implemented several changes to the sentencing guidelines for drug offenders. The Commission has also expanded the number of drug offenses covered by the guidelines. This section will revisit and update information regarding those actions.

Longer Sentence Recommendations for Second or Subsequent Sale of a Schedule I or II Drug. An analysis of compliance of no-parole cases sentenced through September 1998 indicated that the compliance rate for a second or subsequent Schedule I or II drug sale (1 count) was only 53%. Throughout this chapter references to sale or sale-related offenses identify crimes of manufacture, sale, distribution, or possess with intent to manufacture, sell, or distribute a specified drug or group of drugs. Most of the departures were aggravations, or sentences above the guidelines recommended range. One in three offenders convicted of this offense were given terms in excess of the guidelines recommendation. Only 14% of the departures were mitigations or sentences below the guidelines range. After additional analysis, the Commission elected

to increase the guidelines recommendation for second or subsequent sales of a Schedule I or II drug by nearly doubling the base recommendation for one count of this offense from 12 to 22 months. For offenders with violent prior convictions, the increase is more substantial. The Commission's goal was to bring sentencing guidelines recommendations more in line with current sentencing practice by increasing recommendations for convictions for second or subsequent sale of a Schedule I or II drug. This change was introduced in the drug guidelines in July 1999.

In fiscal year (FY)2000, the results indicate that the Commission's goal may have been achieved. Compliance for one count of this offense has risen to 63%, with departures much more evenly split between aggravated (15.5%) and mitigated (21.8%) sentences. The median sentence length has not changed; at the time of the Commission's 1998 analysis, the median sentence length for one count was 36 months, the same as observed in FY2000.

An impact of this guidelines change has been a dramatic increase in the number of offenders convicted for the specific crime of second or subsequent sale of a Schedule I or II drug. In FY1997 through FY1999, the average number of cases fluctuated around 49 cases per year. The number of cases has increased to 77 in FY2000, a rise of 57% increase. The reason may relate to incentive. From a statutory point of view, there is little difference between a statutory maximum of 40 years for an initial sale of a Schedule I or II drug, and a life term available for the second or subsequent crime. Whether under the old parole-based system or the newer no-parole, offenders were seldom sentenced to the maximum term, so there was little to gain by pursuing the enhanced penalty for the second or subsequent sale. Indeed, based on calendar year (CY) 1998 Pre/Post-Sentence Investigation (PSI) data, only 15% of the offenders eligible for conviction for a second or subsequent sale of a Schedule I or II drug were convicted under that portion of the statute. When the Commission increased the recommendation for repeat cocaine sales, prosecutors have responded by increasing prosecutions under the enhanced penalty.

Recommending Incarceration for More Offenders Convicted of Possessing a Schedule I/II Drug. An analysis of compliance in FY1998 indicated that while the sentencing for offenders convicted of possession of a Schedule I or II drug was highly compliant (77%) with guidelines recommendations, there was also an aggravation rate (17%) nearly three times the mitigation rate. This pattern of compliance and aggravation suggested that the guidelines might be missing an important factor. Subsequent analysis led to the following Commission action.

The Commission added a factor to both Section A and Section B (worksheet for probation or incarceration up to six months) to be scored only if the primary offense is for possession of a Schedule I or II drug and the offender has two or more prior convictions for either the sale (§18.2-248(C)) or possession (§18.2-250) of a Schedule I or II drug. On both worksheets, adding this factor increases the likelihood that offenders convicted of possessing a Schedule I or II drug will be recommended for incarceration if they have previously been convicted of two or more Schedule I or II drug sale or possession offenses. This factor was added to the drug guidelines in July 1999. In the first year of implementation, compliance for the offense increased to 82%, while aggravation decreased to 11%. Thus, although the departures still favor aggravation (11% vs. 7%), the departure pattern is more balanced and compliance has improved. Of the 281 offenders in FY2000 whose sentence recommendation was increased by this change, 74% were sentenced within the newly recommended sentence range.

Longer Sentence Recommendations for Felons Selling 28.35 Grams or More of Cocaine. For offenders convicted of sales-related offenses involving 28.35 grams (1 ounce) or more of cocaine, the Commission added a factor to be scored on the drug prison sentence length worksheet. If the offender is convicted of the sale of cocaine, and the amount of cocaine is 28.35 grams or more, the recommended midpoint sentence is increased by either three or five years. The three-year midpoint increase applies if the amount of cocaine is between 28.35 to less than 226.8 grams. The five-year midpoint increase applies if the amount of cocaine is 226.8 (1/2 pound) grams or more. The intent of this change was to increase the recommended sentence lengths for offenders who sell larger amounts of cocaine. Cocaine was the only drug type targeted because it represents almost the vast majority of Schedule I or II drug convictions in Virginia's circuit courts. This factor was added to the drug sentencing guidelines in July 1997.

The result has been an increase in sentence lengths for those affected by this sentencing guideline change. For example, prior to the drug amount factor's inclusion, according to the CY1997 PSI database, the median sentence for those convicted of selling more than 28.35 grams of cocaine was 18 months. By comparison, the median sentence (middle value, with half the sentences above and half below) recorded in the sentencing guideline database has been 48 months in

FY1998 and FY1999, and was 42 months in FY2000. Looking to Figure 58, a similar pattern can be seen; after the guidelines change, offenders convicted of sale of 28.35 grams or more of cocaine, were less likely to be sentenced to 24 months or less, and more likely to be sentenced to more than 24 months. Those sentenced in FY1997 were almost three times more likely to be sentenced to no incarceration/ alternative sanction than those sentenced in FY2000.

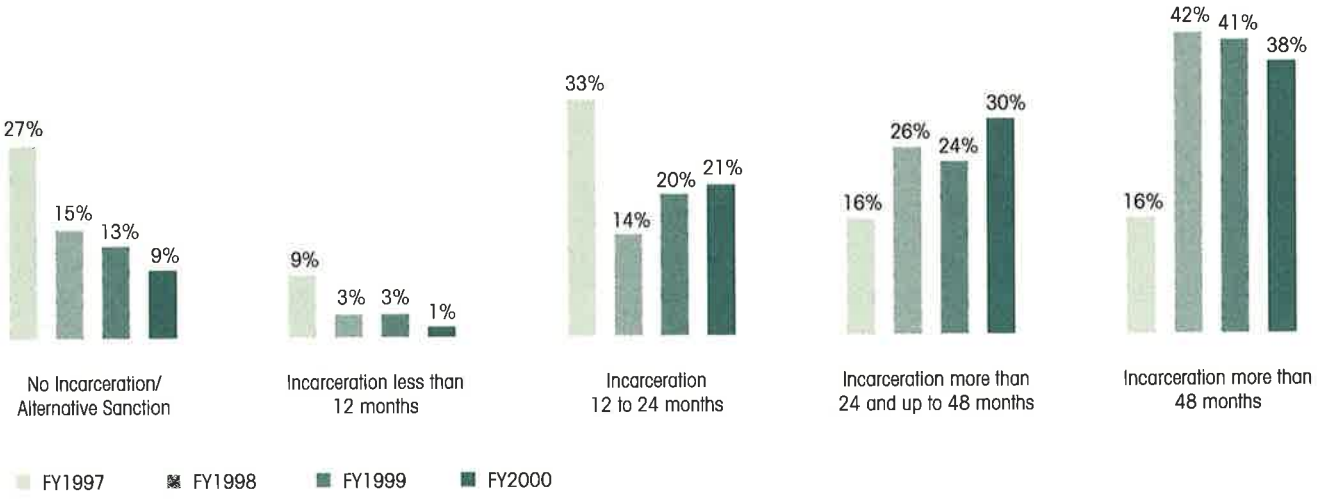
Compliance with the guidelines for offenders sentenced with the drug amount enhancement is 51% for FY1998 through FY2000. Most of the departures are sentences below the guidelines recommendation.

Revised Scoring for Manufacturing Marijuana. An analysis of compliance indicated that while sentencing for manufacturing marijuana was largely within sentencing guidelines recommendations (71%), all of the departures were aggravated (29%). This pattern of compliance and aggravation suggested that the drug guidelines worksheet might be missing an important factor.

Upon further analysis, it was determined that the primary offense scores were somewhat out of synch with recent sentencing practices. Consequently, the Commission revised the primary offense scores for manufacturing marijuana on both the prison in/ out and probation/incarceration up to six months worksheets of the drug guidelines

Figure 58

Sentences for Felons Selling 28.35 Grams or More of Cocaine (FY1997-FY2000)



by adding points to the existing primary offense score on both worksheets. As with the possession of a Schedule I or II drug, the Commission sought address the high rate of aggravation; that is, sentences above the guidelines recommendation. This revision was added to the drug sentencing guidelines worksheets in July 1999.

Although the FY2000 compliance figures for this offense are based on only 18 cases, the pattern is promising. If these few cases are telling, then both goals of the Commission's adjustments were met. Aggravated and mitigated sentences were evenly split at 11%, achieving the sought after balance. Meanwhile, the rate of compliance has increased to 78%.

Risk Assessment for Drug Offenders. In the 1994 Special Session, the General Assembly requested that the Commission explore whether 25% of non-violent offenders could be diverted from prison into alternative sanction programs. After analyzing the characteristics and historical patterns of recidivism of larceny, fraud and drug offenders, the Commission developed a risk assessment tool for integration into the existing sentencing guidelines system. The risk assessment instrument identifies those offenders recommended by the sentencing guidelines for a term of incarceration who have the lowest probability of being reconvicted of a felony crime. These offenders are then recommended for sanctions other than traditional incarceration in prison. Use of the risk assessment component of the guidelines system began in selected circuits December 1, 1997 (see the *Nonviolent Offender Risk Assessment* chapter of this report for more details on the project as a whole).

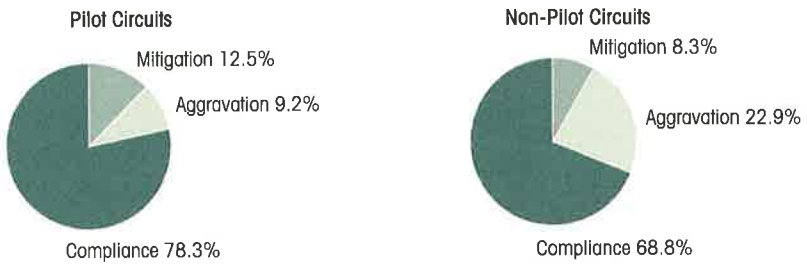
In the pilot circuits, the risk assessment worksheet is completed for fraud, larceny and drug offenders who are recommended for some period of incarceration by the guidelines and who satisfy the eligibility criteria established by the Commission. Offenders with any current or prior convictions for violent felonies (defined in §17.1-803) and offenders who sell an ounce or more of cocaine are excluded from risk assessment consideration. When the risk assessment instrument is completed, offenders scoring nine points or less on the scale are recommended for sanctions other than traditional incarceration. The instrument itself does not recommend any specific type or form of alternative punishment. That decision is left to the discretion of the judge and may depend on program availability. In these cases, judges are considered in compliance if they sentence within the recommended incarceration range or if they follow the recommendation for alternative punishment. For offenders scoring over nine points, the original recommendation for incarceration remains unchanged.

For drug offenders eligible for risk assessment consideration, judges in the pilot circuits have complied with either the sentencing guidelines recommendation or with the risk assessment recommendation 78% of the time (see Figure 59). When judges departed in risk assessment cases, the sentence was a little more likely to be aggravated (12.5%) than mitigated (9.2%). This contrasts sharply with similarly situated offenders in non-pilot circuits (those who meet all or nearly all of the eligibility criteria for risk assessment). Only 69% of such offenders in non-pilot circuits were sentenced within the guidelines recommended sentence range, while mitigated sentences (22.9%) were almost three times more likely than aggravated sentences (8.3%). The difference between the pilot and non-pilot circuits might be attributable to the broadened definition of compliance for judges in the pilot circuits; that is, judges can sentence offenders to the recommended incarceration term or to an alternative sanction if one is recommended and be considered in compliance with the guidelines. Nonetheless, not all of the difference in compliance rates can be explained in this manner. Less than two-thirds (60%) of the difference in compliance rates can be explained by differences in the definition of compliance.

Much of the remaining difference may be the result of judges using the risk assessment instrument to screen offenders they may be considering for alternative sanctions. Certainly, the comparative pattern of compliance is suggestive. The pilot circuits have a much lower mitigation rate; even when controlling for the difference in how diversions are treated for computing compliance, the pilot circuits mitigate half as often as the non-pilot circuits. Delving deeper, those offenders in the non-pilot circuits eligible for risk assessment evaluation were sentenced to an alternative sanction program that includes substance abuse treatment (detention center, diversion center, boot camp, drug court, or to a local

Figure 59

Compliance for Nonviolent Risk Assessment Eligible Drug Offenders, FY1998-FY2000



treatment program) 21% of the time. By comparison, in the pilot circuits, 21% of the offenders found to be of low risk (recommended for an alternative sanction by the risk assessment instrument) were sentenced to same type of diversion programs, but only 15% of the offenders found to be of higher risk (not recommended for an alternative sanction by risk assessment) were similarly sentenced (see Figure 60). These results indicate that when the risk level is higher, that judges will reconsider an initial inclination to divert an offender from incarceration. This is one of the explicit purposes of risk assessment. However, it appears that judges are not yet utilizing risk assessment to the same extent for re-evaluating offenders they are initially inclined to incarcerate, even when the risk score is low. These results should not be of great surprise. When a decision maker, such as a judge, begins to use an empirically-derived tool, it takes time to validate the tool with experience, and when given a choice to validate by erring on behalf of public safety, and erring on the part of a convicted felon, most judges would prefer public safety.

Figure 60

Percent Sentenced to Diversion Program with a Substance Abuse Treatment Component,* FY1998-FY2000

Non-Pilot Circuits	21%
Pilot Circuit - recommended for alternative sanction	21%
Pilot Circuit - not recommended for alternative sanction	15%

*Diversion programs with treatment components include detention center, diversion center, boot camp, and local treatment programs.

The National Center for State Courts in Williamsburg, Virginia, has received a grant from the National Institute of Justice, an agency of the United States Justice Department, to evaluate the development and impact of the Commission's risk assessment instrument for nonviolent offenders. The project will be the first comprehensive evaluation that examines how risk assessment and alternative sanctions are integrated into a sentencing guidelines structure, and the effect this has on the criminal justice system. Preliminary findings from the National Center for State Courts evaluation study are presented in the *Nonviolent Offender Risk Assessment* chapter of this report. These initial findings, which indicate that the instrument provides judges with useful information regarding offender risk, are promising. Completion of the evaluation is anticipated in 2001.

Recommended Use of Alternative Sanctions. Offenders convicted for the distribution, sale, manufacture, or possession with intent to distribute, sell, or manufacture of one gram or less of cocaine who have no prior felony record receive a dual sentencing guidelines recommendation under current guidelines. In addition to the prison recommendation that has been available since January 1, 1995, detention cen-

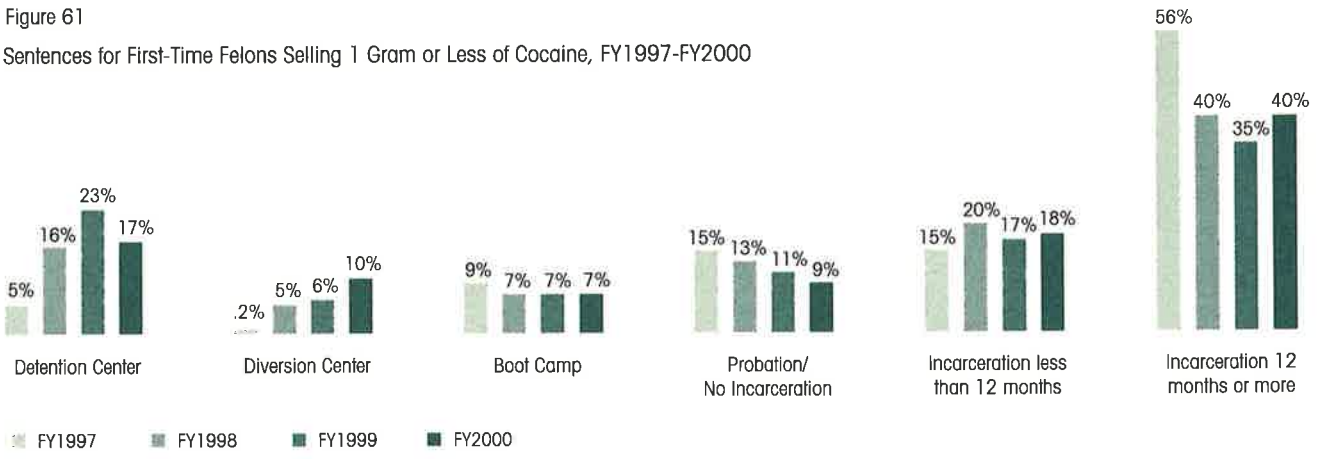
ter incarceration became an alternative sentencing guideline recommendation in July 1997. Similarly, boot camp became an alternative recommendation in July 1999. When making the decision to add these alternative sanctions as sentencing guidelines recommendations, the Commission considered programmatic length of stay and the existence of substance abuse treatment programs to be important factors. The purpose of the Commission when making these recommendations was not to reduce the punishment of first-time drug offenders. Both of these programs involve confinement of four to six months in a structured environment and provide substance abuse treatment programming. The unique treatment options offered in these programs may help reduce the recidivism rates of these offenders. Boot camp was included only after the duration of the program was increased to four months, and the Department of Corrections attested to the quality of the treatment component.

Judges may sentence an offender convicted of selling one gram of less of cocaine with no felony prior record to the recommended incarceration or order the offender to detention center incarceration or boot camp and still be in compliance with the guidelines. In these cases, 70% are in compliance, with more than a third of this compliance associated with sentences to one of the recommended alternative sanction programs. About one in four of these offenders received a mitigated sentence, nearly all of which were for a sentence of probation without incarceration. Only six percent of these offenders were sentenced above the recommended range.

Figure 61 presents a breakdown of the sentences for first-time felons selling one gram or less of cocaine by fiscal year. After the Commission's recommendation, incarcerations in excess of 12 months dropped substantially. Most of these cases were diverted into detention center incarceration, the only

Figure 61

Sentences for First-Time Felons Selling 1 Gram or Less of Cocaine, FY1997-FY2000



alternative sanction that would not result in a departure for a non-prison sentence in FY1998 and FY1999. Indeed, when the incarceration rate for those sentenced to more than 12 months dropped in FY1999, there was a corresponding increase for detention center incarceration. However, in FY1999, after boot camp incarceration became an alternative guidelines recommendation, there was no marked change in its use as a sentencing option.

Expanded Number of Offenses Covered by Sentencing Guidelines. Two drug offenses were added to those covered by sentencing guidelines in July 1999. The first offense was the distribution, sale, manufacture, or possess with intent to distribute, sell, or manufacture an imitation Schedule I or II drug. The Commission's recommendation for this offense involved adding an additional primary offense score to the existing drug guidelines. In FY2000, there were 111 cases observed. In the first year, 30% were recommended for a term of incarceration that includes prison, and the median sentence for those offenders was one year. Compliance for this offense was 75%, with 16% of the cases aggravated (sentenced above the guidelines recommendation), and 9% mitigated (sentenced below the guidelines recommendation).

The Commission also added the transport of five or more pounds of marijuana into the Commonwealth to the crimes covered by the drug sentencing guidelines. As above, the Commission's recommendation for this offense involved adding an additional primary offense score to the existing drug guidelines. The guidelines ensure that all offenders convicted of this crime are recommended for a term of incarceration that includes prison. Offenders with no prior record are recommended for 19 months in prison. Those with a violent prior record receive a significantly longer recommendation. Compliance for this offense in FY2000 was only 44%, with most of the departures below the recommended sentence range (44.4%). However, these compliance results must be interpreted with caution, as there were only nine cases in FY2000.

Sentencing Guidelines Recommendations and Deterrence

Whether sentencing guidelines recommendations are adequate to deter recidivism is a complex question that cannot be fully answered with available data. Virginia's sentencing guidelines only recommend a criminal justice sanction. The likelihood of recidivism for released drug offenders involves the interplay of personal (e.g., addiction, amenability to treatment, fear of detection, return to criminal activity) and criminal justice system (e.g., resources available for detection, detection of criminal activity) variables, as well as how long an offender is tracked in the search for recidivism.

Deterrence is usually thought of as a response to the likelihood of punishment. There are two forms of deterrence, general and specific. General deterrence is the extent to which knowledge of criminal justice sanctions prevents members of the general population (not just those convicted of crimes) from engaging in criminal behavior. Specific deterrence, by contrast, is the extent to which the threat or application of punishment prevents a person previously convicted of a crime from engaging in further criminal behavior. Some believe that the enhanced sentence recommendations for offenders who have a violent prior record have a deterrent effect, but that assumes that the person considering an illegal act knows that their prior record will trigger an enhanced sentence recommendation.

This is an effect that has not yet been demonstrated empirically. However, the Department of Corrections (DOC) is currently using an "Offender Notification Cards" program designed to inform inmates, about to be released from prison, of sentence recommendation enhancements based on the offender's own prior record. The National Center of State Courts is conducting an evaluation study of this program. This study will be looking for a specific deterrent effect stemming from the Offender Notification Card program. Any deterrent effect associated with the sentencing guidelines recommendation should be more pronounced when coupled with the Offender Notification Card program.

Nonetheless, the Commission can report on some baseline drug offender recidivism rates. Although these cannot be used to answer the question raised by the SABRE enactment clause, it can provide the foundation for a future analysis that seeks to establish a trend in recidivism. The data came from the Commission's study on nonviolent risk assessment, and served as the basis for the risk assessment instrument for nonviolent offenders described above. The full study collected information on offenders convicted of burglary, drug, fraud, and larceny crimes, who were released into the community (sentenced to no incarceration, or sentenced and released from either prison or jail) between July 1, 1991 and December 31, 1992. These offenders were tracked for three years following release into the community. Recidivism was measured as

a new conviction for any felony. Details of the sampling methodology and data collection can be found in the Commission's 1997 Annual Report.

Recidivism rates broken down by original disposition type are found in Figure 62. The overall recidivism rate was 19%, and varied by type of sanction originally imposed. When the offender had been sentenced to no incarceration or probation, the rate was only 14%. However, 19% of those sentenced to jail were reconvicted within three years, as were 27% of those originally sentenced to prison. Although these differences may reflect the experience and ability of judges to ascertain which offenders are more likely to re-offend, hence merit the more severe criminal justice sanction, there may be a number of other factors (both related and unrelated to a judge's decision) reflected in the disposition type/recidivism association. For example, offenders with longer prior records are more likely to receive a prison term, but research has shown repeat offenders are also more likely to recidivate once released.

Figure 62

Recidivism Rates by Type of Original Disposition

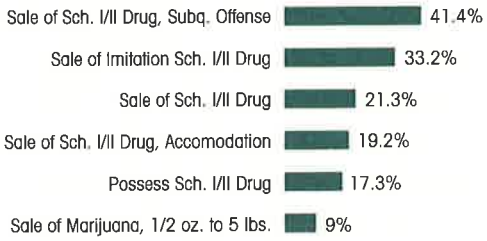
Probation/No Incarceration	13.8%
Jail	18.6
Prison	26.5
Overall	**19.0%**

Offenders Released July 1991 through December 1992

Figure 6 presents the observed three-year recidivism rates by original offense. Offenders who were convicted for a subsequent sale of a Schedule I or II drug were far more likely to be re-convicted within three years than any other drug offender; at 41%, these offenders were more than twice as likely as the average drug offender to be re-convicted. As noted above, these offenders were targeted for longer sentence recommendations beginning in July 1999. Offenders originally convicted of selling an imitation Schedule I or II drug were the next most likely to be reconvicted within the follow-up period, at 33%. An offender with an original offense of sale of 1/2 ounce to five pounds of marijuana was the least likely to recidivate (9% of these offenders were reconvicted, about half the rate as the average). Most of the remaining offenders, with original offenses reported in Figure 63 (possession, sale, or sale for accommodation of a Schedule I/II drug), were reported

Figure 63

Recidivism Rates by Selected Offenses



with recidivism rates of 17 to 21%; these rates are close to the average reported for this sample.

Nonetheless, it is important to remember that there are a number of reasons why there can be no definitive answer about the relationship between sentencing guidelines and deterrence. To begin, deterrence is hard to measure. General deterrence is virtually impossible to detect from the overall population. Measuring general deterrence requires researchers to determine whether the absence of criminal behavior in a person is due to deterrence, or some other predisposition not to commit a crime, or, if in combination, the proportion of the absence attributable to deterrence. In an artificial setting, it is possible to determine whether a general deterrence effect may occur, but the effect cannot be generalized to the overall population. Specific deterrence can be measured, but the scope of the experiment needs to remain small and focused. A good example is the "Offender Notification Cards" program. The start date of the program was well defined, so pre and post-test groups could be identified. The "experimental" condition was well defined, either the inmate was provided the information on the card before release, or not. And the other study variables (i.e., offender demographics, offense characteristics, prior record, length of follow up after release) can be well controlled, so that any non-random effects can be accounted for with a measured degree of certainty.

Although the deterrent effect of sentencing guidelines is difficult to measure, it is clear that Virginia's truth-in-sentencing system and the truth-in-sentencing guidelines are having an incapacitation effect. Virginia's truth-in-sentencing laws mandate sentencing guidelines recommendations for violent offenders (those with current or prior convictions for violent crimes) that are significantly longer than the terms violent felons typically served under the parole system, and the laws require felony offenders, once convicted, to serve at least 85% of their incarceration sentences. Since 1995, the Commission has carefully monitored the impact of these dramatic changes on the state's criminal justice system. Overall, judges have responded to the sentencing guidelines by complying with recommendations in three out of every four cases. Moreover, there is considerable evidence that the truth-in-sentencing guidelines are 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 (see the *Impact of Truth-in-Sentencing* chapter of this report for additional detail). Thus, the truth-in-sentencing guidelines have resulted in the incapacitation of violent offenders for longer periods of time. Yet, the relationship between this incapacitation effect and any deterrent effect can be difficult to examine through scientific measurement.

Finally, the impact of drug addiction on the potential deterrent effects of sentencing guidelines and criminal sanctions is unclear. Criminal sanctions alone may not be enough to deter some addicted offenders from repeat criminal behavior. For some offenders, the addiction drives the crime, either by the act of possessing the drug, or the need to generate cash through theft or drug sales in order to purchase more drugs for personal use. The treatment component of the SABRE legislation is aimed at this type of offender with the objective of reducing recidivism by treating the addiction.

Sentencing Guidelines Recommendations and the Opportunity for Treatment

To address whether sentencing guidelines recommendations are adequate to ensure the opportunity for substance abuse treatment, it is important to have an understanding of what treatment services are available, both through the Department of Corrections (DOC) and the Community Services Boards (CSB). CSBs are the local government agencies responsible for oversight and coordination of substance abuse services. Figure 64 presents substance abuse service and program information drawn from DOC's "Substance Abuse Services Glossary" card and the Department of Mental Health, Mental Retardation, and Substance Abuse Services' "Community Service Board Substance Abuse Services Reference Guide."

The time required to complete a substance abuse treatment program varies from program to program. Frequently, an offender's treatment program will consist of multiple services or programs. The substance abuse treatment program for most offenders ranges from 18 to 24 months for those undergoing treatment in a Therapeutic Community, and six to 12 months for those undergoing other forms of treatment. The decision of how to treat an offender for substance abuse is based on a combination of the severity of the offender's addiction and the duration of the offender's criminal justice sanction (incarceration and/or probation). The simple answer, then, is that

because the offender's treatment program is tailored to fit within the criminal justice sanction, an offender will always have the opportunity to be treated for substance abuse. According to DOC, all offenders in the institutions identified as needing substance abuse treatment receive at least substance abuse educational and/or self-help group services. Within the institutions, the limiting factor is length of stay. To participate in a Therapeutic Community, not only does the offender need to qualify on the basis of addiction severity, but must also be sentenced to a minimum of two years so that the offender has enough time to be placed in the program and to complete the treatment phases. DOC has also developed a process to allow for a more seamless transition from treatment in the institutions to treatment in the community. This process includes improved communication among treatment and supervision staff (e.g., the revised Therapeutic Community Status Change Form). Similarly, for offenders not sentenced to prison, the factor limiting treatment is primarily the length of stay in jail (if any) combined with the duration of supervised probation.

The opportunity to complete treatment may be enhanced for offenders sentenced for crimes committed on or after July 1, 2000. When an offender is sentenced to a term of active incarceration, under the revised §19.2-295.2, judges are required to either suspend at least six months of an imposed sentence, or order the offender to complete a post-release supervision for a term of at least six months, but no more than three years. The sentencing judge has jurisdiction over the suspended time, while the Parole Board has jurisdiction over post-release, and either can order continuation of substance abuse treatment for an offender under their control.

The sentencing guidelines do not provide any specific recommendation for the length of a probationary term or treatment programming. A judge has wide discretion in making a sentencing decision. The judge can order the offender to participate in treatment, and completion of probation can be made contingent on meeting certain conditions, any of which can be imposed without the sentencing guidelines making a specific recommendation. Nonetheless, the more information a judge has about a particular offender and the choice of treatment programs, the better able that judge is to ensure that the offender has the opportunity to complete recommended and/or ordered treatment. The public safety needs of the community must be weighed with the treatment needs of the offender in order to provide the best balance of criminal justice sanctions and substance abuse treatment.

Figure 64

Substance Abuse Services and Programs in Virginia

Service	Program Description	DOC*	CSB**
Crisis Stabilization	Services, available 24 hours per day and seven days per week, that provides crisis intervention, stabilization.		ES
Drug/Alcohol Testing	Unannounced, random sampling throughout treatment and supervision period.	IC	CS
Relapse Prevention	Open enrollment group at least 12 weeks of offenders who have completed a substance abuse treatment program. Includes education in identifying high-risk drug use situations and opportunities to plan a strategy to cope with and manage these high-risk situations.	IC	CS
Self Help	Participants organize, form and conduct groups to assist and support each other to maintain sobriety and sustain recovery.	IC	CS
Medical Detoxification	24-hour staff monitored medical setting detoxification, supervised by health care professionals and medical backup. Referral to continuing care and Case Management included.	I	IS
Social Detoxification	24-hour staff monitored social setting detoxification. Referral to continuing care and Case Management services included.	I	RS
Halfway House	24-hour supervision. Group and individual counseling, self help, vocational, occupational, educational and substance abuse education services. Discharge planning, follow-up care plan, case management and drug/alcohol	RS	RS
Methadone Detoxification	Outpatient treatment combined with the administering of methadone.		OS
Methadone Maintenance	Outpatient treatment combined with the administering of methadone as a substitute narcotic drug.		OS
Case Management	Services include: identifying and reaching out to potential consumers; assessing needs and planning services; linking the individual to services and supports; assisting the person directly to locate, develop or obtain needed services and resources; coordinating services with other providers; enhancing community integration;		OS
Education	Usually consists of Didactic groups which may address the following : Addictive Process, Physiological and psychological effects of Addiction and Substance Abuse, Effects of Substance Abuse on Others, Addiction and Criminality, Behavior Change, Denial and Defense Mechanisms, Twelve Step/Support Programs, Recovery, HIV/AIDS Prevention, Relapse Prevention and the treatment process.	I	OS
Day Treatment/ Partial Hospitalization	Provides structured programs of mental health, mental retardation, or substance abuse treatment, activity, or training services, generally in clusters of two or more continuous hours per day, multiple days per week to groups or individuals in a non-residential setting.		DS
Outpatient	Provided to consumers on an hourly schedule, on an individual, or family basis, and usually in a clinic or similar facility or in another location.		OS
Motivational Treatment	A course of motivational treatment may involve a single session, but more typically four or eight sessions; and it may be repeated, if necessary, as long as repetition is clinically indicated.		OS
Intensive Substance Abuse Outpatient Services	Intensive outpatient services include multiple group therapy sessions during the week as well as individual and family therapy, consumer monitoring, and case management		OS
Outpatient Group Counseling	The service should be based on the individual treatment plan and acceptable behavior.	OS	
Intensive Outpatient Counseling	The service provides nine hours per week to include process groups, psych-educational groups and one-on-one counseling if necessary for a minimum of six weeks.	OS	

Service	Program Description	DOC*	CSB**
Peer Support Group	The service is led by former therapeutic community participants following an established format, and facilitated by trained probation officers. The service includes personal sharing, problem solving, group planning, continued behavior change, social support, and helping self by helping others.	OS	
Intensive In-home (adolescents)	These services provide crisis treatment; individual and family counseling; life, parenting, and communication skills; case management activities and coordination with other required services; and 24 hour per day emergency response.		OS
Halfway House	24-hour supervision. Group and individual counseling, self help, vocational, occupational, educational and substance abuse education services. Discharge planning, follow-up care plan, case management and drug/alcohol	RS	RS
Supervised Substance Abuse Services	Less intensive residential services that may include: supervised apartments and domiciliary care.		RS
Diversion Center	The program involves a four to six month minimum-security facility designed for those who do not require long-term incarceration, but who many not do well in a community setting without intervention. The program provides remedial education (GED), substance abuse education, life skills (e.g., job readiness), parenting, and other special topic groups. Employment in the private sector and community service are integral parts of the program. Intensive supervision is provided upon release.	RS	
Boot Camp	The program involves 120-day military-style regimen. The program provides basic education (GED), substance abuse education, and life-skills development. Public service while at camp is an integral part of the program. Intensive supervision is provided upon release.	RS	
Detention Center	The program involves a four to six month minimum-security facility for those who do not perform well in the community, and do not require long-term incarceration. The program provides structure and discipline, remedial education (GED), life-skills development and substance abuse education. Work on public projects is an integral part of the program. Intensive supervision is provided upon release.	RS	
Therapeutic Community	The service is a highly structured residential program designed to habilitate drug users through development of individual accountability. The program has several phases, and length of stay is based on progress. Phase I is orientation. Phase II is re-socialization. Phase III is maturation role modeling. Phase IV is re-entry skill development with community based activities. The final phase occurs in a separate program, transitional therapeutic community.	I	RS
Transitional Therapeutic	The service is Phase V of the therapeutic community program and involves residential transition. The service provides a gradual release process based on responsible behavior, and includes employment, as well as the development of peer support group skills.	RS	

*Department of Corrections **Community Services Boards

Legend
- ES Emergency Services
- CS Community Supervision Services
- OS Outpatient Services
- IS Inpatient Services
- RS Residential Services
- I Institutional Services
- IC Both Institutional and Community Supervision Services

Integration of Screening and Assessment, Criminal Justice Sanctions and Treatment Services

During the 1998 session of the General Assembly, legislation was passed that required many offenders, both adult and juvenile, to undergo screening and assessment for substance abuse problems related to drugs or alcohol. A goal of this legislation was to provide judges with information relating to the substance abuse problems and treatment needs of an offender before the court, so that the balance between public safety and treatment needs could be addressed more fully at sentencing. The new law targets all adult felons convicted in circuit court and adults convicted in general district court of any drug crime classified as a Class 1 misdemeanor (§18.2-251.01 and §19.2-299.2). Juvenile offenders adjudicated for a felony or any Class 1 or 2 misdemeanor also fall under the screening and assessment provisions (§16.1-273). Under the new law, these offenders must undergo a substance abuse screening. If the screening reveals key characteristics or behaviors likely related to drug use or alcohol abuse, a full assessment must be administered. Assessment is a thorough evaluation. Results of comprehensive assessment can be used for developing treatment plans and assessing needs for services. Different screening and assessment instruments are used for the adult and juvenile populations. The General Assembly authorized a six-month pilot period (July-December 1999) to test implementation of the provisions. The screening and assessment program began on a statewide basis January 1, 2000.

An Interagency Drug Offender Screening and Assessment Committee was formed to oversee the implementation and subsequent administration of this program. The expressed goals of this committee include: (1) to enhance sharing of pertinent information across stages in the criminal justice system while adhering to confidentiality requirements; (2) assist in the development and enhancement of Memorandums of Agreement and Memorandums of Understanding between agencies; (3) assist in the development and enhancement of contracts with private treatment providers; and (4) reduce duplication of activities and services.

Although §18.2-251.01 requires that all felons undergo screening and, if indicated, an assessment for substance abuse problems, current Code does not specify at what point in the criminal justice process screening and assessment must be administered. Section 19.2-299 only specifies that a screening must be performed as part of any pre-sentence report ordered by the court. In FY1997, pre-sentence reports were completed in two-thirds of new felony cases sentenced in Virginia's circuit courts.

The rate at which judges order pre-sentence reports varies considerably from court to court. Thus, many judges continue to sentence felony offenders without the benefit of information regarding the offender's substance abuse problems and treatment needs.

After discussions with staff members from the Departments of Corrections (DOC), Criminal Justice Services (DCJS), and Mental Health, Mental Retardation, and Substance Abuse Services (DMHMRSAS), it is clear that there is some degree of integration among the three components (screening/assessment, criminal justice sanctions, and treatment services). For some offenders, the first layer of integration occurs at sentencing. In the pre-sentence phase, screening (Simple Screening Instrument) and assessment (Addiction Severity Index) are administered, with the results provided to the judge as part of the pre-sentence investigation report. The judge also has access to the sentencing guidelines recommendation and information about the various substance abuse treatment options available locally (typically through the Community Services Board) and DOC. The second layer of integration occurs during the transition from treatment while in a DOC institution to local treatment. For inmates released into the community, probation and parole officers have electronic access to the Inmate Progress Reports (IPR), which provides information on the released inmate's progress while in a DOC institution, the program participation, and recommendations for follow-up services. Although an IPR is an annually updated report, recently there has been an emphasis on having the IPR updated shortly before releasing an inmate. For example, the IPR for inmates released from a Therapeutic Community (TC) will be updated to include current information on their "phase" progress in the Therapeutic Community program, any special parole or probation conditions (including entry into the residential transition phase of TC), and any specific aftercare needs. For offenders sentenced to jail or probation, integration depends on communication between judges, jail officials, probation officers, and local treatment staff.

While the framework for integration exists, the actual degree of integration could be improved. From the Commission's perspective, the greatest barriers to integration seem to be lack of communication and misperceptions about state and federal confidentiality laws. For the integration of substance abuse treatment and criminal justice sanctions to be effective, information must flow between the treatment program and the criminal justice system. Every decision maker in the criminal justice system needs detailed information to make the best decision, not only for offender, but also for the public safety.

For example, most drug court programs rely on detailed treatment information flowing regularly to the judge, prosecutor, and defense attorney. This information, which includes the offender's attendance record and the results from drug testing, enables the drug court judge to "work with" the defendant. A good performance should earn praise, while a poor performance rates a minimum reaction of criticism, yet may also result in punishment. The treatment program must be able to disclose information about offender to the criminal justice system.

Any program that specializes, in whole or in part, in providing treatment, counseling, and/or assessment and referral services for patients with alcohol or drug problems must comply with the Federal confidentiality regulations (42 U.S.C. §§290dd-3 and ee-3 and 42 Code of Federal Regulations, Part 2). Although the Federal regulations apply only to programs that receive Federal assistance, this includes organizations that receive indirect forms of Federal aid such as tax-exempt status, or State or local funding coming, even in part, from the Federal government. Nonetheless, information protected by the Federal confidentiality laws and regulations may always be disclosed after the offender has signed a proper consent form. Furthermore, Federal regulations also permit disclosure without the offender's consent in several limited situations (e.g., medical emergencies, under a court's special authorizing order, communication among substance abuse treatment program staff). Disclosures to an authorized criminal justice agency are permissible once a defendant has signed a criminal justice system consent form (§2.35).

The problem is that many do not fully understand the confidentiality regulations. For example, access to the assessment results has not been consistently available to CSB treatment service providers. Even when DOC has a signed "Consent to Release Medical Information" form (DOC 703-A), both Probation Officers and CSB service providers have expressed a concern that communicating more than the summary assessment results may compromise an offender's confidentiality. Consequently, Probation Officers and CSB service providers each assess the offender, and when a judge wants to know more details about the assessment results, the probation officer adds the information to the "Personal History" narrative of the pre-sentence report.

Kenneth Batten of the Office of Substance Abuse Services, DMHMRSAS, views the problem as one of training and communication. Therefore, in November 2000, the agency scheduled workshops on confidentiality for those criminal justice programs involved in the SABRE initiative, including the screening and assessment of offenders.

However, conclusions regarding the integration of screening and assessment, substance abuse treatment, and criminal justice sanctions may be premature. Substance abuse screening and assessment for offenders began on a statewide basis on January 1, 2000. Many treatment services are now being expanded due to the influx of funding as a result of the SABRE legislation that became law on July 1, 2000. DOC has recently made changes to both its intake and transfer forms to aid in its ability to communicate information about an inmate both within institutions, and upon release from the institutions. Officials at DOC feel that there is now a good framework for treatment in place, as well as a way to identify those most in need of treatment. Time is needed to locate and fill any remaining gaps in coverage. Furthermore, DCJS' Criminal Justice Research Center has been assigned the task to evaluate the screening and assessment program over the next two to three years.

Northern Virginia Regional Drug Task Force

In a letter, the Northern Virginia Regional Drug Task Force requested that the Commission consider enhanced sentence recommendations for distributors of methamphetimine. In particular, the Task Force was requesting enhanced sentencing recommendations for larger amounts of methamphetimine similar to those for cocaine. According to the letter, they believe "... that changing the guidelines would greatly assist with the prosecution of these distributors on the state level." There are a number of questions unanswered by the letter. For example, where would the thresholds be drawn for large amounts of methamphetimine? How would adding a drug amount factor for methamphetimine assist with prosecution? The answers to these questions would help shape the Commission's response.

Based on the supporting materials provided (an intelligence bulletin on "Mexican drug trafficking organizations in the Mid-Atlantic region," and newspaper articles), the Task Force seems to be concerned with seizures of methamphetimine in the range of 100 grams. According to the intelligence bulletin report, dated October 1999, "(s)lightly more than one year ago, seizures of methamphetimine in the 100-gram range were considered very significant. ...Since that time, multi-pound methamphetimine seizures

have become the standard" (p. 4). The bulletin goes on to identify specific Virginia counties and independent cities in the Shenandoah Valley as being the location of a large methamphetimine seizure or the destination of such a seized shipment.

An examination of recent data from the Pre/Post-Sentence Investigation (PSI) database found only three offenders convicted for a drug crime involving 50 grams or more of methamphetimine; no offenders were convicted with 100 or more grams of methamphetimine in Virginia's circuit courts. However, the data reported in the intelligence bulletin indicate that there are arrests for these large amounts of methamphetimine. As these offenders are not being convicted in state courts, their convictions should be found in the federal court system. Given that these offenders are arrested and convicted for crimes committed within the Commonwealth by a Task Force whose law enforcement agents include state and local officers, then the only thing preventing their prosecution in state courts is a discretionary choice of venue.

At the federal level, the sentencing within the U.S. Sentencing Commission's guideline recommendation is mandatory, and the amount of the drug (regardless of drug type) enhances this recommendation. At the state level, the Virginia Criminal Sentencing Commission's guidelines recommendation is advisory, compliance is voluntary on the part of the judges, and the amount of methamphetimine does not change the recommendation. Only if an offense at conviction carries a mandatory-minimum term, will the prosecutor be certain of incarceration in one of the Virginia state courts. It is uncertain how adding a drug-amount factor to Virginia's sentencing guidelines would ensure certainty of incarceration, and thus, there would still be no incentive to prosecute these offenders in state courts.

However, the SABRE legislation, passed by the 2000 General Assembly, may provide the Task Force with the sought after tools. A portion of SABRE targets methamphetimine offenses involving 100 or more grams. Three crimes are defined by SABRE that explicitly lists methamphetimine as a triggering drug; two apply when the amount consists of 100 or more grams, while the third applies to offenses involving 250 grams or more. SABRE also provides for mandatory minimum sentences for these new offenses. In addition, there are two other mandatory minimum provisions available through the SABRE legislation that could be used to prosecute methamphetimine traffickers. Therefore, prosecutors have the desired certainty of incarceration element.

First, §18.2-248(H) provides for the distribution, sale, manufacture, or possession with intent to distribute, sell, or manufacture 100 or more grams of methamphetimine or 200 or more grams of a mixture containing methamphetimine to be punished as a felony carrying a term of 20 years to life. A 20-year sentence is mandatory, which can be suspended only if the offender meets all five of the following conditions: (1) the offender has no violent prior record; (2) the current offense did not involve violence or a firearm; (3) the current offense did not result in a serious injury or death; (4) the offender was not a leader in the current offense, nor a part of a continuing criminal enterprise; and (5) the offender cooperates to the fullest ability. This statute may be applied even when the offender has not been observed actively trying to manufacture, sell, or distribute the methamphetimine. Under Virginia case law, when the intent to distribute is based upon circumstantial evidence, *Hunter v. Commonwealth* (213 Va. 569, also see *Dukes v. Commonwealth,* 227 Va. 119) found that "... quantity, when greater than the supply ordinarily possessed by a narcotics user for his personal use, is a circumstance which, standing alone, may be sufficient to support a finding of intent to distribute." Thus, arresting an offender with 100 or more grams of methamphetimine, an amount that the General Assembly has implied under §18.2-248(H) to be significantly greater than a user's ordinary supply, should be sufficient to convict under the SABRE provisions.

Second, the distribution, sale, manufacture, or possession with intent to distribute, sell or manufacture 100 grams to less than 250 grams of methamphetimine or 200 grams to less than one kilograms of a mixture that includes methamphetimine as part of a continuing criminal enterprise is a felony carrying a penalty of 20 years to life. A 20-year sentence is mandatory, and cannot be suspended for any reason.

Third, the distribution, sale, manufacture, or possession with intent to distribute, sell or manufacture 250 or more grams of methamphetimine or one kilogram or more of a mixture that includes methamphetimine as part of a continuing criminal enterprise is a felony carrying a penalty of life. The life sentence is mandatory, and can be reduced to 40 years only under the condition of substantial cooperation. No further reduction is allowed under the SABRE provisions.

Fourth, under §18.2-248(C), the subsequent manufacture, sale, distribution, or possession with intent to manufacture, sell, or distribute a Schedule I or II drug (including methamphetimine) is a felony carrying a penalty of five years to life. The SABRE legislation added for the third or subsequent conviction, a mandatory minimum of three years, which cannot be suspended for any reason.

Fifth, transporting one ounce or more of a Schedule I or II drug into the Commonwealth is punishable under §18.2-248.01 as a felony for a term of five to forty years. Mandatory minimums were added for this crime by the SABRE legislation. A first conviction carries a three-year mandatory minimum term, while a subsequent conviction carries a 10-year mandatory minimum. In both instances, the mandatory minimum sentence cannot be suspended for any reason.

In sum, the crimes raised by the Northern Virginia Regional Drug Task Force are completely subsumed under the SABRE legislation. The Virginia Criminal Sentencing Commission already has a policy in place with respect to mandatory minimum sentences. Under the Commission's policy, those who prepare guidelines are instructed to replace any part of the sentencing guidelines recommendation that is less than an existing mandatory minimum with the mandatory minimum. Given the enactment of SABRE and the Commission's existing policy relating to mandatory minimum sentences, there should be no need for the Commission to enhance its recommended range of penalties further for crimes involving large amounts of methamphetimine.

Conclusion

The Commission has concluded that no further action regarding the sentencing guidelines for drug offenders is needed at this time. Existing data are inadequate to examine whether sentencing guidelines recommendations deter recidivism among drug offenders. Second, sentencing guidelines recommendations do not interfere with an offender's opportunity for substance abuse treatment. The judge, in Virginia, retains discretion to tailor an offender's sentence, conditions for supervision and treatment requirements. Once sentenced, each offender's program of treatment is tailored by the offender's addiction severity and the imposed criminal justice sanction. Indeed, treatment needs can vary considerably, therefore a uniform sentence recommendation may not be in the best interests of either the offender or the criminal justice system. However, the Commission has always taken the position that a judge should be provided with as much information as possible, so that the best sentencing decision can be made. Every felon should be subjected to a substance abuse screening, and, if necessary, assessment, prior to the sentencing hearing. However, under current practice, not all felons are screened and assessed prior to sentencing. Third, conclusions regarding the integration of substance abuse screening and assessment, criminal justice sanctions, and substance abuse treatment are premature. There are a number of recent

changes (some brought about by the SABRE legislation in July 2000) affecting integration that are not yet fully implemented. Furthermore, DCJS has been assigned the task to evaluate the screening and assessment program for the Interagency Drug Offender Screening and Assessment Committee.

The Commission actions indicate that its ongoing monitoring process is working well. Not only are problem areas being identified, but also the solutions appear to help bring the guidelines more in tune with current judicial thinking. Since 1996, the Commission has instituted enhanced sentence recommendations for sales-related offenses involving large amounts of cocaine, for the repeat sale of Schedule I or II drugs, and for the repeat possession of Schedule I or II drugs. It also has encouraged judges to consider alternatives to incarceration, by expanding the definition of compliance to include diversion sentences when recommended, for first-time drug offenders who sell small amounts of cocaine and for drug offenders whose risk to public safety, as measured by the Commission's risk assessment instrument, is small, so that these offenders can obtain needed treatment without occupying expensive prison beds. In response to the Northern Virginia Regional Drug Task Force, the Commission will also continue to monitor methamphetimine offenses. If large quantities of methamphetimines begin to appear in the circuit courts, the Commission may consider recommending revisions to the sentencing guidelines in the future.

Larceny and Fraud Study

Introduction

In the fall of 1999, concern over the impact on victims of larceny crimes involving high valued items prompted the Commission to undertake formal analysis of the connection between the value of items involved in larceny/fraud cases and sentencing. The purpose of the larceny/fraud project is to study the relationship between the value of money or property stolen in larceny and fraud cases and judges' sentencing decisions. The Commission could elect to add a factor for value of items stolen to the sentencing guidelines worksheets that would provide additional points in larceny/fraud cases involving high dollar amounts. This addition would result in a harsher sentencing recommendation. As the result of a 1997 study of embezzlement cases, the Commission added a factor to the larceny sentencing guidelines to increase the sentencing recommendation for offenders who embezzle large sums of money.

The remainder of the Larceny/Fraud Chapter is divided into three main sections. In the first, background information is provided in a summary of state larceny sentencing policies. The state summary includes discussion of felony larceny thresholds, the impact of inflation on thresholds, different types of systems used to address larceny crimes throughout the states, items and circumstances commonly excluded from larceny thresholds, and Virginia's larceny threshold. Next, the statistical analysis is presented. The analysis section begins with the methodology, moves on to the larceny results, and concludes with the fraud results. Finally, the Commission's plan of action is briefly highlighted.

Summary of State Larceny Policies

The purpose of this summary is to provide background information on larceny sentencing policies throughout the states. The definition of states for the purposes of this summary have been expanded to include Washington, DC, in addition to the 50 states, for a total number of 51 "states" surveyed. Some states' larceny sentencing practices are defined by statute, others are defined through sentencing guidelines, and some states combine statutes and sentencing guidelines to determine felony larceny sentencing policy. While this information has provided perspective to the larceny/fraud study, it also reveals a nearly unanimous precedent for connecting the value of items involved in a larceny case with the penalty for the crime.

Information on felony thresholds, that is the dollar value that determines whether a larceny offense is a misdemeanor or a felony, was derived primarily from statutes and sentencing guidelines in the individual states and was confirmed by experts within the states whenever possible. Economists from the U.S. Department of Labor, Bureau of Labor Statistics and the College of William and Mary, Public Policy Department were consulted regarding the methodology for adjustments to inflation.

Felony thresholds are the minimum dollar value of a stolen good or service that will result in an offender being charged with a felony. Statutes may require, or allow, application of different thresholds or penalties for specific items or situations that would supersede the general felony threshold (discussed below). Otherwise, the dollar value of a stolen good or service delineates a felony larceny from a misdemeanor larceny charge in most states.

With a median value of $500, the felony larceny thresholds range from $0 to $2,000 (Figure 65). The most common felony threshold, in use in 32% of states, is $500. This is followed by 24% of states with a felony larceny threshold of $1,000, and 16% of states with a felony larceny threshold of $250. At the time of this survey, 10% of states had a felony larceny threshold of $300. However, in October 2000, Maryland was scheduled to raise its threshold from $300 to $500. Only 4% of states have a felony larceny threshold of $200, including Virginia. The $0 felony threshold is in Indiana, where the threshold is defined by the intent to deprive another person of the property's value rather than a dollar value.

Figure 65

State Larceny Thresholds

Felony Threshold		State	Year	Threshold in 1999 dollars
$ 0		Indiana	1977	no $ threshold*
$ 50		Oklahoma	1982	$ 86
$ 200	2 states	Virginia	1980	$404
		New Jersey	1984	321
$ 250	8 states	Washington	1975	$774
		Alabama	1979	574
		Washington, DC	1982	432
		Massachusetts	1987	367
		New Mexico	1987	367
		Arizona	1989	336
		Nevada	1989	336
		Mississippi	1992	297
$ 300	5 states	Maryland	1978	$767
		Illinois	1982	518
		Florida	1986	456
		Hawaii	1986	456
		Kentucky	1992	356
$ 400		California	1982	$691
$ 500	16 states	Rhode Island	1915	$8,248
		Alaska	1977	1,375
		New Hampshire	1977	1,375
		North Dakota	1981	926
		Vermont	1981	926
		Georgia	1982	863
		Minnesota	1983	836
		Wyoming	1984	802
		Kansas	1988	704
		Tennessee	1989	672
		South Dakota	1990	637
		Nebraska	1992	594
		Arkansas	1995	547
		Ohio	1996	531
		Colorado	1998	511
		Louisiana	1999	500
$ 750	2 states	Oregon	1993	$865
		Missouri	1998	767
$1,000	12 states	Connecticut	1982	$1,726
		New York	1986	1,520
		North Carolina	1991	1,223
		Wisconsin	1991	1,223
		Iowa	1992	1,187
		South Carolina	1994	1,124
		West Virginia	1994	1,124
		Utah	1995	1,093
		Delaware	1996	1,062
		Idaho	1998	1,022
		Michigan	1999	1,000
		Montana	1999	1,000
$1,500		Texas	1993	$1,729
$2,000	2 states	Pennsylvania	1973	$7,505
		Maine	1995	2,186

A felony larceny threshold is the minimum dollar value of a good or service stolen that will result in an offender being charged with a felony.

* In Indiana, the threshold is defined by the intent to deprive the other person of the property's value.

In order to put the dollar value of felony larceny thresholds in perspective, the thresholds were inflated using the national average Consumer Price Index to reflect changes in the value of the felony larceny thresholds over time. The Consumer Price Index (CPI), produced by the U.S. Department of Labor, Bureau of Labor Statistics, is an indexation of the prices of goods and services over time. It tracks changes in prices of goods and services that enable one to determine the purchasing power of the dollar at a particular point of time relative to another point of time. The advantages of using the CPI are that it is directly linked to the types of items involved in larceny cases and it can be applied over all states. One disadvantage of using the national average CPI is that there are regional differences that can result in a slight overestimation or underestimation of the adjusted value. However, prices can differ even within a region or state where a single felony larceny threshold applies. For instance, within a state, a highly concentrated metropolitan area may experience different price patterns than a sparsely populated rural area; yet, the same threshold would apply within that state. Therefore, a slight variation in the valuation of items involved in larceny offenses is inevitable. Another concern about the use of the CPI is that prices for different products inflate at varying rates. For example, the price of a loaf of bread may increase faster or slower than the price of a computer. Since felony thresholds apply to all items not specifically excluded by statute, regardless of their rate of inflation, the Consumer Price Index for all items was applied.

The adjusted value represents the amount of money that it would take to buy a comparable bundle of items in 1999 that one could buy with the felony threshold dollar amount in the year the threshold was enacted, or in states where the policy was not immediately applicable, the date the policy went into effect. For example, in 1987, Massachusetts enacted a felony threshold of $250. To buy comparable items that cost $250 in 1987, it would have cost $367 in 1999.

Three states have policies that make direct comparison difficult: Indiana because of its definitional threshold based on intent, Pennsylvania because of its unique treatment of Class 1 misdemeanors, and Rhode Island because of its extremely early date of enactment. Prior to adjustment for inflation, the remaining states felony larceny thresholds range from $50 to $2,000, with a median (middle value) of $500. After adjusting for inflation, the range of felony larceny thresholds in the remaining states becomes $86 to $2,186, with a median, or middle value, of $766.56 (Figure 65).

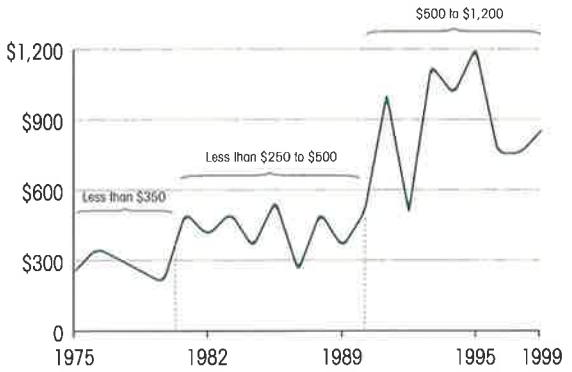
In general, felony threshold dollar amounts enacted have increased over time, consistent with concerns about the shrinking value of the dollar in reaction to inflationary pressures. In the past thirty years, 98% of states have increased their felony threshold. In the past decade, 43% of states have increased their felony threshold. Figure 66 tracks the means of newly enacted felony thresholds from 1975 to 1999 (excluding Indiana). All but two states, Rhode Island (1915) and Pennsylvania (1974) have enacted new felony thresholds during that period. Each state is only included once, for the year of their most recent change to the felony threshold. Therefore, some variation in the trend line occurs from year to year since states have enacted varying threshold values. During the 1970s, the mean thresholds enacted were always below $350. In the 1980s, the mean of newly enacted felony thresholds ranged from $250 to $500, and in the 1990s, they ranged from $500 to $1,200, showing a steady rise in the felony threshold value in the revised sentencing policies.

The felony threshold has remained stagnant in only two states. In Rhode Island, the felony threshold of $500 has been traced back to 1915 (Rhode Island State Librarian, May 2000). The other unusual case is Pennsylvania, where the $2,000 threshold was enacted in 1974. However, in Pennsylvania, a Class 1 Misdemeanor is punishable by up to five years in prison (Pennsylvania Sentencing Commission, May 2000). Therefore, due to the severity of punishment for a Class 1 misdemeanor, a direct comparison to other states is difficult.

Although all but one state, Indiana, has a felony dollar threshold for larceny, the individual approaches are unique and display complex characteristics (see Appendix 5). States vary in the way they classify felony larceny offenses, the dollar levels associated with each classification, the penalty range associated with each classification, and misdemeanor classes of related offenses. Still, two general groups can be formed: states with only a single value threshold and states with multiple value thresholds. These groups can be based on statutory definitions, which is the most common, or through sentencing guidelines structure.

Figure 66

Trend of Means of Newly Enacted Felony Thresholds by Year



Each state has been tracked with the exception of Rhode Island (enacted 1915), Pennsylvania (enacted 1974) and Indiana (enacted 1977). In 1976, 1985, and 1997 no felony threshold enactments were reported.

Of the 50 states plus Washington, DC, 16 have a single dollar threshold, meaning that there is a single dollar value that defines the severity level of larceny (Figure 67). The majority of single larceny thresholds (all but one) separate misdemeanor larceny from felony larceny. In Indiana, felony larceny is determined through intent, and then the offense is broken into two felony classes depending on whether the offense involved amounts of $100,000 or more. Since the felony class is divided rather than a single separation between misdemeanor and felony larceny, Indiana resembles the multiple threshold states.

Two-thirds of states have multiple larceny thresholds, that is, there is more than one dollar threshold to distinguish between larceny class or penalty range (Figure 68). More than 25% of states have two thresholds, more than 23% of states have three thresholds, and nearly 12% of states have four thresholds. Six percent of the states have five or more thresholds.

Not all larcenies are considered under dollar thresholds. There are items and circumstances that statutorily require or allow application of different thresholds or punishment. These exceptions include considerations related to the victim, the offender, business, and others (Figure 69).

Many states offer special protection to certain types of victims in larceny offenses. Most commonly, in 51% of the states including Virginia (§18.2-95(i)), a larceny from a person is excluded from the general larceny threshold. In 22% of the states, vulnerable persons, who can include the elderly, young, or impaired depending on the state, are excluded from the larceny threshold. Similarly, some states give vic-

Figure 67
Multiple/Single Threshold States

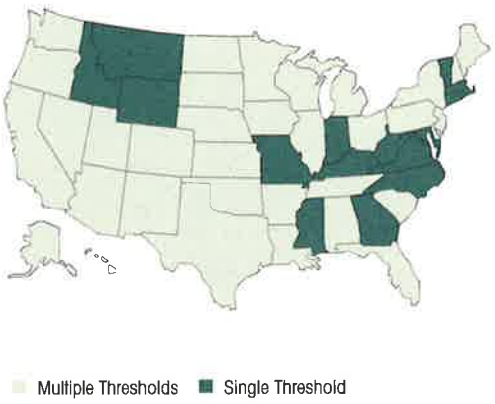
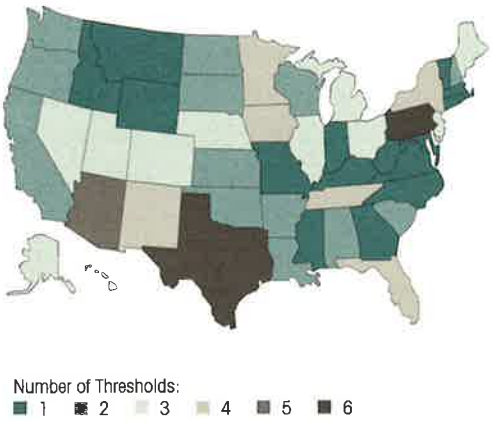


Figure 68
Number of Larceny Thresholds in States



tims in certain circumstances or places special protection. In places where a natural or man-made disaster has occurred, where the dead are buried or memorialized (or the dead as victims), and places of religious significance, larceny offenses are excluded from the threshold in some states.

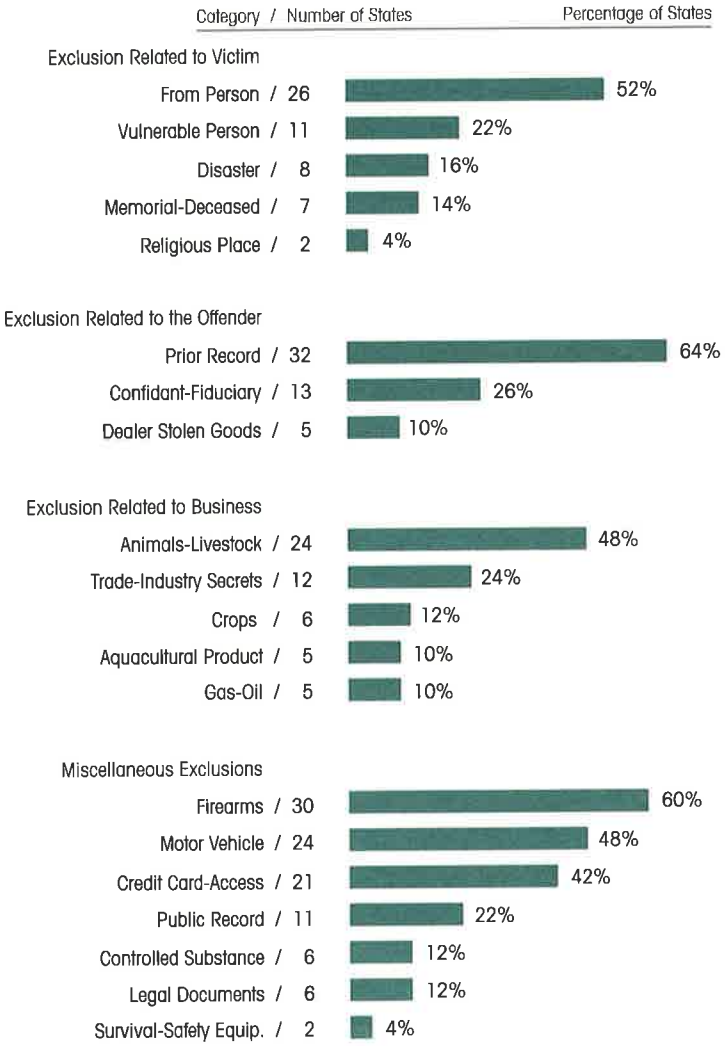
Characteristics of the offender may also cause exclusion from the larceny threshold. In 63% of states including Virginia, presence of a prior record can result in a harsher larceny penalty. For instance, in Virginia (§18.2-104), a third or subsequent petit larceny is considered a felony, although other states may use different criteria. Also, if the offender is a dealer of stolen goods or had a fiduciary relationship, or a relationship as a confidant, a harsher penalty could apply.

Other exclusions stem from business or production. Among these, 47% of states including Virginia (§18.2-97) apply different standards to larceny of animals and 24% of states apply different standards to larceny of trade or industry secrets. Exclusions also exist to protect the production and sales of gas and oil, aquacultural products, and, as in Virginia (§18.2-100), crops.

Fifty-nine percent of the states exclude larceny of a gun from the dollar threshold, as does Virginia (§18.2-95(iii)). Almost half of the states, 47%, have separate offenses for larceny of a motor vehicle. Along with Virginia (§18.2-98), 41% of states have separate offenses for larceny involving a credit card or other financial access information. Other items that are excluded from general larceny thresholds include survival or safety equipment, legal documents, controlled substances, and public records (Virginia §18.2-107).

Figure 69

Items and Circumstances Excluded from the General Felony Larceny Threshold



For exclusions listed here, statute requires or allows consideration under different value thresholds or punishment schemes than offenses considered under the general larceny threshold.

Virginia Larceny Policy

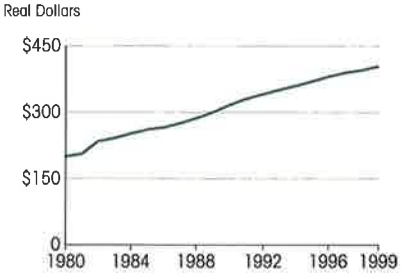
Since 1980, the threshold defining felony larceny has been $200. From 1966 to 1980, the felony larceny dollar threshold was $100.

Using the national average CPI, the value in 1999 of the felony larceny threshold in real dollars (adjusted for inflation) is $404.37 (Figure 70). Accounting for regional differences in inflation rates across the nation, the value of the felony larceny threshold in real dollars is $395.60.

The $200 felony larceny threshold established in 1980 is equivalent to approximately $400 today. Of all the felony larceny cases in the sample data, 22% are between $200 and $400, and of the larceny cases subject to the $200 threshold, 31% fall within the $200to $400 range. Similarly, 4.5% of all fraud cases in the sample involve values of $200 to $400. Of felony fraud cases with a threshold of at least $200 or more, 16% are within the $200 to $400 range.

Figure 70

Virginia Felony Larceny Threshold in Real Dollars



Real Dollars reflect inflation for each year shown.

Research Methodology

The Commission proposed to study the value of money or property stolen in larceny cases to determine if there is a relationship between value involved in these cases and sentencing outcomes. Later it was decided to conduct a similar analysis for fraud cases since many fraud offenses are deemed larceny by the Code of Virginia or are punishable as larcenies. The Commission was also aware that factors such as type of item stolen, location and duration of the offenses, number and type of victims, the offender's relationship to the victim, and restitution may have an impact on sentencing. Once a random sample of cases was selected, the Commission obtained supplemental information describing the total dollar value involved and the other factors of interest for these cases. All of the factors were analyzed simultaneously to model judicial sentencing practices and to determine whether the inclusion of additional factors significantly improved the accuracy of the model.

The Commission drew a random sample of felony larceny and fraud cases sentenced in calendar years (CY) 1998 and 1999 from the Commission's sentencing guidelines database. The Commission also has access to the Pre/Post-Sentence Investigation (PSI) database compiled and maintained by the Department of Corrections. The PSI database contains detailed information for most felony cases sentenced in Virginia's circuit courts. The PSI data, however, were potentially biased for this study because there are felony offenders for which no PSI report is ever prepared. The sentencing guidelines database contained 20% more larceny cases than the PSI.

Aware that some types of larceny and fraud offenses occur with relatively low frequency (for example, conversion of military property and utilities fraud), the Commission determined that a large sample was necessary so that all categories would be adequately represented. The Commission also realized that it would be difficult to obtain detailed supplemental information on all of the cases in the sample. This is particularly a problem when the offender received neither a prison sentence nor supervised probation. In other instances, the information could be omitted or unavailable. The Commission felt that the non-response rate could be as high as 25% in the cases selected. Therefore, the sample size was increased from 600 to 800 cases.

Embezzlement was excluded because the Commission studied embezzlement offenses in 1997. The focus of the study was on the theft of items of monetary benefit or personal property. Third or subsequent convictions for petit larceny or shoplifting with a value under $200 were excluded because it was felt that offenses typically involving lesser amounts of money would distort the study findings. Cases involving automobiles, such as grand larceny auto or unauthorized use, were also omitted. Automobiles are relatively high-dollar items that are nearly always insured. Judges, therefore, may consider non-monetary factors to be more important, such as the impact on the victim of losing one's sole means of transportation. The Commission felt that judges could weigh factors differently in cases involving automobiles, so these cases were removed from the sample. Forging a public record (driver's license, traffic ticket, summons, fingerprint card) was excluded because it does not involve a loss of property.

Figure 71

Larceny/Fraud Study Offenses

Larceny Offenses

- Grand larceny, $200 or more not from person
- Grand larceny, $5 or more from person
- Receive stolen goods, $200 or more
- Conceal, possess merchandise, shoplift, or alter price tags, $200 or more
- Fail to return leased personal property, $200 or more
- Receive stolen firearm
- Bank notes, checks, or any book of accounts, $200 or more
- Firearm, regardless of value, not from person
- Bailee, fail to return animal, etc., $200 or more
- Conversion by fraud, of property titled to another, $200 or more
- Animals (dog, horse, pony, mule, cow, steer, bull, calf)
- Military property, conversion value $200 or more
- Alter, deface, remove, possess serial number, value $200 or more
- Goods on approval, fail to pay or return goods, $200 or more
- Animals and poultry worth less than $200

Fraud Offenses

- Forgery
- Theft of credit card
- Obtain money by false pretenses, $200 or more
- Uttering
- Bad checks, $200 or more
- Fraudulently obtain welfare assistance, $200 or more
- Bad checks, two or more within 90 days, $200 or more
- Credit card fraud, $200 or more over a six-month period
- Forgery of credit card
- Forging coins or bank notes
- Unauthorized use of food stamps, $200 or more
- False statement to obtain property or credit, $200 or more
- False statement to obtain hotel/motel service etc., $200 or more
- Receive goods from credit card fraud, $200 or more
- Obtain signature to writing by false pretenses
- False statement to obtain utilities, TV, $200 or more
- Possess forged bank notes or coins, 10 or more

The remaining primary offenses eligible for selection are listed in Figure 71.

A random sample of 200 grand larceny cases and 600 other larceny and fraud cases was drawn for the study. This ensured adequate representation of offenses other than grand larceny in the sample. Overall, the study sample contained 342 larceny cases and 458 fraud cases.

Once the study sample was drawn, it was necessary to collect supplemental data describing the total value of stolen property and other factors of interest not contained in the automated data maintained by the Commission. These data were obtained from several different sources. Narratives from automated PSI reports keyed by probation officers provided information for cases sentenced after April 1999. Department of Corrections (DOC) central office files were used for prison cases sentenced prior to April 1999. DOC probation district files supplied data for cases sentenced to probation or jail prior to April 1999. Lastly, circuit court records were examined for cases in which a Pre/Post-Sentence report has not been done (usually due to the fact that the offender did not receive a prison sentence or supervised probation) or had not yet been completed. These data were obtained "from the field" via telephone/fax or visits to the circuit court by Commission staff.

Factors recorded as part of the supplemental data collection included total dollar value of stolen property, types of items stolen, location and duration of offenses, number and types of victims, physical injury to any victim, and the offender's relationship to the victims. Money or items recovered, damage to items, insurance coverage and deductibles for stolen items, the amount of restitution ordered (if any) at sentencing, and the status of restitution at sentencing were also recorded when available.

Analysis of the supplemental data revealed that certain cases were inappropriate for inclusion in the study. Fifty-one cases (33 larcenies, 18 frauds) of the original sample were subsequently dropped from the study. Thirty-four cases were dropped because the facts of the case did not fit the criteria for inclusion in the study. For example, some grand larceny cases actually involved auto theft. Another 11 cases were assigned the wrong Virginia Crime Code (VCC). For example, some cases involving forgery of a public record were erroneously coded as simple forgeries. Supplemental data were not available for six cases.

The study sample contained cases from all areas of the Commonwealth of Virginia. Figure 72 presents the distribution of study cases by judicial region. The geographical distribution of cases reflects the typical pattern seen for cases in the sentencing guidelines database.

The remaining 309 larceny cases and 440 fraud cases were analyzed separately to determine whether total dollar value or any other factors not currently accounted for by the guidelines were significantly related to sentencing decisions. Using actual sentencing data, three separate sentencing models were developed to examine three distinct sentencing decisions: the decision whether or not to sentence the offender to more than six months of incarceration, the decision to sentence an offender to probation or a jail term up to six months, and the sentence length decision for cases given an incarceration term in excess of six months. Each of these decisions was modeled and analyzed separately.

Figure 72

Distribution of Study Cases by Judicial Region

Region		Number	Percent
I	Southeastern Virginia	206	27.5%
II	Northern Virginia	168	22.4
III	I-95 Corridor	141	18.9
IV	Southwestern Virginia	54	7.2
V	South Central Virginia	111	14.8
VI	Shenandoah/Charlottesville	68	9.1
	Unknown	1	0.1
	Total	749	100.0%

Larceny Sample Characteristics

The value of items stolen is concentrated at the low end, with approximately 67% below $2,500 and nearly 39% below $500 (Figure 73). Values range from $5 to $75,000, with a median value (middle value, with half of the values above and half of the values below) of approximately $553. In almost 18% of cases, the exact dollar value was unknown. Often this occurs when the offender is apprehended immediately and the item is returned to the victim at the scene of the offense. In this situation, the value may not be recorded.

Items stolen include all items involved in the larceny offenses. Since a single offense could involve more than one type of item, the total number is more than the number of cases (370 types of items from 309 cases). Of the items stolen, the most frequent, nearly 28% was cash or some other monetary benefit. Next, at nearly 21%, was electronics, which could include car stereos, VCRs, and similar items. Clothing was nearly 18% of the items, jewelry approximately 8% of the items, and guns were 4.6% of the items. Nearly 9% of types of items were unknown. This typically occurs when the offender is caught immediately and the item is returned to the victim at the scene of the offense. Animals and services were less than one percent of the items each and motorcycles/ATVs, bikes, furniture, sporting equipment, computers, and food were one to slightly more than two percent of the items each.

Information about the location and duration of the offense was also collected. The most frequent location for a larceny offense, in more than half of the offenses, was a business, followed by a house at approximately 19%. Larceny in or from a vehicle was nearly 10% of the locations, in or from private property (other than a house or business) was nearly 7% of the locations, and in a street or park was 6.5% of the locations. Government offices, other, schools, and unknown locations are less than 2.5% each. All locations of offenses, including multiple locations for a single case, were recorded. Most larceny offenses, nearly 75%, were single day events. Nearly 11% of the offenses took place between one day and one month and nearly 7% between one month and six months. In only 1.2% of the cases, the offense went on for more than six months.

Several factors relating to victims were examined including the number of victims, victim injury, the type of victim, and the victim's relationship to the offender. In nearly 88% of the cases, there was only one victim. In 8% of the cases, there were two victims. Only 3% of the cases involved three or more victims. In 2% the number of victims was unknown. Victim injury

Figure 73

Larceny Sample Characteristics

Factor	Number	Percentage
Dollar Value of Items		
Below $200	15	4.9%
$200-500	104	33.7
$501-1,000	40	13.1
$1,001-2,500	48	15.6
$2,501-5,000	24	7.6
$5,001-10,000	10	3.2
$10,001-50,000	8	2.6
$50,001-100,000	2	0.8
Unknown	57	18.6
Types of Items Stolen		
Cash/Monetary	86	27.8%
Electronics	64	22.6
Clothing	55	17.8
Jewelry	25	8.1
Gun	14	4.6
Other	64	20.6
Unknown	27	8.9
Locations of Offenses		
Business	169	54.8%
House	59	19.2
Vehicle	30	9.6
Private Property	21	6.8
Street, Park, etc.	20	6.5
Duration of Offenses		
1 Day	231	74.8%
1 Day to 1 Month	33	10.6
1 to 6 Months	20	6.6
Unknown	19	6.2
Number of Victims		
One	271	87.6%
Two	24	7.6
Three	9	2.8
Victim Injury		
No Injury	283	91.7%
Injury	9	2.9
Unknown	17	5.4

Factor	Number	Percentage
Type of Victim		
Business	173	56.0%
Individual	132	42.6
Money/Items Recovered		
All	110	35.6%
Some	45	14.7
None	35	11.3
Unknown	119	38.5
Restitution Ordered		
Yes	134	43.3%
No	175	56.7
Status of Restitution at Time of Sentencing		
Full	6	1.8%
Some	11	3.6
None	184	59.5
Unknown	108	35.1
Offender Relationship to Victim		
Customer	130	42.2%
Stranger	43	13.9
Acquaintance	42	13.7
Employee	36	11.8
Family Member	11	3.6
Other	6	1.9
Unknown	42	13.7
Offender Age at Sentencing		
Below 25	96	31.1%
25-30	82	26.5
31-40	81	26.2
41-50	41	13.3
Over 50	9	2.9

Sentences	Range	Median
All Cases	0 - 10 yrs.	< 2 mos.
Probation/Incarceration up to 6 mos.	0 - 6 mos.	0 mos.
Incarceration > 6 mos.	8 mos. - 10 yrs.	1 yr. 10 mos.

was reported in nearly 3% of the cases, no victim injury was reported in nearly 92% of the cases, and in a little more than 5% of the cases, it was unknown whether a victim was injured. Since it was possible to have more than one victim in an offense, the types of victim number 322 from 309 larceny cases. The most common victim was a non-bank business, at 56%, followed by individuals, at nearly 43%. Government agencies and banks were approximately 2% of the victims, only 1% of the victim types were unknown, and less than 1% of victims were a school or church. Most frequently, in more than 42% of cases, the offender was a customer. Approximately 14% of the relationships were of an acquaintance or a stranger and nearly 12% were employees.

Henry Tazewell sat on the bench during a time of transition for the Virginia Supreme Court. He was appointed in 1777 to the General Court which later became the Supreme Court consisting of five judges. Tazewell became a member of this court in 1793. One year later he resigned to become a United States Senator.

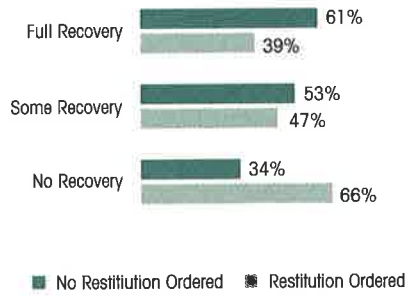
Just fewer than 4% of relationships were family members and authority figures or co-workers were less than 1% of the relationships each. Fifteen percent of the relationships between victim and offender were unknown.

Return of items stolen, either through recovery of the actual item, through insurance, or through financial restitution from the offender was also studied. Recovery of an item means that the item(s) stolen have been found and returned to the owner. The money or item stolen was completely recovered in nearly 36% of cases, some was recovered in nearly 15% of cases and none was recovered in approximately 11% of the cases. In one case (.2%) the item was reported as completely destroyed and in slightly more than 4% of cases, damage to items was reported. In more than 42% of cases, no damage was reported. However, in the majority of cases, 53%, it was not known whether damage occurred or not. Although the Commission attempted to collect information on insurance coverage, in over 95% of the cases it was not known whether items stolen were insured.

In nearly 57% of larceny cases sampled, restitution was not ordered, while in approximately 43% of cases the judge ordered the offender to pay restitution. Although the number of cases without restitution ordered seems high, restitution would not be expected in cases where the items were recovered unless there was damage. In cases where no recovery was made, restitution was ordered in nearly 66% of cases (Figure 74). Similarly, no restitution or compensation to the victim had been paid at the time of sentencing in nearly 60% of cases. Looking at just cases where restitution is ordered, this percentage drops to approximately 39% (Figure 75).

Figure 74

Restitution Ordered With Recovery of Items Stolen

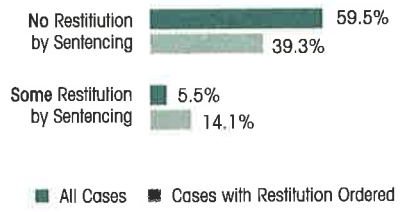


Nearly one-third (31%) of offenders were under age 25 at the time of conviction. As age increases, there are fewer offenders, with approximately 26% from ages 25 to 40, approximately 13% from ages 41 to 50, and only 3% over the age of 50.

Sentences ranged from 0 months to 10 years, with a median effective sentence (imposed sentence less any suspended time) of just under two months. In cases that received non-prison sanctions involving incarceration of six months or less, approximately 58% received no jail time. Of cases that received more than six months incarceration, sentences ranged from eight months to 10 years, with a median sentence of approximately one year, 10 months.

Figure 75

Restitution Status With Recovery of Items Stolen



Larceny Analysis

In / Out Decision:
The decision to incarcerate an offender for more than six months is referred to as the in/out decision. Using actual sentencing data, the Commission found that the current guidelines score models judges' in/out decisions with 93.92% accuracy. Factors gathered through supplemental data were added to try to improve on the predictive ability of the guidelines model. Although many variations of the factors dis-cussed were tried, none of the models with factors that were statistically significant could predict as accurately as the model with only the current guidelines score.

Probation / Incarceration Up to Six Months Decision:
The current sentencing guidelines for probation/incarceration up to six months decisions are 79.59% accurate. Two alternative models have been found that slightly improve on predictive ability (Figure 76). The first alternative model adds a factor for value of item(s) stolen of $2,500 or more and predicts with 81.76% accuracy. With this model, offenders who steal items valued at $2,500 or more are more likely to receive incarceration time than offenders who steal items of lesser value, given current guidelines scores. The second alternative model adds a factor for "at least some restitution made at time of sentencing" in addition to the factor for value of $2,500 or more. The second alternative model predicts with 82.4% accuracy. In the second model, offenders who steal items valued at $2,500 or more and/or offenders who paid no restitution by time of sentencing are more likely to receive incarceration time than offenders who steal items of lesser values or provide some compensation to the victim prior to sentencing.

Figure 76

Probation/Incarceration Up to Six Months Decision Models – Larceny Cases

Model	Factors
Guidelines Model	Current Guidelines Score
Alternative Model 1	Adds $2,500 or more
Alternative Model 2	Adds $2,500 or more Adds "at least some restitution made by time of sentencing"

Sentence Length Decision:
In modeling the sentence length decision for offenders receiving more than six months incarceration, the Commission found one model that slightly improves upon the model using only the current guidelines score. The alternative model increased explanatory power by six percentage points. In the alternative model, two factors are added. The first is a grouped value factor developed from statistical analysis of the value data (Figure 77). One concern about this factor is that the values of $5,001 to $10,000 are not included in the grouping because of a lack of data available for this range. However, close examination of the few cases available for this range reveal sentences consistent with the expected pattern. Thus, it is feasible to combine that range with the lower value range, to form the range of $2,501 to $10,000. The first factor indicates that offenders who steal higher valued items are more likely to receive longer prison sentences than offenders who steal items of lesser value, given current guidelines scores. The second factor is "item recovered or restitution made at time of sentencing." This factor considers whether recovery or some compensation to the victim was made by time of sentencing. If recovery was not made and/or the offender made no restitution by time of sentencing, the offender is more likely to receive a longer sentence than offenders who made restitution or had the items they stole recovered.

Figure 77
Sentence Length Decision Models – Larceny Cases

Model	Factors
Guidelines Model	Current Guidelines Score
Alternative Model 1	Adds Value Group:
	Less than $1,000
	$1,001 to 2,500
	$2,501 to 10,000
	More than $10,000
	Adds "item recovered or restitution made at time of sentencing"

Fraud Sample Characteristics

The distribution of total dollar values involved in the fraud cases covered a wide range. Values ranged from a minimum of $8 to a maximum of $70,000. The median value was $681. The proportion of values below $200 was 13%, somewhat higher than that observed in the larceny data (Figure 78). Over 50% of the cases had a dollar value at or below $1,000. Relatively few of these values were above $5,000 and the total dollar value was unknown in 15% of the fraud cases.

Nearly 95% of the fraud cases involved cash or monetary benefit, with only scattered responses observed for other types of items. Multiple responses were possible (although infrequent) for this factor, so the percentages in the graph do not sum to 100%.

Location and duration information was also collected for fraud cases. Offenses committed against a non-bank business were observed in approximately 70% of these cases. Offenses committed inside a house occurred in nearly 13% of the cases. Nearly 12% of the fraud cases listed an unknown location – the exact location of the offense was more difficult to identify in the fraud cases. These crimes rarely occurred on private property other than a house, on public, government, or school property, or in other locations. Nearly 57% of the fraud cases involved crimes of a single day's duration. Approximately one-fourth of the fraud offenses were from just over one day to one month's duration. Only 4% of these crimes involved durations exceeding six months.

Victim information, including the number of victims, injury to victims, type of victims, and relationship of victims to offenders were considered. Like the larcenies, the fraud cases were predominantly single victim offenses (79%). Multiple victims, however, were more frequent in fraud cases (20% versus 11% for larceny). Victim injury was extremely rare in fraud cases, occurring in only two cases (0.5%). The primary offenses in these two cases were credit card fraud ($200 or more) and bad checks ($200 or more). In both of these cases, the offender physically assaulted the victim but was not convicted of any additional charges. As with larcenies, individuals and businesses were most often targeted. Non-bank businesses were victims in 41% of the fraud cases, versus a corresponding rate of 56% in the larceny cases. However, banks and government agencies were more frequently the victims of frauds than larcenies. In over 50% of the fraud cases, offenders were customers of a bank or other business. Employee, stranger, and acquaintance relationships occurred with low frequency, while family member and co-worker relationships were relatively rare. Multiple relationships were possible for a case.

The status of items stolen, whether recovered, damaged, insured, or restitution was ordered, was examined as part of the fraud study. In nearly 45% of these cases, it was

Figure 78

Fraud Sample Characteristics

Factor	Number	Percentage
Dollar Value of Items		
Below $200	59	13.4%
$200-500	94	21.4
$501-1,000	81	18.4
$1,001-2,500	64	14.5
$2,501-5,000	39	8.9
$5,001-100,000	37	8.4
Unknown	66	15.0
Types of Items		
Cash	417	94.8%
Other	35	8.0
Unknown	3	0.7
Locations of Offenses		
Business	309	70.2%
House	57	13.0
Government	22	5.0
Other	23	5.2
Unknown	54	12.3
Duration of Offenses		
1 Day	252	57.3%
1 Day to 1 Month	101	22.9
1 to 6 Months	29	6.6
More than 6 Months	17	3.9
Over 1 Day but Unknown	6	1.3
Unknown	35	8.0
Restitution Ordered		
Yes	257	58.4%
No	183	41.6
Offender's Relationship to Victim		
Customer	234	53.2%
Acquaintance	44	10.0
Stranger	39	8.9
Employee	34	7.7
Family Member	21	4.8
Co-Worker	8	1.8
Other	42	9.5
Unknown	39	8.9

Factor	Number	Percentage
Number of Victims		
One	349	79.3%
Two	51	11.7
Three	19	4.3
Four	8	1.8
Five	1	0.2
More than Five	11	2.5
Unknown	1	0.2
Victim Injury		
No Injury	425	96.5%
Injury	2	0.5
Unknown	13	3.0
Type of Victims		
Individual	189	43.0%
Business	180	40.9
Bank	69	15.7
Government	27	6.1
Other/Unknown	9	2.0
Money/Items Recovered		
None	159	36.1%
Some	26	5.9
All	56	12.8
Unknown	199	45.2
Restitution at Sentencing		
None	214	48.6%
Some	16	3.7
Full	23	5.2
Unknown	187	42.5
Offender's Age		
Below 25	107	24.3%
25-30	110	25.0
31-40	146	33.2
41-50	69	15.7
Over 50	5	1.1
Unknown	3	0.7

Sentences

	Range	Median
All Cases	0 - 10.5 years	1 mos.
Probation/Incarceration up to 6 mos.	0 - 6 mos.	0 mos.
Incarceration > 6 mos.	7 - 10.5 years	1 year

unknown whether the item was recovered. Some money or items were recovered in about 6% of the cases and all money or items were recovered in 13% of the cases. Damage to money could only be verified in two fraud cases (0.5%). Of the remaining fraud cases, nearly 63% had no damage, and 37% were unknown. Information concerning insurance coverage in fraud cases was generally unknown unless restitution to the insurer was specified in the sentencing order or a Victim Impact Statement was available. Restitution was ordered in approximately 58% of the fraud cases. In contrast, restitution was ordered in nearly 43% of the larceny cases. Over 90% of the time, the status of restitution at the time of sentencing in the fraud cases was no restitution made or unknown. This was similar to the pattern observed in the larceny cases.

Approximately half of the offenders in fraud cases were age 30 or below. Nearly one-third of the offenders were between 31 and 40 years of age, and approximately 16% were between 41 and 50 years of age. Very few offenders were over age 50.

Sentences ranged from 0 months to 10.5 years, with a median effective sentence (imposed sentence less any suspended time) of one month. In fraud cases receiving probation or up to six months in jail, approximately 75% received no jail time. In fraud cases resulting in incarceration terms longer than six months, the sentences ranged from seven months to 10.5 years, with a median effective sentence of one year in prison.

Fraud Analysis

In / Out Decision:
When the decision is to incarcerate for more than six months or not, the guidelines model using only the worksheet score predicts outcome with 84.3% accuracy. Two other factors from the Commission's supplemental data were found to be significant in predicting the in/out decision: whether the offender's relationship to a victim is as a family member and whether a bank is a victim (Figure 79). An offender whose relationship is as a family member is less likely to receive a term in excess of six months, while an offender defrauding a bank would be more likely to receive such a sentence. An alternative model with these two additional factors increases predictive accuracy to 86.6% in the sample data.

Figure 79
In/Out Decision Models – Fraud Cases

Model	Factors
Guidelines Model	Current Guidelines Score
Alternative Model 1	Adds Relationship to Victim is Family Member Adds Type of Victim is Bank
Alternative Model 2	Adds Relationship to Victim is Family Member Adds $1,000 or more

A second alternative model includes the family relationship factor and a factor determining whether the dollar value of the crime is $1,000 or more. An offender whose crime exceeds the $1,000 level would be more likely to receive a prison term. However, this alternative model achieves only 85.9% accuracy. Both of these alternative models offer only a small increase in predictive power. In addition, it may be difficult to define and integrate the family relationship factor into the worksheet.

Probation / Incarceration Up to Six Months Decision:

Using only the current guidelines score, the sentencing guidelines model predicts outcome with 71.9% accuracy. The Commission found that two other factors were related to this decision: whether the offender is acquainted with a victim and whether the dollar value of the crime is $500 or more (Figure 80). Both factors make it more likely for the offender to receive an incarceration sentence. The acquaintance relationship factor was more strongly related to outcome than the dollar value $500 or more factor. An alternative model adding the acquaintance relationship factor predicts with 74.8% accuracy in the sample data. A second alternative model adding the dollar value $500 or more factor as well as the acquaintance relationship factor predicts outcome with 75.2% accuracy, but this is a gain of less than one-half of one percent over the model adding only the acquaintance relationship.

Figure 80

Probation/Incarceration Up to Six Months Decision Models – Fraud Cases

Model	Factors
Guidelines Model	Current Guidelines Score
Alternative Model 1	Adds Relationship to Victim is Acquaintance
Alternative Model 2	Adds Relationship to Victim is Acquaintance Adds $500 or more

Fifty-two percent (12 out of 23) of the offenders acquainted with a victim received an incarceration term, versus a corresponding rate of 22% (55 out of 251) for non-acquainted offenders. The rather high rate of incarceration sentences in offenders acquainted with a victim may be due to the small sample size in that subgroup. Having the same trend with a larger number of cases would constitute stronger evidence.

Like the family relationship factor, acquaintance may be difficult to define and implement on the worksheet. It would exclude family members, members of the same church or club, co-workers, employees, strangers, and customers. These relationships have been separately recorded in the Commission's supplemental data collection. They were tested and found not significantly related to outcome. Acquaintances may include neighbors or other individuals slightly known by the victim.

Sentence Length Decision:
The Commission first modeled effective sentence length for offenders sentenced to more than six months incarceration using only the current guidelines recommendation. Analysis produced an alternative model adding two factors: an acquaintance relationship and total dollar value from $2,501 to $5,000 (Figure 81). Among these cases, the acquaintance relationship is associated with a more lenient sentence, the opposite of the result in the analysis for probation/incarceration up to six months. On the other hand, offenders with crimes in the $2,501 to $5,000 range would receive harsher sentences. These offenders tended to receive longer sentences in the sample data – however, there were only 14 cases in this range. This alternative model offers a four percentage point improvement in explanatory power over the current guidelines model.

Figure 81
Sentence Length Decision Models – Fraud Cases

Model	Factors
Guidelines Model	Current Guidelines Score
Alternative Model 1	Adds Relationship to Victim is Acquaintance Adds $2,501 to $5,000

Commission Action

The Commission has taken the results of the larceny/fraud study under consideration. Further evaluation of these results and any recommendations based on them will be important items on the Commission's agenda for 2001.

Impact of Truth-in-Sentencing

Introduction

In the more than five years since the inception of Virginia's truth-in-sentencing system, the Commission has continually examined the impact of truth-in-sentencing laws on the criminal justice system in the Commonwealth. Legislation passed by the General Assembly in 1994 radically altered the way felons are sentenced and serve incarceration time in Virginia. The practice of discretionary parole release from prison was abolished, and the existing system of awarding inmates sentence credits for good behavior was eliminated.

Virginia's truth-in-sentencing laws mandate sentencing guidelines recommendations for violent offenders (those with current or prior convictions for violent crimes) that are significantly longer than the terms violent felons typically served under the parole system, and the laws require felony offenders, once convicted, to serve at least 85% of their incarceration sentences. Since 1995, the Commission has carefully monitored the impact of these dramatic changes on the state's criminal justice system. Overall, judges have responded to the sentencing guidelines by complying with recommendations in three out of every four cases, inmates are serving a larger proportion of their sentences than they did under the parole system, violent offenders are serving longer terms than before the abolition of parole, the inmate population is not growing at the record rate of the early 1990s, and the numbers and types of alternative sanction programs have been expanded to provide judges with numerous sentencing options. Nearly six years after the enactment of truth-in-sentencing laws in Virginia, there is substantial evidence that the system is achieving what its designers intended.

Impact on Percentage of Sentence Served for Felonies

The reform legislation that became effective January 1, 1995, was designed to accomplish several goals. 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 in prison. Prior to 1995, extensive good conduct credits combined with the granting of parole resulted in many inmates serving as little as one-fourth of the sentence imposed by a judge or a jury. Today, under the truth-in-sentencing system, parole release has been eliminated and each inmate is required to serve at least 85% of his sentence. The system of earned sentence credits in place since 1995 limits the amount of time a felon can earn off his sentence to 15%.

The Department of Corrections (DOC) policy for the application of earned sentence credits specifies four different rates at which inmates can earn credits: 4½ days for every 30 served (Level 1), three days for every 30 served (Level 2), 1½ days for every 30 served (Level 3) and zero days (Level 4). 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.

Analysis of earned sentenced credits being accrued by inmates sentenced under truth-in-sentencing provisions and confined in Virginia's prisons on December 31, 1999, reveals that almost half (48.5%) are earning at Level 2, or three days for every 30 served (Figure 82). Only 31.5% of inmates are

Figure 82

Levels of Earned Sentence Credits among Prison Inmates (December 31, 1999)

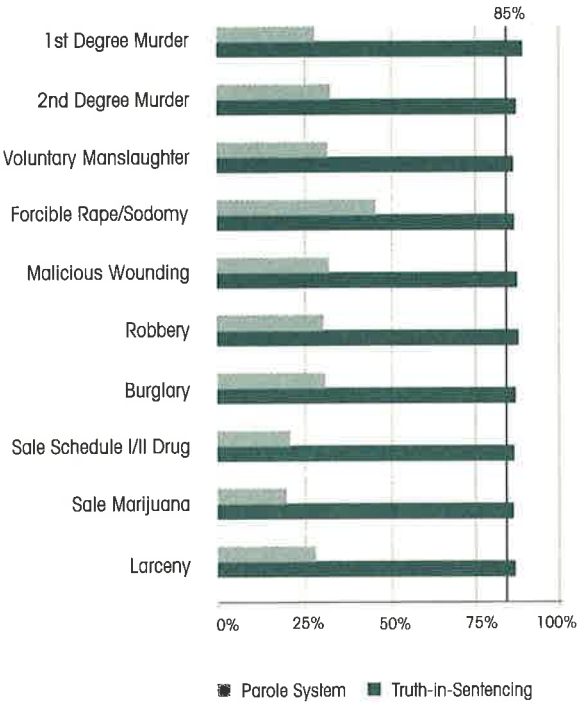
Level	Days Earned	Percent
Level 1	4.5 days per 30 served	31.5%
Level 2	3.0 days per 30 served	48.5
Level 3	1.5 days per 30 served	8.7
Level 4	0 days	11.3

earning at the highest level, Level 1, gaining 4½ days for every 30 served. A much smaller proportion of inmates are earning at Levels 3 and 4. About 9% are earning 1½ days for every 30 served (Level 3), while 11% are earning no sentence credits at all (Level 4). Based on this one-day "snapshot" of the prison population, inmates sentenced under the truth-in-sentencing system are, on average, serving just under 91% of the sentences imposed in Virginia's courtrooms. The rates of earned sentence credits do not vary significantly across major offense groupings. For instance, larceny and fraud offenders, on average, are earning credits such that they are serving almost 91% of their sentences, while inmates convicted of robbery are serving about 92% of their sentences. Inmates incarcerated for drug crimes are serving 90%. The rates at which inmates were earning sentence credits at the end of 1999 closely reflect those recorded at the end of 1998.

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). Under the truth-in-sentencing system, first-degree murderers typically are serving 93% of their sentences in prison (Figure 83). Robbers, who on average spent less than one-third of their sentences in prison before being released under the parole system, are now serving nearly 92% of the sentences pronounced

Figure 83

Average Percent of Sentence Served – Parole System v. Truth-in-Sentencing



Parole system data represents FY1993 prison releases; truth-in-sentencing data is derived from rate of sentence credits earned among prison inmates as of December 31, 1999.

in Virginia's courtrooms. 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 almost 91% 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 90% 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 dramatically the gap between the sentence ordered by the court and the time actually served by a convicted felon in prison.

Impact on Incarceration Periods Served by Violent Offenders

Eliminating the practice of discretionary parole release and restructuring the system of sentence credits created a system of truth-in-sentencing in the Commonwealth and diminished the gap between sentence length and time served, but this was not the only goal of sentencing reform. 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 initial guidelines recommendations reflect the average incar-

ceration time served by offenders convicted of similar crimes during a period governed by parole laws, prior to the implementation of truth-in-sentencing.

The truth-in-sentencing guidelines were designed to recommend longer sentences for violent offenders without increasing the proportion of felons sentenced to prison, and judges have responded to the guidelines by complying with recommendations at very high rates, particularly in terms of the type of disposition recommended by the guidelines. Overall, since the introduction of truth-in-sentencing, offenders have been sentenced to incarceration in excess of six months slightly less often than recommended by the guidelines. For fiscal years (FY)1998 through 2000, the guidelines recommended that 78% of offenders convicted of crimes against the person serve more than six months, while 74% received such a sanction (Figure 84). The difference between recommended and actual rates of incarceration over six months has narrowed among person, property and drug crimes from last year. Over the last three fiscal years (FY1998-FY2000), the guidelines recommended 38% of property offenders for terms over six months and 34% of them were sentenced accordingly. For drug crimes, offenders were recommended for and sentenced to terms exceeding six months in 32% and 28% of the cases, respectively. Many property and drug offenders recommended by the guidelines to more than six months of incarceration in a traditional correctional setting have been placed in state and local alternative sanction programs instead. See *Impact on Alternative Punishment Options* in this chapter for information regarding alternative sanction programs under truth-in-sentencing.

Overall, 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.

Figure 84

Recommended and Actual Incarceration Rates for Terms Exceeding 6 Months by Offense Type, FY1998-FY2000

Type of Offense	Recommended	Received
Person	77.5%	73.8%
Property	37.5	34.2
Drug	31.5	28.3
Other	70.5	68.5

The crime of first-degree murder illustrates the impact of truth-in-sentencing on prison terms served by violent offenders. Under the parole system (1988-1992), offenders convicted of first-degree murder who had no prior convictions for violent crimes were released typically after serving twelve and a half years in prison, based on the time served median (the middle value, where half of the time served values are higher and half are lower). Under the truth-in-sentencing system (FY1998-FY2000), however, first-degree murderers having no prior convictions for violent crimes have been receiving sentences with a median time to serve of 35 years (Figure 85). In these cases, time served in prison has tripled under truth-in-sentencing.

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. The crime of first-degree murder can be used to demonstrate the impact of these prior record enhancements. First degree murderers with a less serious violent record (Category II), who served a median of 14 years when parole was in effect (1988-1992), have been receiving terms under truth-in-sentencing (FY1998-2000) with a median time to serve of nearly 61 years. Offenders convicted of first-degree murder who had a previous conviction for a serious violent felony (Category I

This discussion reports values of actual incarceration time served under parole laws (1988-1992) and expected time to be served under truth-in-sentencing provisions for cases sentenced in FY1998-FY2000. Time served values are represented by the median (the middle value, where half of the time served values are higher and half are lower). Truth-in-sentencing data includes only cases recommended for, and sentenced to, more than six months of incarceration.

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

Figure 85

First Degree Murder

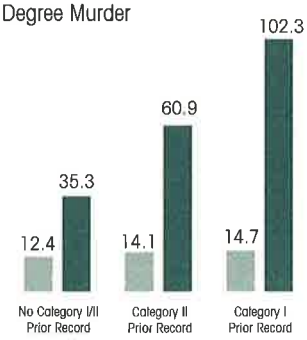


Figure 85 is not to scale with the following displays.

record) currently are serving terms with a median of 102 years under truth-in-sentencing, compared to the 15 years typically served during the parole era.

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 (1988-1992) (Figure 86). With the implementation of truth-in-sentencing (FY1998-FY2000), 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. For second-degree murderers with prior convictions for Category II violent crimes the impact of truth-in-sentencing is even more pronounced. Under truth-in-sentencing, these offenders are serving a median almost 25 years, or nearly four times the historical time served. The median sentence of 18 years for second-degree murders with a Category I prior record looks out of synch. However, it is important to note that there are so few offenders in this group that a few cases can skew the data. In fact in FY2000, there was one offender with a Category I prior record convicted of second-degree murder.

The impact of truth-in-sentencing is also evident in cases of voluntary manslaughter. For voluntary manslaughter, offenders sentenced to prison typically served two to three years under the parole system (1988-1992), regardless of the nature of their prior record (Figure 87). Persons with no violent prior record convicted of voluntary manslaughter under truth-in-sentencing (FY1998-FY2000) are serving more than twice as long as these offenders served historically. For those who do have previous convictions for violent crimes, median expected lengths of stay have risen to seven and nine years under truth-in-sentencing, depending on the seriousness of the

Figure 86
Second Degree Murder

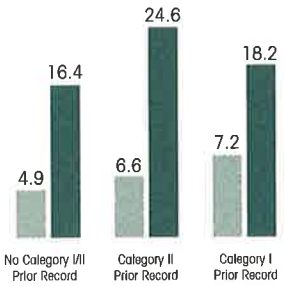
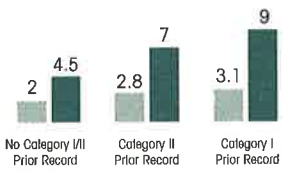


Figure 87
Voluntary Manslaughter



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

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

■ Parole System
■ Truth-in-Sentencing

offender's prior record. Offenders convicted of voluntary manslaughter today are serving prison terms two to three times longer than those served when parole was in effect.

The impact of sentencing reform on time served for rape and other sex crimes has been profound. 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 by only one year (Figure 88). Under sentencing reform (FY1998-FY2000), rapists with no previous record of violence are being sentenced to terms with a median nearly twice the historical time served. 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 seven years they served prior to sentencing reform. For those with a more serious violent prior record (Category I), such as a prior rape, the sentences imposed under truth-in-sentencing are equivalent to time to be served of 27 years, which is more than four times longer than the prison term served by these offenders historically.

The impact of truth-in-sentencing on forcible sodomy cases exhibits a pattern very similar to rape cases. Historically, under the parole system, offenders convicted of forcible sodomy served a median of four and a half to five and a half years in prison, even if they had a prior conviction for a serious violent felony (Figure 89). Recommendations of the truth-in-sentencing guidelines have led to a significant increase in the median time to serve for this crime. Once convicted of forcible sodomy,

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

This discussion reports values of actual incarceration time served under parole laws (1988-1992) and expected time to be served under truth-in-sentencing provisions for cases sentenced in FY1998-FY2000. Time served values are represented by the median (the middle value, where half of the time served values are higher and half are lower). Truth-in-sentencing data includes only cases recommended for, and sentenced to, more than six months of incarceration.

Figure 88

Forcible Rape

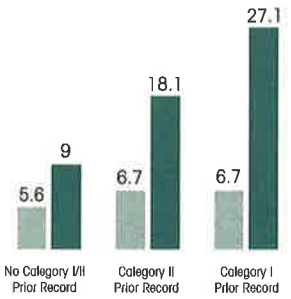
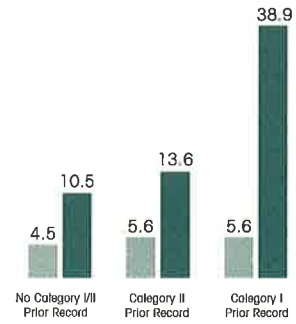


Figure 89

Forcible Sodomy



offenders can expect to serve terms typically ranging from 11 years, if they have no violent prior convictions, up to a median of 39 years if they have a Category I violent prior record.

Lengths of stay for the crime of aggravated sexual battery have also increased as the result of sentencing reform. Aggravated sexual battery convictions under the parole system (1988-1992) yielded typical prison stays of one to two years (Figure 90). In contrast, sentences handed down under truth-in-sentencing (FY1998-FY2000) are producing a median time to serve ranging from just under three years for offenders never before convicted of a violent crime, to over six years for batterers who have committed violent felonies in the past. In aggravated sexual battery cases, time served has more than doubled under truth-in-sentencing.

The tougher penalties specified by the truth-in-sentencing guidelines for offenders convicted of aggravated malicious injury, which results in the permanent injury or impairment of the victim, have yielded substantially longer prison terms for this crime. Offenders convicted of aggravated malicious injury with no prior violent convictions, served, typically, less than four years in prison under the parole system (1988-1992), but sentencing reform (FY1998-FY2000) has resulted in a median term of nine years for these offenders (Figure 91). Likewise, the median length of stay for a conviction of aggravated malicious injury when an offender has a violent prior record has increased from four and a half years to 18 years for offenders with a Category II record and to 27 years when a Category I record is present.

Figure 90

Aggravated Sexual Battery

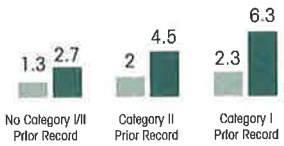
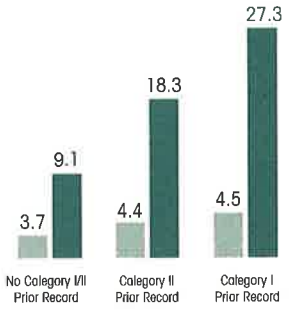


Figure 91

Aggravated Malicious Injury



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

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

Parole System

Truth-in-Sentencing

Sentencing in malicious injury cases demonstrates a similar pattern (Figure 92). Sentencing reform has more than doubled time served for those convicted of malicious injury who have no prior violent record or a less serious violent record (Category II), and almost tripled time served for those with the most serious violent record (Category I).

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 93). Even robbers with the most serious type of violent prior record (Category I) only served a little more than four years in prison, based on the median, prior to the sentencing reform and the introduction of the truth-in-sentencing guidelines. Today, however, offenders who commit robbery with a firearm are receiving prison terms that will result in a median time to serve of over six 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.

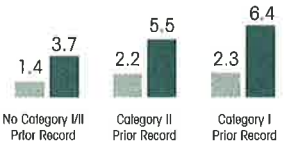
The truth-in-sentencing guidelines were formulated to target violent offenders for incarceration terms longer than those served under the parole system. The designers of sentencing reform defined a violent offender not just in terms of the current offense but in terms of the offender's entire criminal history. Any offender with a current or prior conviction for a violent felony is subject to enhanced recommendations under the truth-in-sentencing guidelines. Only offenders who have never been

This discussion reports values of actual incarceration time served under parole laws (1988-1992) and expected time to be served under truth-in-sentencing provisions for cases sentenced in FY1998-FY2000. Time served values are represented by the median (the middle value, where half of the time served values are higher and half are lower). Truth-in-sentencing data includes only cases recommended for, and sentenced to, more than six months of incarceration.

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

Figure 92

Malicious Injury



convicted of a violent crime are recommended for terms equivalent to the average time served historically by similar offenders prior to the abolition of parole.

Sentencing reform and the truth-in-sentencing guidelines have been successful in increasing terms for violent felons, including offenders whose current offense is nonviolent but who have a prior record of criminal violence. For example, for the sale of a Schedule I/II drug such as cocaine, the truth-in-sentencing guidelines recommend an incarceration term of one year (the midpoint of the recommended range) in the absence of a violent record, the same as what offenders convicted of this offense served on average prior to sentencing reform (1988-1992). In the truth-in-sentencing period (FY1998-FY2000), these drug offenders, in fact, are serving a median of just over one year (Figure 94). The sentencing recommendations increase dramatically, however, if the offender has a violent criminal background. Although drug sellers with violent criminal histories typically served only a year and a half under the parole system, the truth-in-sentencing guidelines recommend sentences which are producing prison stays of three to four and a half years (at the median), depending on the seriousness of prior record. Offenders convicted of selling a Schedule I/II drug who have a history of violence are serving two to three times longer under truth-in-sentencing than they did under the parole system.

In most cases of the sale of marijuana (more than $^{1}/_{2}$ ounce and less than five pounds), the sentencing guidelines do not recommend incarceration over six months, particularly if the offender has a minimal prior record, and judges typically utilize sentencing options other than prison when sanctioning these offenders, reserving prison for those believed to be least amenable to alternative punishment programs. Under truth-in-sentencing, offenders convicted of selling marijuana who receive sentences in excess of six months (the definition

Figure 93

Robbery with Firearm

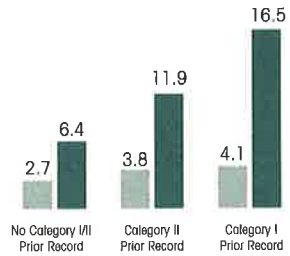
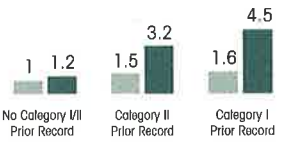


Figure 94

Sale of a Schedule I/II Drug



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

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

Parole System

Truth-in-Sentencing

of a prison sentence when the guidelines were implemented in 1995), despite having a nonviolent criminal record, have been given terms which, at the median, more than double historical time served during the parole era (Figure 95). For offenders who sold marijuana and have a prior violent record, the truth-in-sentencing guidelines have served to increase the time to be served. When sellers of marijuana have the most serious violent criminal history (Category I), judges have responded by handing down sentences which will yield a median prison term of over two years.

Similarly, in grand larceny cases, the sentencing guidelines do not recommend a sanction of incarceration over six months unless the offender has a fairly lengthy criminal history. When the guidelines recommend such a term and the judge chooses to impose such a sanction, grand larceny offenders with no violent prior record are being sentenced to a median term of just over one year (Figure 96). Offenders whose current offense is grand larceny but who have a prior record with a less serious violent crime (Category II) are serving twice as long after sentencing reform, with terms increasing from just under a year to just under two years. Their counterparts with the more serious violent prior records (Category I) are now serving terms of more than two years instead of the one year they had in the past.

The impact of Virginia's truth-in-sentencing system on the incarceration periods of violent offenders has been significant. The truth-in-sentencing data presented in this section provide evidence that the sentences imposed on violent offenders after sentencing reform are producing lengths of stay dramatically longer than those seen historically. Moreover, in contrast to the parole system, offenders with the most violent criminal records will be incarcerated much longer than those with less serious criminal histories.

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

Figure 95

Sale of Marijuana (More than 1/2 oz and less than 5 lbs)

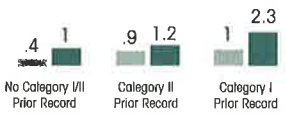


Figure 96

Grand Larceny

Impact on Projected Prison Bed Space Needs

During the development of sentencing reform legislation, much consideration was given as to how to balance the goals of truth-in-sentencing and longer incarceration terms for violent offenders with demand for expensive correctional resources. 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 to preserve 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.

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

In addition to affecting the composition of the prison population, truth-in-sentencing may have some impact on the size of the prison population since violent offenders are serving longer terms than they did prior to truth-in-sentencing reforms. Because sentencing reforms target violent offenders, who were already serving longer than average sentences, the full impact of longer lengths of stay for these offenders are not likely to have a noticeable impact until 2001 and after. To date, however, sentencing reform has not had the dramatic impact on the prison population that some

critics had once feared when the reforms were first enacted. Despite double-digit increases in the inmate population in the late 1980s and early 1990s, the number of state prisoners has grown much more slowly in recent years. As such, Virginia's official state responsible (i.e., prison) forecast for the year 2002 has been revised downward for the sixth consecutive year. Where the state once expected nearly 45,000 inmates in June 2002, the current projection for that date is 32,589, with a small increase to 33,900 by June of 2005. The forecast for state prisoners developed in 2000 projects average annual growth of only 1.46% over the next five years, with the largest single-year growth projected for FY2001 (Figure 97). Unanticipated drops in the number of admissions to prison in FY1994 and FY1995 fueled progressively lower forecasts starting in the mid-1990s. 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 violent offenders are serving much longer terms as the result of truth-in-sentencing reform, the prison population has not experienced sizeable growth since 1996.

Figure 97

Historical and Projected State Responsible (Prison) Population 1993-2005

	Date*	Inmates	Percent Change
Historical	1993	20,760	
	1994	23,648	13.9%
	1995	27,364	15.7
	1996	28,743	5.0
	1997	28,743	0.0
	1998	29,442	2.4
	1999	31,181	5.9
	2000	31,528	1.1
Projected	2001	32,071	1.7
	2002	32,589	1.6
	2003	33,037	1.4
	2004	33,538	1.5
	2005	33,900	1.1

*June figures are used for each year.

Impact on Alternative Punishment Options

When the truth-in-sentencing system was created, the General Assembly established a two level community-based corrections system. Reform legislation created 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 the state's violent offenders. Although the Commonwealth already operated some community corrections programs at the time truth-in-sentencing laws were enacted, a more comprehensive system was enabled through this legislation.

As part of the state community-based corrections network, two new cornerstone programs, the diversion center incarceration program and the detention center incarceration program, were authorized. The new programs, while they involve confinement, differ from traditional incarceration in jail or prison since they include more structured services designed to address problems associated with recidivism. These centers involve highly structured, short-term incarceration for felons deemed suitable by the courts and the Department of Corrections (DOC). Offenders accepted in these programs are considered probationers while participating in the program and the sentencing judge retains authority over the offender should he fail the conditions of the program or subsequent community supervision requirements. The detention center program features military-style management and supervision, physical labor in organized public works projects and such services as remedial education and substance abuse services. The diversion center program emphasizes assistance to the offender in securing and maintaining employment while also providing education and substance abuse services. In the more than five years since the new sentencing system became effective, the DOC has gradually established detention and diversion centers around the state as part of the community-based corrections system for state-responsible offenders.

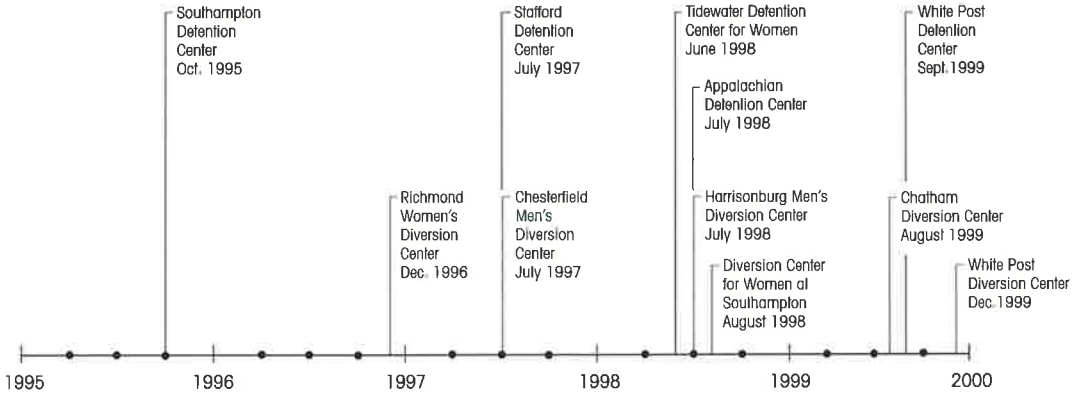
As of June 2000, DOC is operating five detention centers and six diversion centers throughout the Commonwealth (Figure 98). Given current bed space, detention centers collectively can handle 1,354 felony offenders annually, while diversion programs can serve 1,296 felons over the course of a year.

These two alternative punishment incarceration programs supplement the boot camp program which has been in operation since 1991. This program for young adult offenders is a military-style program focusing on drill and ceremony, physical labor, remedial education, and a drug education program. Young male offenders are received into the program once a month in platoons averaging about 30 each. Beginning January 1, 1998, the program was lengthened from three to four months making it more comparable in length to the detention and diversion center programs. With space for 100 young men, the boot camp program can graduate 300 felons annually. The few women referred and accepted to the program are sent to a women's boot camp facility in Michigan. According to management at DOC, generally, the detention center is the preferred alternative due to cost and logistics.

On June 30, 2000, 1071 probationers were in the detention center, diversion center, and boot camp programs, compared to around 824 offenders on the same date in 1999 and 500 offenders in June of 1998. The diversion center programs have been operating at full capacity while the detention center programs are functioning at near full capacity. In September of this year, 126 offenders had been accepted into one of these programs and were on waiting lists until openings could be made available.

Figure 98

Opening Date for Currently Operating Detention Centers and Diversion Centers 1995-2000



In addition to the alternative incarceration programs described above, the DOC operates a host of non-incarceration programs as part of its community-based corrections system. Programs such as regular and intensive probation supervision, home electronic monitoring, day reporting centers, and adult residential centers are an integral part of the system. Regular probation services have been available since the 1940's; intensive supervision, characterized by smaller caseloads and closer monitoring of offenders, was pilot tested in the mid 1980's. Intensive supervision is now an alternative in most of the state's 42 probation districts. Home electronic monitoring, piloted in 1990-1992, is now available in all probation districts, and is used in conjunction with intensive and conventional supervision. In addition, the Department currently operates ten day reporting centers, with an eleventh in the planning stage. With current capacity, day reporting programs can supervise up to 1,730 felons over the course of a year. These centers feature daily offender contact and monitoring as well as structured services, such as educational and life skills training programs. Offenders report each day to the center and are directed to any combination of education or treatment programs, to a community center work project, or a job. Day reporting centers are considered a more viable option in urban rather than rural areas since offenders must have transportation to the center.

In addition to day reporting centers DOC also operates 10 residential centers around the state for inmates transitioning back to the community, which together can serve 800 offenders a year.

Day reporting centers in Richmond, Newport News/Hampton, Norfolk, and Roanoke, along with districts in Charlottesville and Fredericksburg are providing interactive services with their respective circuit courts to support "Drug Court" programs. Of the seven Drug Court programs operating in circuit courts, Norfolk is the only program that is strictly post-adjudication model. In exchange for participating in and completing the drug court program (treatment, drug screens, employment or school, etc.), a convicted offender can receive a reduced sentence. The other programs are a combination of post-adjudication, pre-adjudication and first time offender models. In these six Drug Court programs (Richmond, Newport News, Roanoke, Charlottesville, Chesterfield and Colonial Heights, and the Rappahannock region), an offender may have a conviction reduced, or have no conviction entered into record and the charge dismissed/reduced upon successful completion of the program, or treated as a first offender. At the end of 2000, there are seven additional Drug Court programs in the planning stage.

In addition to expanding the network of state-run community corrections programs, the General Assembly also established a more intricate network of local community corrections programming as an integral part of reform legislation. In 1994, the General Assembly created the Comprehensive Community Corrections Act for Local-Responsible Offenders (CCCA) and the Pre-Trial Services Act (PSA). These two acts gave localities authority to provide supervision and services for defendants awaiting trial and for offenders convicted of low-level felonies (Class 5 and Class 6) or misdemeanors that carry jail time. In order to participate, localities were required, by legislative mandate, to create Community Criminal Justice Boards (CCJBs) comprised of representatives of the courts (circuit court, general district court and juvenile and domestic relations court), the Commonwealth's Attorney's office, the police department, the sheriff's and magistrate's offices, the education system, the Department of Mental Health, Mental Retardation and Substance Abuse Services, and other organizations. The CCJBs oversee the local CCCA and PSA programs, facilitate exchange among criminal justice agencies and serve as an important local policy board for criminal justice matters. The Virginia Department of Criminal Justice Services provides technical assistance, coordinating services and, often, grant funding for local CCCA and PSA programs.

Impact on Incarceration of Nonviolent Offenders

With the 1994 reform legislation, the General Assembly expanded the system of local and state community corrections programs in Virginia. At the same time, the General Assembly charged the Commission to study the feasibility of placing 25% of property and drug offenders in alternative (non-prison) sanctions by using an empirically-based risk assessment instrument. Such an instrument is used to identify those offenders who are likely to present the lowest risk to public safety. After analyzing the characteristics and historical patterns of recidivism of larceny, fraud and drug offenders, the Commission developed a risk assessment tool for integration into the existing sentencing guidelines system which identifies those offenders recommended for a term of incarceration who have the lowest probability of being reconvicted of a felony crime within three years. These offenders are then recommended for sanctions other than traditional incarceration in prison.

Risk assessment can be viewed as an important component to help maximize the utilization of alternative punishments for nonviolent offenders while, at the same time, minimizing threat to public safety and reserving the most expensive correctional space for the state's violent offenders.

The risk assessment component of the guidelines system is currently being pilot tested in six circuits around the Commonwealth and is not yet operational statewide. The National Center for State Courts' preliminary evaluation of this instrument is included in the *Nonviolent Offender Risk Assessment* chapter of this report

Summary

In the sixth year of Virginia's comprehensive felony sentencing reform legislation, the overhaul of the felony sanctioning system continues to be a success. Offenders are serving approximately 90% of incarceration time imposed with violent felons serving significantly longer periods of incarceration than those historically served. At the same time, Virginia's prison population growth has continued to stabilized with a projected growth rate in the prison population of just 1.46% over the next five years. Part of the reduction in prison growth is due to the funding of intermediate punishment/treatment programs at a level to handle a capacity of approximately 8,400 felons annually. Thus nearly six years after the enactment of the sentencing reform legislation in Virginia, there is substantial evidence that the system is continuing to achieve what its designers intended.

Spencer Roane served on the Virginia Supreme Court from 1794 until his death in 1822. At 33, he was the youngest judge elected to the court. He was referred to as one of the most colorful figures in the history of Virginia jurisprudence. Roane also played an important role in the early history of the University of Virginia.

Recommendations of the Commission

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.

The Commission draws on several sources of information to guide its discussions about modifications to the guidelines system. Commission staff meet with circuit court judges and Commonwealth's Attorneys at various times throughout the year, and these meetings provide an important forum for input from these two groups. In addition, the Commission operates a "hot line" phone system staffed Monday through Friday, to assist users with any questions or concerns regarding the preparation of the guidelines. While the hot line has proven to be an important resource for guidelines users, it has also been a rich source of input and feedback from criminal justice professionals around the Commonwealth. Moreover, the Commission conducts 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 1999, utilizing the wealth of information available from a variety of sources, the Commission adopted six recommendations, all of which involved modifications to the guidelines worksheets. All six worksheet amendments became effective July 1, 2000, and are included in the Commission's 2000 manual edition. This year, the Commission has adopted 12 recommendations for modifications to the sentencing guidelines system. Each of these is described in detail on the pages that follow.

RECOMMENDATION 1

Amend the sentencing guidelines for rape and other sexual assault offenses by increasing the upper end of the guidelines range by 300% for offenders scoring 44 points or more on the sex offender risk assessment instrument developed by the Commission

Issue

Although guidelines account for prior criminal history and factors related to the offense before the court, existing guidelines do not explicitly account for risk of future dangerousness. The sex offender risk assessment instrument developed by the Commission can 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.

Analysis

In 1999, the Virginia General Assembly requested the Commission to develop a sex offender risk assessment instrument, based on the risk of re-offense, for utilization with the state's sentencing guidelines for sex offenses. In accordance with SJR 333 (1999 General Assembly), the Commission embarked on an empirical study of sex offenders convicted in the Commonwealth. Thus, the instrument constructed by the Commission reflects the characteristics and recidivism patterns of the population of felony sex offenders convicted and sentenced in Virginia. Although no risk assessment model can ever predict a given outcome with perfect accuracy, the Commission's instrument, overall, produces higher scores for the groups of offenders who exhibited higher recidivism rates during the period examined. In this way, the instrument developed by the Commission is indicative of offender risk of re-offense. The Commission found that every offender in the sample scoring 44 points or more on the risk assessment instrument recidivated within the study period. These offenders, predicted to be at the very highest risk level according to the Commission's instrument, failed after an average of less than two years in the community. See the *Sex Offender Risk Assessment* chapter of this report or the Commission's report entitled Assessing Risk Among Sex Offenders in Virginia for additional detail.

Currently, for each offender recommended for a term of incarceration that includes prison, the guidelines are presented to the judge in the form of a midpoint recommendation and an accompanying range (a low recommendation and a high recommendation). A judge sentencing an offender identified by the risk assessment instrument to be relatively high risk may decide that a longer sentence is needed in order to incapacitate the offender for a longer period. However, if the judge gives a sentence that exceeds the guidelines recommendation, he or she is considered out of compliance with the guidelines. Increasing the upper end of the range would pro-

vide judges the flexibility to sentence higher risk sex offenders to terms above the current 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 flexibility to evaluate the circumstances of each case.

Virginia's sentencing guidelines are discretionary; judges are not required to comply with the recommended sentence. Judges in the Commonwealth are free to depart from the guidelines when they feel circumstances warrant a sentence above or below the guidelines recommendation. Under §19.2-298.01, when sentencing outside the guidelines range, a judge is required only to provide a written explanation of the reason for the departure. Integrating sex offender risk assessment into Virginia's discretionary guidelines system can provide judges with an additional tool to assist them in formulating sentencing decisions in sex offense cases.

The Commission's proposal calls for increasing the upper end of the guidelines range for both Rape and Other Sexual Assault guidelines by 300% for offenders scoring 44 points or more on the risk assessment instrument. Under the proposal, the low end of the guidelines range and the midpoint recommendation would remain unchanged. Figure 99 demonstrates the effect of this

Figure 99

Proposed Modifications to the Rape Section C Recommendation Table

			Current High	Recommendation 1
	Sentence Range			Risk Assessment Score 44 or more
Score	Midpoint	Low	High	High
144	12 yr. 0 mo.	6 yr. 8 mo.	14 yr. 5 mo.	57 yr. 8 mo.
145	12 yr. 1 mo.	6 yr. 9 mo.	14 yr. 6 mo.	58 yr. 0 mo.
146	12 yr. 2 mo.	6 yr. 9 mo.	14 yr. 7 mo.	58 yr. 4 mo.
147	12 yr. 3 mo.	6 yr. 10 mo.	14 yr. 8 mo.	58 yr. 8 mo.
148	12 yr. 4 mo.	6 yr. 10 mo.	14 yr. 10 mo.	59 yr. 4 mo.
149	12 yr. 5 mo.	6 yr. 11 mo.	14 yr. 11 mo.	59 yr. 8 mo.
150	12 yr. 6 mo.	7 yr. 0 mo.	15 yr. 0 mo.	60 yr. 0 mo.
151	12 yr. 7 mo.	7 yr. 0 mo.	15 yr. 1 mo.	60 yr. 4 mo.
152	12 yr. 8 mo.	7 yr. 1 mo.	15 yr. 2 mo.	60 yr. 8 mo.
153	12 yr. 9 mo.	7 yr. 1 mo.	15 yr. 4 mo.	61 yr. 4 mo.
154	12 yr. 10 mo.	7 yr. 2 mo.	15 yr. 5 mo.	61 yr. 8 mo.
155	12 yr. 11 mo.	7 yr. 2 mo.	15 yr. 6 mo.	62 yr. 0 mo.
156	13 yr. 0 mo.	7 yr. 3 mo.	15 yr. 7 mo.	62 yr. 4 mo.
157	13 yr. 1 mo.	7 yr. 3 mo.	15 yr. 8 mo.	62 yr. 8 mo.
158	13 yr. 2 mo.	7 yr. 4 mo.	15 yr. 10 mo.	63 yr. 4 mo.
159	13 yr. 3 mo.	7 yr. 5 mo.	15 yr. 11 mo.	63 yr. 8 mo.
160	13 yr. 4 mo.	7 yr. 5 mo.	16 yr. 0 mo.	64 yr. 0 mo.
161	13 yr. 5 mo.	7 yr. 6 mo.	16 yr. 1 mo.	64 yr. 4 mo.
162	13 yr. 6 mo.	7 yr. 6 mo.	16 yr. 2 mo.	64 yr. 8 mo.
163	13 yr. 7 mo.	7 yr. 7 mo.	16 yr. 4 mo.	65 yr. 4 mo.
164	13 yr. 8 mo.	7 yr. 7 mo.	16 yr. 5 mo.	65 yr. 8 mo.
165	13 yr. 9 mo.	7 yr. 8 mo.	16 yr. 6 mo.	66 yr. 0 mo.
166	13 yr. 10 mo.	7 yr. 8 mo.	16 yr. 7 mo.	66 yr. 4 mo.
167	13 yr. 11 mo.	7 yr. 9 mo.	16 yr. 8 mo.	66 yr. 8 mo.
168	14 yr. 0.0 mo.	7 yr. 10 mo.	16 yr. 10 mo.	67 yr. 4 mo.

proposal on guidelines recommendations. The tables displayed in Figure 99 present portions of the Section C Recommendation Tables for both the Rape guidelines and the Other Sexual Assault guidelines. Guidelines preparers use these tables to look up the total score an offender receives on the prison sentence length worksheet (Section C) in order to find the guidelines midpoint recommendation and the accompanying recommended range. Although scores from seven to 600 are contained in the Rape Section C Recommendation Table in the sentencing guidelines manual, only scores from 144 through 168 are presented in Figure 99. This range of scores was selected because the median midpoint recommendation under the Rape guidelines is 13 years. Similarly, the scores of seven to 31 were selected for presentation in the Other Sexual Assault Section C Recommendation Table in Figure 99 because a large share of cases covered by the Other Sexual Assault guidelines receive recommendations with midpoints between seven months and two years, seven months. Selecting these portions of the tables demonstrates the impact of the Commission's proposals for typical cases.

As shown in Figure 99, for an offender scoring 44 or more on risk assessment, the upper end of the guidelines range would be higher than for an offender scoring below that level, even if both offenders had the same score on the current sentencing guidelines. With the additional information pro-vided by risk assessment, the judge could then use his or her discretion to sentence a sex offender considered a high risk for re-offense to a longer term of incarceration than the lower risk offender while remaining in compliance with the guidelines. The Commission estimates that a relatively small portion of sex offenders (4%) would qualify for the 300% increase in the upper end of the guidelines range.

Figure 99 continued

Proposed Modifications to the Other Sexual Assault Section C Recommendation Table

			Current High	Recommendation 1
	Sentence Range			Risk Assessment Score
Score	Midpoint	Low	High	44 or more High
7	0 yr. 7 mo.	0 yr. 7 mo.	1 yr. 2 mo.	4 yr. 8 mo.
8	0 yr. 8 mo.	0 yr. 7 mo.	1 yr. 3 mo.	5 yr. 0 mo.
9	0 yr. 9 mo.	0 yr. 7 mo.	1 yr. 4 mo.	5 yr. 4 mo.
10	0 yr. 10 mo.	0 yr. 7 mo.	1 yr. 4 mo.	5 yr. 4 mo.
11	0 yr. 11 mo.	0 yr. 7 mo.	1 yr. 5 mo.	5 yr. 8 mo.
12	1 yr. 0 mo.	0 yr. 7 mo.	1 yr. 6 mo.	6 yr. 0 mo.
13	1 yr. 1 mo.	0 yr. 7 mo.	1 yr. 8 mo.	6 yr. 8 mo.
14	1 yr. 2 mo.	0 yr. 7 mo.	1 yr. 10 mo.	7 yr. 4 mo.
15	1 yr. 3 mo.	0 yr. 7 mo.	2 yr. 0 mo.	8 yr. 0 mo.
16	1 yr. 4 mo.	0 yr. 7 mo.	2 yr. 2 mo.	8 yr. 8 mo.
17	1 yr. 5 mo.	0 yr. 7 mo.	2 yr. 4 mo.	9 yr. 4 mo.
18	1 yr. 6 mo.	0 yr. 8 mo.	2 yr. 6 mo.	10 yr. 0 mo.
19	1 yr. 7 mo.	0 yr. 9 mo.	2 yr. 8 mo.	10 yr. 8 mo.
20	1 yr. 8 mo.	0 yr. 9 mo.	2 yr. 9 mo.	11 yr. 0 mo.
21	1 yr. 9 mo.	0 yr. 10 mo.	2 yr. 10 mo.	11 yr. 4 mo.
22	1 yr. 10 mo.	0 yr. 10 mo.	2 yr. 11 mo.	11 yr. 8 mo.
23	1 yr. 11 mo.	0 yr. 11 mo.	3 yr. 0 mo.	12 yr. 0 mo.
24	2 yr. 0 mo.	1 yr. 0 mo.	3 yr. 2 mo.	12 yr. 8 mo.
25	2 yr. 1 mo.	1 yr. 1 mo.	3 yr. 3 mo.	13 yr. 0 mo.
26	2 yr. 2 mo.	1 yr. 1 mo.	3 yr. 5 mo.	13 yr. 8 mo.
27	2 yr. 3 mo.	1 yr. 2 mo.	3 yr. 6 mo.	14 yr. 0 mo.
28	2 yr. 4 mo.	1 yr. 3 mo.	3 yr. 8 mo.	14 yr. 8 mo.
29	2 yr. 5 mo.	1 yr. 4 mo.	3 yr. 9 mo.	15 yr. 0 mo.
30	2 yr. 6 mo.	1 yr. 5 mo.	3 yr. 11 mo.	15 yr. 8 mo.
31	2 yr. 7 mo.	1 yr. 6 mo.	4 yr. 1 mo.	16 yr. 4 mo.

RECOMMENDATION 2

Amend the sentencing guidelines for rape and other sexual assault offenses by increasing the upper end of the guidelines range by 100% for offenders scoring 34 to 43 points on the sex offender risk assessment instrument developed by the Commission

Issue

Although guidelines account for prior criminal history and factors related to the offense before the court, existing guidelines do not explicitly account for risk of future dangerousness. Recommendation 1 proposes increasing the upper end of the guidelines range for rape and other sexual offenders who score 44 points or more on the Commission's sex offender risk assessment instrument. A Commission study, however, revealed that offenders scoring 34 to 43 points on the instrument recidivate at a rate substantially higher than the overall average.

Analysis

In accordance with SJR 333 (1999 General Assembly), the Commission developed a risk assessment instrument for sex offenders, based on the risk of re-offense. The instrument constructed by the Commission, based on empirical study, reflects the characteristics and recidivism patterns of the population of felony sex offenders convicted and sentenced in Virginia. While all offenders scoring 44 points or more recidivated during the study period, the Commission's analysis also revealed that offenders scoring 34 to 43 points on the instrument recidivate at a rate substantially higher than the overall average. Nearly three out of four (71%) of offenders scoring 39 through 43 points on the risk assessment instrument recidivated. This rate is nearly twice the overall average recidivism rate of 37% found during the Commission's study.

As discussed in Recommendation 1, the Commission believes increasing the upper end of the range would provide judges the flexibility to sentence higher risk sex offenders to terms above the current 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 flexibility to evaluate the circumstances of each case. The Commission proposes increasing the upper end of the guidelines range for both Rape and Other Sexual Assault guidelines by 100% for offenders scoring 34 through 43 points on the risk assessment instrument. The

low end of the guidelines range and the midpoint recommendation would not be altered. Figure 100 shows the impact of Recommendation 2 together with Recommendation 1 on guidelines recommendations for offenders who score within the specified ranges on the risk assessment instrument. The tables shown in Figure 100 present portions of the Section C Recommendation Tables, which preparers use to translate the total score received on the prison sentence length worksheet (Section C) into the guidelines midpoint and accompanying recommended range. The selected portions demonstrate the impact of the Commission's proposals for typical cases. Based on Commission data, slightly more than one in five sex offenders (21%) would be subject to the 100% increase in the upper end of the guidelines range.

Figure 100

Proposed Modifications to the Rape Section C Recommendation Table

			Current High	Recommendation 2	Recommendation 1
				Risk Assessment Score	
Score	Sentence Range Midpoint	Low	High	34 to 43 High	44 or more High
144	12 yr. 0 mo.	6 yr. 8 mo.	14 yr. 5 mo.	28 yr. 10 mo.	57 yr. 8 mo.
145	12 yr. 1 mo.	6 yr. 9 mo.	14 yr. 6 mo.	29 yr. 0 mo.	58 yr. 0 mo.
146	12 yr. 2 mo.	6 yr. 9 mo.	14 yr. 7 mo.	29 yr. 2 mo.	58 yr. 4 mo.
147	12 yr. 3 mo.	6 yr. 10 mo.	14 yr. 8 mo.	29 yr. 4 mo.	58 yr. 8 mo.
148	12 yr. 4 mo.	6 yr. 10 mo.	14 yr. 10 mo.	29 yr. 8 mo.	59 yr. 4 mo.
149	12 yr. 5 mo.	6 yr. 11 mo.	14 yr. 11 mo.	29 yr. 10 mo.	59 yr. 8 mo.
150	12 yr. 6 mo.	7 yr. 0 mo.	15 yr. 0 mo.	30 yr. 0 mo.	60 yr. 0 mo.
151	12 yr. 7 mo.	7 yr. 0 mo.	15 yr. 1 mo.	30 yr. 2 mo.	60 yr. 4 mo.
152	12 yr. 8 mo.	7 yr. 1 mo.	15 yr. 2 mo.	30 yr. 4 mo.	60 yr. 8 mo.
153	12 yr. 9 mo.	7 yr. 1 mo.	15 yr. 4 mo.	30 yr. 8 mo.	61 yr. 4 mo.
154	12 yr. 10 mo.	7 yr. 2 mo.	15 yr. 5 mo.	30 yr. 10 mo.	61 yr. 8 mo.
155	12 yr. 11 mo.	7 yr. 2 mo.	15 yr. 6 mo.	31 yr. 0 mo.	62 yr. 0 mo.
156	13 yr. 0 mo.	7 yr. 3 mo.	15 yr. 7 mo.	31 yr. 2 mo.	62 yr. 4 mo.
157	13 yr. 1 mo.	7 yr. 3 mo.	15 yr. 8 mo.	31 yr. 4 mo.	62 yr. 8 mo.
158	13 yr. 2 mo.	7 yr. 4 mo.	15 yr. 10 mo.	31 yr. 8 mo.	63 yr. 4 mo.
159	13 yr. 3 mo.	7 yr. 5 mo.	15 yr. 11 mo.	31 yr. 10 mo.	63 yr. 8 mo.
160	13 yr. 4 mo.	7 yr. 5 mo.	16 yr. 0 mo.	32 yr. 0 mo.	64 yr. 0 mo.
161	13 yr. 5 mo.	7 yr. 6 mo.	16 yr. 1 mo.	32 yr. 2 mo.	64 yr. 4 mo.
162	13 yr. 6 mo.	7 yr. 6 mo.	16 yr. 2 mo.	32 yr. 4 mo.	64 yr. 8 mo.
163	13 yr. 7 mo.	7 yr. 7 mo.	16 yr. 4 mo.	32 yr. 8 mo.	65 yr. 4 mo.
164	13 yr. 8 mo.	7 yr. 7 mo.	16 yr. 5 mo.	32 yr. 10 mo.	65 yr. 8 mo.
165	13 yr. 9 mo.	7 yr. 8 mo.	16 yr. 6 mo.	33 yr. 0 mo.	66 yr. 0 mo.
166	13 yr. 10 mo.	7 yr. 8 mo.	16 yr. 7 mo.	33 yr. 2 mo.	66 yr. 4 mo.
167	13 yr. 11 mo.	7 yr. 9 mo.	16 yr. 8 mo.	33 yr. 4 mo.	66 yr. 8 mo.
168	14 yr. 0 mo.	7 yr. 10 mo.	16 yr. 10 mo.	33 yr. 8 mo.	67 yr. 4 mo.

As shown in Figure 100, for an offender scoring 34 through 43 points on risk assessment, the upper end of the guidelines range would be higher than for an offender scoring below that level, even if both offenders had the same score on the current sentencing guidelines. For those scoring 44 points or more, the upper end of the guidelines range would be considerably higher (see Recommendation 1). With the additional information provided by risk assessment, the judge could then use his or her discretion to sentence a sex offender considered a high risk for re-offense to a longer term of incarceration than the lower risk offender while remaining in compliance with the guidelines.

Figure 100 continued

Proposed Modifications to the Other Sexual Assault Section C Recommendation Table

			Current High	Recommendation 2	Recommendation 1
				Risk Assessment Score	
Score	Sentence Range Midpoint	Low	High	34 to 43 High	44 or more High
7	0 yr. 7 mo.	0 yr. 7 mo.	1 yr. 2 mo.	2 yr. 4 mo.	4 yr. 8 mo.
8	0 yr. 8 mo.	0 yr. 7 mo.	1 yr. 3 mo.	2 yr. 6 mo.	5 yr. 0 mo.
9	0 yr. 9 mo.	0 yr. 7 mo.	1 yr. 4 mo.	2 yr. 8 mo.	5 yr. 4 mo.
10	0 yr. 10 mo.	0 yr. 7 mo.	1 yr. 4 mo.	2 yr. 8 mo.	5 yr. 4 mo.
11	0 yr. 11 mo.	0 yr. 7 mo.	1 yr. 5 mo.	2 yr. 10 mo.	5 yr. 8 mo.
12	1 yr. 0 mo.	0 yr. 7 mo.	1 yr. 6 mo.	3 yr. 0 mo.	6 yr. 0 mo.
13	1 yr. 1 mo.	0 yr. 7 mo.	1 yr. 8 mo.	3 yr. 4 mo.	6 yr. 8 mo.
14	1 yr. 2 mo.	0 yr. 7 mo.	1 yr. 10 mo.	3 yr. 8 mo.	7 yr. 4 mo.
15	1 yr. 3 mo.	0 yr. 7 mo.	2 yr. 0 mo.	4 yr. 0 mo.	8 yr. 0 mo.
16	1 yr. 4 mo.	0 yr. 7 mo.	2 yr. 2 mo.	4 yr. 4 mo.	8 yr. 8 mo.
17	1 yr. 5 mo.	0 yr. 7 mo.	2 yr. 4 mo.	4 yr. 8 mo.	9 yr. 4 mo.
18	1 yr. 6 mo.	0 yr. 8 mo.	2 yr. 6 mo.	5 yr. 0 mo.	10 yr. 0 mo.
19	1 yr. 7 mo.	0 yr. 9 mo.	2 yr. 8 mo.	5 yr. 4 mo.	10 yr. 8 mo.
20	1 yr. 8 mo.	0 yr. 9 mo.	2 yr. 9 mo.	5 yr. 6 mo.	11 yr. 0 mo.
21	1 yr. 9 mo.	0 yr. 10 mo.	2 yr. 10 mo.	5 yr. 8 mo.	11 yr. 4 mo.
22	1 yr. 10 mo.	0 yr. 10 mo.	2 yr. 11 mo.	5 yr. 10 mo.	11 yr. 8 mo.
23	1 yr. 11 mo.	0 yr. 11 mo.	3 yr. 0 mo.	6 yr. 0 mo.	12 yr. 0 mo.
24	2 yr. 0 mo.	1 yr. 0 mo.	3 yr. 2 mo.	6 yr. 4 mo.	12 yr. 8 mo.
25	2 yr. 1 mo.	1 yr. 1 mo.	3 yr. 3 mo.	6 yr. 6 mo.	13 yr. 0 mo.
26	2 yr. 2 mo.	1 yr. 1 mo.	3 yr. 5 mo.	6 yr. 10 mo.	13 yr. 8 mo.
27	2 yr. 3 mo.	1 yr. 2 mo.	3 yr. 6 mo.	7 yr. 0 mo.	14 yr. 0 mo.
28	2 yr. 4 mo.	1 yr. 3 mo.	3 yr. 8 mo.	7 yr. 4 mo.	14 yr. 8 mo.
29	2 yr. 5 mo.	1 yr. 4 mo.	3 yr. 9 mo.	7 yr. 6 mo.	15 yr. 0 mo.
30	2 yr. 6 mo.	1 yr. 5 mo.	3 yr. 11 mo.	7 yr. 10 mo.	15 yr. 8 mo.
31	2 yr. 7 mo.	1 yr. 6 mo.	4 yr. 1 mo.	8 yr. 2 mo.	16 yr. 4 mo.

RECOMMENDATION 3

Amend the sentencing guidelines for rape and other sexual assault offenses by increasing the upper end of the guidelines range by 50% for offenders scoring 28 to 33 points on the sex offender risk assessment instrument developed by the Commission

Issue

Although guidelines account for prior criminal history and factors related to the current offense, existing guidelines do not explicitly account for risk of future dangerousness. Recommendations 1 and 2 propose increasing the upper end of the guidelines range for rape and other sexual offenders who score at least 34 points on the Commission's sex offender risk assessment instrument. In its study of sex offender recidivism, however, the Commission found that offenders scoring 28 to 33 points recidivate at a rate exceeding the overall average.

Analysis

In accordance with SJR 333 (1999 General Assembly), the Commission developed a risk assessment instrument for sex offenders, based on the risk of re-offense. The instrument constructed by the Commission, based on empirical study, reflects the characteristics and recidivism patterns of the population of felony sex offenders convicted and sentenced in Virginia. The Commission's data reveal that offenders scoring 28 to 33 points on the risk assessment instrument recidivated at a rate of 41%. This is higher than the overall average recidivism rate for convicted sex offenders, estimated by the Commission to be 37%.

As discussed in Recommendations 1 and 2, the Commission believes increasing the upper end of the range would provide judges the flexibility to sentence higher risk sex offenders to terms above the current guidelines range and still be in compliance with the guidelines. The Commission proposes increasing the upper end of the guidelines range for both Rape and Other

Sexual Assault guidelines by 50% for offenders scoring 28 through 33 points on the risk assessment instrument. This proposal would not affect the low end of the guidelines range and the midpoint recommendation provided under current guidelines. Figure 101 shows the impact of Recommendations 1, 2 and 3 on guidelines recommendations for offenders who score within the specified ranges on the risk assessment instrument. Figure 101 presents portions of the Section C Recommendation Tables, which provide the guidelines midpoint and accompanying recommended range associated with the total score computed on the prison sentence length worksheet (Section C), in order to demonstrate the impact of the Commission's proposals for typical cases. The Commission estimates that more than one in five sex offenders (22%) would be affected by the 50% increase in the upper end of the recommended range.

Figure 101

Proposed Modifications to the Rape Section C Recommendation Table

			Current High	Recommendation 3	Recommendation 2	Recommendation 1
			Risk Assessment Score			
Score	Sentence Range Midpoint	Low	Up to 27 High	28 to 33 High	34 to 43 High	44 or more High
144	12 yr. 0 mo.	6 yr. 8 mo.	14 yr. 5 mo.	**21 yr. 8 mo.**	28 yr. 10 mo.	57 yr. 8 mo.
145	12 yr. 1 mo.	6 yr. 9 mo.	14 yr. 6 mo.	**21 yr. 9 mo.**	29 yr. 0 mo.	58 yr. 0 mo.
146	12 yr. 2 mo.	6 yr. 9 mo.	14 yr. 7 mo.	**21 yr. 11 mo.**	29 yr. 2 mo.	58 yr. 4 mo.
147	12 yr. 3 mo.	6 yr. 10 mo.	14 yr. 8 mo.	**22 yr. 0 mo.**	29 yr. 4 mo.	58 yr. 8 mo.
148	12 yr. 4 mo.	6 yr. 10 mo.	14 yr. 10 mo.	**22 yr. 3 mo.**	29 yr. 8 mo.	59 yr. 4 mo.
149	12 yr. 5 mo.	6 yr. 11 mo.	14 yr. 11 mo.	**22 yr. 5 mo.**	29 yr. 10 mo.	59 yr. 8 mo.
150	12 yr. 6 mo.	7 yr. 0 mo.	15 yr. 0 mo.	**22 yr. 6 mo.**	30 yr. 0 mo.	60 yr. 0 mo.
151	12 yr. 7 mo.	7 yr. 0 mo.	15 yr. 1 mo.	**22 yr. 8 mo.**	30 yr. 2 mo.	60 yr. 4 mo.
152	12 yr. 8 mo.	7 yr. 1 mo.	15 yr. 2 mo.	**22 yr. 9 mo.**	30 yr. 4 mo.	60 yr. 8 mo.
153	12 yr. 9 mo.	7 yr. 1 mo.	15 yr. 4 mo.	**23 yr. 0 mo.**	30 yr. 8 mo.	61 yr. 4 mo.
154	12 yr. 10 mo.	7 yr. 2 mo.	15 yr. 5 mo.	**23 yr. 2 mo.**	30 yr. 10 mo.	61 yr. 8 mo.
155	12 yr. 11 mo.	7 yr. 2 mo.	15 yr. 6 mo.	**23 yr. 3 mo.**	31 yr. 0 mo.	62 yr. 0 mo.
156	13 yr. 0 mo.	7 yr. 3 mo.	15 yr. 7 mo.	**23 yr. 5 mo.**	31 yr. 2 mo.	62 yr. 4 mo.
157	13 yr. 1 mo.	7 yr. 3 mo.	15 yr. 8 mo.	**23 yr. 6 mo.**	31 yr. 4 mo.	62 yr. 8 mo.
158	13 yr. 2 mo.	7 yr. 4 mo.	15 yr. 10 mo.	**23 yr. 9 mo.**	31 yr. 8 mo.	63 yr. 4 mo.
159	13 yr. 3 mo.	7 yr. 5 mo.	15 yr. 11 mo.	**23 yr. 11 mo.**	31 yr. 10 mo.	63 yr. 8 mo.
160	13 yr. 4 mo.	7 yr. 5 mo.	16 yr. 0 mo.	**24 yr. 0 mo.**	32 yr. 0 mo.	64 yr. 0 mo.
161	13 yr. 5 mo.	7 yr. 6 mo.	16 yr. 1 mo.	**24 yr. 2 mo.**	32 yr. 2 mo.	64 yr. 4 mo.
162	13 yr. 6 mo.	7 yr. 6 mo.	16 yr. 2 mo.	**24 yr. 3 mo.**	32 yr. 4 mo.	64 yr. 8 mo.
163	13 yr. 7 mo.	7 yr. 7 mo.	16 yr. 4 mo.	**24 yr. 6 mo.**	32 yr. 8 mo.	65 yr. 4 mo.
164	13 yr. 8 mo.	7 yr. 7 mo.	16 yr. 5 mo.	**24 yr. 8 mo.**	32 yr. 10 mo.	65 yr. 8 mo.
165	13 yr. 9 mo.	7 yr. 8 mo.	16 yr. 6 mo.	**24 yr. 9 mo.**	33 yr. 0 mo.	66 yr. 0 mo.
166	13 yr. 10 mo.	7 yr. 8 mo.	16 yr. 7 mo.	**24 yr. 11 mo.**	33 yr. 2 mo.	66 yr. 4 mo.
167	13 yr. 11 mo.	7 yr. 9 mo.	16 yr. 8 mo.	**25 yr. 0 mo.**	33 yr. 4 mo.	66 yr. 8 mo.
168	14 yr. 0 mo.	7 yr. 10 mo.	16 yr. 10 mo.	**25 yr. 3 mo.**	33 yr. 8 mo.	67 yr. 4 mo.

Together, Recommendations 1, 2 and 3 integrate sex offender risk assessment into the sentencing guidelines by providing a guidelines range that is linked to the offender's score on the risk assessment instrument. These recommendations specify increases in the upper end of the guidelines range in degrees based on the offender's score. Collectively, the Commission's recommendations for increasing the upper end of the guidelines range for higher-risk sex offenders is projected to impact approximately half (48%) of the rape and sexual assault cases covered by the sentencing guidelines.

Figure 101 continued

Proposed Modifications to the Other Sexual Assault Section C Recommendation Table

			Current High	Recommendation 3	Recommendation 2	Recommendation 1
			Risk Assessment Score			
Score	Sentence Range Midpoint	Low	Up to 27 High	28 to 33 High	34 to 43 High	44 or more High
7	0 yr. 7 mo.	0 yr. 7 mo.	1 yr. 2 mo.	1 yr. 9 mo.	2 yr. 4 mo.	4 yr. 8 mo.
8	0 yr. 8 mo.	0 yr. 7 mo.	1 yr. 3 mo.	1 yr. 11 mo.	2 yr. 6 mo.	5 yr. 0 mo.
9	0 yr. 9 mo.	0 yr. 7 mo.	1 yr. 4 mo.	2 yr. 0 mo.	2 yr. 8 mo.	5 yr. 4 mo.
10	0 yr. 10 mo.	0 yr. 7 mo.	1 yr. 4 mo.	2 yr. 0 mo.	2 yr. 8 mo.	5 yr. 4 mo.
11	0 yr. 11 mo.	0 yr. 7 mo.	1 yr. 5 mo.	2 yr. 2 mo.	2 yr. 10 mo.	5 yr. 8 mo.
12	1 yr. 0 mo.	0 yr. 7 mo.	1 yr. 6 mo.	2 yr. 3 mo.	3 yr. 0 mo.	6 yr. 0 mo.
13	1 yr. 1 mo.	0 yr. 7 mo.	1 yr. 8 mo.	2 yr. 6 mo.	3 yr. 4 mo.	6 yr. 8 mo.
14	1 yr. 2 mo.	0 yr. 7 mo.	1 yr. 10 mo.	2 yr. 9 mo.	3 yr. 8 mo.	7 yr. 4 mo.
15	1 yr. 3 mo.	0 yr. 7 mo.	2 yr. 0 mo.	3 yr. 0 mo.	4 yr. 0 mo.	8 yr. 0 mo.
16	1 yr. 4 mo.	0 yr. 7 mo.	2 yr. 2 mo.	3 yr. 3 mo.	4 yr. 4 mo.	8 yr. 8 mo.
17	1 yr. 5 mo.	0 yr. 7 mo.	2 yr. 4 mo.	3 yr. 6 mo.	4 yr. 8 mo.	9 yr. 4 mo.
18	1 yr. 6 mo.	0 yr. 8 mo.	2 yr. 6 mo.	3 yr. 9 mo.	5 yr. 0 mo.	10 yr. 0 mo.
19	1 yr. 7 mo.	0 yr. 9 mo.	2 yr. 8 mo.	4 yr. 0 mo.	5 yr. 4 mo.	10 yr. 8 mo.
20	1 yr. 8 mo.	0 yr. 9 mo.	2 yr. 9 mo.	4 yr. 2 mo.	5 yr. 6 mo.	11 yr. 0 mo.
21	1 yr. 9 mo.	0 yr. 10 mo.	2 yr. 10 mo.	4 yr. 3 mo.	5 yr. 8 mo.	11 yr. 4 mo.
22	1 yr. 10 mo.	0 yr. 10 mo.	2 yr. 11 mo.	4 yr. 5 mo.	5 yr. 10 mo.	11 yr. 8 mo.
23	1 yr. 11 mo.	0 yr. 11 mo.	3 yr. 0 mo.	4 yr. 6 mo.	6 yr. 0 mo.	12 yr. 0 mo.
24	2 yr. 0 mo.	1 yr. 0 mo.	3 yr. 2 mo.	4 yr. 9 mo.	6 yr. 4 mo.	12 yr. 8 mo.
25	2 yr. 1 mo.	1 yr. 1 mo.	3 yr. 3 mo.	4 yr. 11 mo.	6 yr. 6 mo.	13 yr. 0 mo.
26	2 yr. 2 mo.	1 yr. 1 mo.	3 yr. 5 mo.	5 yr. 2 mo.	6 yr. 10 mo.	13 yr. 8 mo.
27	2 yr. 3 mo.	1 yr. 2 mo.	3 yr. 6 mo.	5 yr. 3 mo.	7 yr. 0 mo.	14 yr. 0 mo.
28	2 yr. 4 mo.	1 yr. 3 mo.	3 yr. 8 mo.	5 yr. 6 mo.	7 yr. 4 mo.	14 yr. 8 mo.
29	2 yr. 5 mo.	1 yr. 4 mo.	3 yr. 9 mo.	5 yr. 8 mo.	7 yr. 6 mo.	15 yr. 0 mo.
30	2 yr. 6 mo.	1 yr. 5 mo.	3 yr. 11 mo.	5 yr. 11 mo.	7 yr. 10 mo.	15 yr. 8 mo.
31	2 yr. 7 mo.	1 yr. 6 mo.	4 yr. 1 mo.	6 yr. 2 mo.	8 yr. 2 mo.	16 yr. 4 mo.

RECOMMENDATION 4

Amend the sentencing guidelines for sexual assault offenses to ensure prison recommendations for all offenders scoring 28 or more on the Commission's sex offender risk assessment instrument

Issue

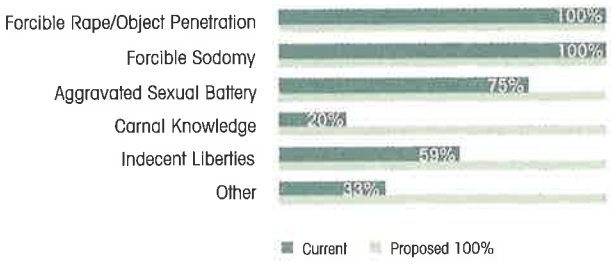
While offenders convicted for rape, forcible sodomy, and object sexual penetration are always recommended for a term of incarceration that includes prison time under current sentencing guidelines, this is not the case for offenders convicted of sex offenses with statutory maximum penalties of less than life. Because the current guidelines do not explicitly account for risk of future dangerousness, some offenders who are at high risk for re-offense are recommended for probation or short-term incarceration in jail.

Analysis

Offenders convicted of aggravated sexual battery, indecent liberties with children, carnal knowledge or other sexual assault felonies are not always recommended for a prison term by the guidelines, particularly if they have a minimal or no prior record. These offenders could, nonetheless, represent a relatively high risk of re-offending once factors found to be important in predicting recidivism are taken into account through risk assessment. The guidelines can be adjusted so that all high-risk offenders are recommended for a term of incarceration that includes prison time. For offenders scoring 28 or more points on its empirically-based risk assessment instrument, the Commission proposes adjusting the guidelines to always recommend a term of incarceration that includes prison. Offenders scoring less than 28 points on the risk assessment instrument would receive no sentencing guidelines adjustments. Figure 102 displays the effect of this proposal on guidelines recommendations by offense type.

Figure 102

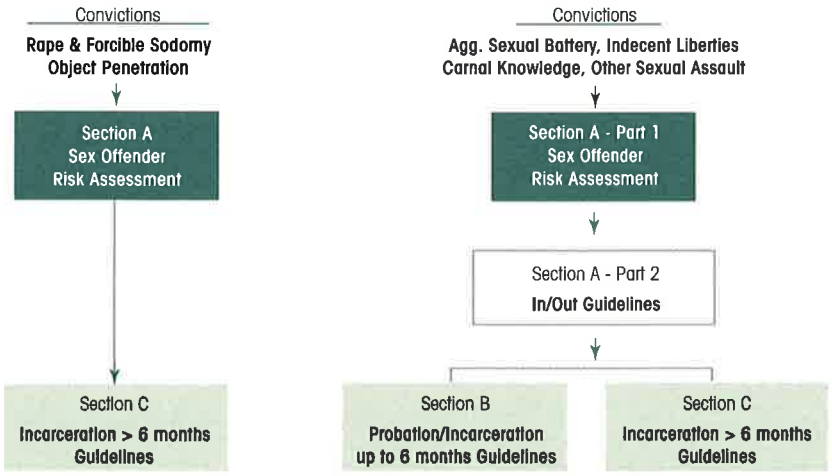
Offenders Scoring 28 or More on Risk Assessment: Percent Recommended for Prison



To implement the Commission's proposal and integrate sex offender risk assessment into the sentencing guidelines, the Rape and Other Sexual Assault worksheets must be modified (Figure 103). Because rape, forcible sodomy and object sexual penetration offenders are automatically recommended for incarceration that includes a prison term under current guidelines, there is no In/Out Decision (Section A) worksheet to complete. The sex offender risk assessment instrument would simply become a Section A worksheet for the Rape guidelines. For sex offenses covered by the Other Sexual Assault guidelines, the guidelines already include an In/Out Decision (Section A) worksheet. The sex offender risk assessment instrument would be inserted and labeled Section A – Part 1. The existing Section A under the Other Sexual Assault guidelines would be labeled Section A – Part 2. A new factor on the Section A – Part 2 worksheet, not scored under current guidelines, will ensure that offenders who score 28 points or more on risk assessment (Section A – Part 1) receive enough points to be recommended for a prison term (forcing the guidelines preparer to complete – Section C, the worksheet for incarceration greater than six months).

Figure 103

Addition of Sex Offender Risk Assessment to Sentencing Guidelines System



RECOMMENDATION 5

Amend §19.2-299 to require pre-sentence investigation reports in all felony sex offense cases

Issue

Under current law, pre-sentence investigation reports are not required in all cases involving rape and sex offenses. Assessment of risk using the Commission's sex offender risk assessment instrument depends on complete and accurate identification of prior arrests for crimes against the person, thorough knowledge of the offender's employment, education and treatment history, and detailed information related to the offense and the victim.

Analysis

Presently, §19.2-299 does not require pre-sentence investigation reports in all cases involving rape and sex offenses. However, assessment of risk using the Commission's instrument depends on a complete and accurate identification of prior arrests for crimes against the person (both adult and juvenile), including out-of-state arrests. When a pre-sentence investigation report is prepared, it is much more likely that a thorough and accurate criminal history check will be completed. Also, there is concern that if a pre-sentence investigation report is not ordered, some of the other factors in the risk assessment form may not be completed accurately (e.g., employment, education, prior treatment experience).

In FY1998, pre-sentence reports were prepared in approximately 72% of the 714 rape, forcible sodomy, object sexual penetration and felony sexual assault conviction cases in the Commonwealth. Under the Department of Corrections' present policy, if a pre-sentence report is not completed in a sex offender case and the offender receives either supervised probation or any prison incarceration time, a post-sentence investigation report must be prepared. Post-sentence investigations were completed in all or nearly all of the FY1998 sex offender cases processed without a pre-sentence report. Based on FY1998 experience, if pre-sentence investigations were required in all sex offender cases, approximately 196 post-sentence investigations would have to be completed prior to sentencing as pre-sentence reports.

In addition to providing valuable information for accurate completion of sex offender risk assessment, a pre-sentence report gives a judge a more thorough and comprehensive picture of the offender and establishes a context for the proper consideration and role of risk assessment. The impact of shifting to all pre-sentence reports in these cases likely would be negligible in any single jurisdiction.

RECOMMENDATION 6

Amend the sentencing guidelines to score any count of the primary offense not scored under the primary offense factor as an additional offense

Issue

Currently, in some cases, not all counts of the primary (i.e., most serious) offense are scored when multiple counts of the offense are combined into the same sentencing event. As a result, on some worksheets, an offender receives the same guidelines recommendation for multiple counts as he or she receives for one count of the primary offense. The guidelines have received some criticism for not making higher sentence recommendations in all cases involving multiple counts of the primary offense.

Analysis

Guidelines are designed to provide recommendations for the typical case. When the guidelines do not explicitly address multiple counts of the primary offense on a worksheet, it is an indication that the typical case does not involve multiple counts.

In fiscal year (FY) 2000, less than 2% of guidelines cases had multiple counts of the primary offense that were not scored on the current guidelines worksheets.

The Commission's proposal addresses the concern that the guidelines do not always recommend a higher sentence in cases with multiple counts of the primary offense. The proposed modification would require users to score counts of an offense not scored under the primary offense factor as additional offenses (Figure 104). This would eliminate the circumstance where offenders receive no additional points for multiple counts of the primary offense. Overall compliance for those recommended for a sentence over six months is projected to increase from 78% to 98% for the small number of cases impacted by this change.

Figure 104

Example of Current and Proposed Scoring of Multiple Counts of the Primary Offense: Forgery (Six Counts)

Current

Fraud Section C

Primary Offense

C. Welfare fraud or food stamp fraud ($200 or more)			
1 count	12	6	3
2 or more counts	20	10	5
D. Forging coins, checks or bank notes; Other writings; Uttering; Making or possessing forging instruments			
1 count	28	14	7
2-3 counts	32	16	8
4 or more counts	40	20	(10)

Additional Offenses

Maximum Penalty		
less than 10		0
10, 20		1
30		2
40 or more		3

Total Score for Primary Offenses: **10**

Proposed

Fraud Section C

Primary Offense

C. Welfare fraud or food stamp fraud ($200 or more)			
1 count	12	6	3
2 or more counts	20	10	5
D. Forging coins, checks or bank notes; Other writings; Uttering; Making or possessing forging instruments			
1 count	28	14	7
2-3 counts	32	16	8
4 or more counts	40	20	(10)

6 Counts

Additional Offenses

Maximum Penalty		
less than 10		0
10, 20		1 X2
30		2
40 or more		3

Total Score for Primary Offenses: **12**

RECOMMENDATION 7

Amend the murder/homicide sentencing guidelines to increase guidelines recommendations for completed second degree murder and felony homicide offenses.

Issue

Guidelines do not recommend sufficient prison time in second degree murder and felony homicide cases. Under current guidelines, all completed second degree murder and felony homicide cases are recommended for prison terms. However, judges are departing above the recommended guidelines range more often than they are sentencing within the range.

Analysis

According to the sentencing guidelines database, between FY1998 and FY2000 there were 187 completed second degree murder and felony homicide cases sentenced in the Commonwealth. In only 44% of the cases, judges agreed with the guidelines recommended range of incarceration. Thus, more than half the time judges disagreed with the guidelines recommendation and sentenced outside of the guidelines range of incarceration. Typically, judges sentenced above the guidelines recommended range of incarceration (46%), with only a small percentage of cases being sentenced below the guidelines recommended range (10%). Between FY1998 and FY2000, approximately one-third of all second degree murder and felony homicide cases were sentenced by jury trial. Sentences imposed by juries typically fall above the guidelines recommended range of incarceration, and this also holds true for second degree murder cases sentenced by juries. However, high aggravation rates in second degree murder cases are evident in non-jury trials as well.

Under current guidelines, when the primary offense is completed second degree murder or felony homicide, an offender with no prior violent felony convictions begins with a base midpoint of 133 months, or just over 11 years of incarceration. The guidelines recommended range for this offender, assuming all other factors on Section C of the murder/homicide worksheet (i.e., additional offenses, prior convictions, or legal restraint) score zero, falls between six years six months and fourteen years five months.

An analysis of second degree murder and felony homicide cases sentenced between FY1998 and FY2000 reveals that in cases involving non-jury trials in which the judge went above the guidelines recommended range, judges exceeded the upper end of the guidelines range by an average of six years. In these aggravating cases, judges most often cite extreme violence involved in the case, the victim's vulnerability, and the lack of remorse demonstrated

by the defendant as general reasons for sentencing above the guidelines recommended range. Although instant offense factors, such as weapon type, were examined during the analysis, no patterns were evident with respect to departures above the guidelines. However, the analysis did reveal that offenders who had no prior violent felony convictions accounted for 86% of all aggravations during the time period.

The Commission proposes increasing scores for second degree murder and felony homicide under the primary offense factor on Section C of the murder/homicide worksheet. Figure 105 displays the proposed scores for this factor. The proposed scores under the primary offense factor would increase the mid-point recommendation for an offender with no prior violent felony convictions by 72 months over current guidelines recommendations. Under the proposal, scores for defendants with a Category I or II prior record classification would remain unchanged. Figure 106 illustrates current compliance rates for second degree murder as well as how the proposed increase would affect these compliance rates. With judges currently sentencing offenders in non-jury cases to incarceration periods averaging six years above the recommended guidelines range, the proposed increase is expected to have little effect on overall compliance in second degree murder cases. Rather, the proposed increase in scoring would serve to reduce the high aggravation rate in second degree murder cases by providing more balance between both mitigation and aggravation departures.

Figure 105

Proposed Primary Offense Factor for Second Degree Murder/Felony Homicide Cases
Murder/Homicide – Section C

Second degree murder or felony homicide

	Category I	Category II	Other
Completed (all counts)	354	236	205

Figure 106

Current and Projected Non-Jury Trial Compliance Rates for Second Degree Murder/Felony Homicide

	Compliance	Mitigation	Aggravation
Current	53%	12%	35%
Projected	53%	21%	26%

RECOMMENDATION 8

Amend the miscellaneous sentencing guidelines to ensure that offenders will always be recommended for an incarceration period for child abuse and neglect offenses resulting in victim injury.

Issue

Currently, the majority of offenders convicted of child abuse and neglect are recommended for probation/no incarceration under the miscellaneous guidelines. Nearly all of the cases involve some form of physical injury, half of which are categorized as serious physical victim injury. Under current guidelines it is virtually impossible for an offender who is referred to the probation/jail worksheet (Section B) to be recommended for a period of incarceration. Therefore, judges are sentencing above the guidelines recommended sanction in nearly 40% of child abuse cases.

Analysis

According to the sentencing guidelines database, there were 96 cases sentenced between FY1998 and FY2000 that involved a primary (i.e., most serious) offense of felony child abuse and neglect. Felony child abuse offenses during the time period had an overall compliance rate of 56%. Therefore, judges departed from the guidelines recommendation in nearly half of all child abuse cases, with the majority imposing more stringent sentences than those recommended by the guidelines.

Approximately three-quarters of all child abuse cases sentenced between FY1998 and FY2000 were recommended for probation without an active term of incarceration. In those cases where the guidelines recommended no incarceration but the judge sentenced the offender to serve a period of incarceration, the median effective sentence (imposed sentence less any suspended time) was nine months. In general, effective sentences for offenders in these aggravation cases ranged from less than one month to as much as seven years. In addition, for nearly two-thirds of cases in which the judge went above the guidelines recommendation of probation and sentenced the offender to a term of incarceration, the victim sustained serious physical injury. Therefore, not surprisingly, the most prevalent departure reasons provided by judges in aggravation cases include references to the victim's vulnerability, the involvement of extreme violence or victim injury, and indications that the guidelines recommendation was too low.

The Commission proposes increasing scores for victim injury on the probation/jail worksheet (Section B) of the miscellaneous guidelines to ensure that all offenders convicted of child abuse/neglect who score victim injury are recommended for incarceration of at least one day to six months. Figure 107 displays the proposed victim injury factor for Section B of the miscellaneous worksheet. Under the proposed changes, victim injury for child abuse cases would be scored separately from other offenses listed on the miscellaneous worksheet. Figure 108 illustrates the current compliance rate and the projected compliance rate under the proposal. Although compliance is projected to decrease slightly with the proposed changes, more balance would be attained between mitigation and aggravation of the guidelines in child abuse cases, and offenders inflicting physical injury on their victims would be assured an incarceration recommendation.

Figure 107

Proposed Victim Injury Factor for Child Abuse and Neglect Cases Miscellaneous – Section B

Victim Injury

Primary offense completed child abuse/neglect		Primary offense other than child abuse/neglect	
Threatened, emotional or physical injury	9	Threatened, emotional or physical injury	2
Serious physical injury	10	Serious physical injury	3

Figure 108

Current & Projected Compliance Rates for Felony Child Abuse and Neglect Cases

	Compliance	Mitigation	Aggravation
Current	56%	4%	40%
Projected	50%	25%	25%

RECOMMENDATION 9

Amend the fraud sentencing guidelines by adding construction fraud as a covered offense

Issue

Currently, felony construction fraud offenses described in §§18.2-200.1 and 43-13 are not covered by the sentencing guidelines.

Analysis

Numerous calls to the Commission's hotline have suggested that felony construction fraud be included as a primary offense covered by the sentencing guidelines. Although limited by a lack of information in the past, the Commission now feels a sufficient number of cases have accumulated to allow for meaningful data analysis and the making of recommendations.

Analysis of the Pre/Post-Sentence Investigation (PSI) database reveals that the majority of felony construction fraud offenses in the Commonwealth in recent years have been for failure to perform construction in return for advances of $200 or more (§18.2-200.1). There have also been several cases of intent to defraud, funds not used to pay for labor or supplies (§43-13). Violation of these statutes is punishable with a sentence of one to twenty years.

The Commission recommends adding these two felony offenses to the guidelines for fraud. It appears that judicial compliance would be maximized by allocating a relatively low number of primary offense points to construction fraud when determining if the offender will be recommended for more than six months of incarceration (Section A of the guidelines) and when determining whether an offender should receive probation or a jail term up to six months (Section B). Conversely, an offender already recommended for a term of incarceration that includes prison (Section C) should receive a relatively high number of primary offense points for construction fraud, since 45% of these cases received an effective prison sentence (imposed sentence less any suspended time) of 24 months or longer.

Under the Commission's proposal, the score for construction fraud on the Primary Offense factor on Section A of the fraud guidelines would be set equivalent to the score for welfare or food stamp fraud, $200 or more (2 points for 1 count; 3 points for 2 or more counts). With this

primary offense score, most offenders convicted of this offense will be scored out on Section B (worksheet for probation and incarceration up to six months). On Section B, the proposed score for construction fraud as the Primary Offense factor would be one point. With this Primary Offense score on Section B, most offenders will be recommended for probation unless they score enough points for additional offenses and prior criminal record to be recommended for incarceration up to six months in jail. Some offenders will score enough points on Section A to be recommended for Section C (worksheet for incarceration greater than six months). On Section C, the Commission proposes points for the Primary Offense factor as shown in Figure 109. These point values are equivalent to those assigned for credit card theft and should provide sentencing recommendations in line with current judicial thinking.

Figure 109

Proposed Primary Offense Factor for Construction Fraud
Fraud Guidelines – Section C

	Proposed		
	Category I	Category II	Other
Construction fraud (all counts)	36	18	9

William Fleming served on the Virginia Supreme Court longer than any other justice. His 42 years began in 1780 until his death in 1824. Due to poor health he didn't attend court sessions his last seven years. He was said to be "impartial, talented and wise, without being great."

RECOMMENDATION 10

Amend the Drug-Schedule I/II sentencing guidelines by adding third or subsequent sale of a Schedule I or II drug as a covered offense

Issue

Currently, a third or subsequent sale of a Schedule I or II drug is not covered by sentencing guidelines.

Analysis

A new crime, third or subsequent sale of a Schedule I or II drug, was created with the enactment of the Substance Abuse Reduction Effort (SABRE) legislation on July 1, 2000. As a new crime, sentencing guidelines are not prepared when it is the primary, or most serious crime, at sentencing. However, prior to the SABRE enactment, this drug crime was covered under the guidelines for a second or subsequent sale of a Schedule I or II drug. Although the new crime has the same statutory penalty range as the crime it replaced, it carries a mandatory minimum three-year term of incarceration and the prosecutor must allege, subject to proof, that the offender had previously been convicted for at least two prior Schedule I or II drug sales. Pre/Post-Sentence Investigation (PSI) data for FY1997 and FY1998, indicate a median sentence for the sale of a Schedule I or II drug of three years when the offender has at least two similar prior sale convictions.

The Commission recommends that a third or subsequent sale of a Schedule I or II drug be added to the Drug-Schedule I/II sentencing guidelines. The new crime would be scored in the same manner as a second or subsequent sale of a Schedule I or II drug. An offender convicted of this crime would be recommended for a term of incarceration that includes prison, and would receive a base Primary Offense score of 22 months. As the crime carries a mandatory minimum term of incarceration, per the Commission's policy toward mandatory minimum sentences, any part of the sentence recommendation that falls below the mandatory minimum will be replaced by the mandatory minimum on the guidelines cover sheet.

RECOMMENDATION 11

Amend the Drug-Other sentencing guidelines by adding third or subsequent felony sale of marijuana as a covered offense

Issue

Currently, a third or subsequent felony sale of marijuana is not covered by sentencing guidelines.

Analysis

A new crime, third or subsequent felony sale of marijuana, was created with the enactment of the Substance Abuse Reduction Effort (SABRE) legislation on July 1, 2000. As a new crime, sentencing guidelines are not prepared when it is the primary, or most serious crime, at sentencing. However, prior to the SABRE enactment, this drug crime was covered by the guidelines as any of several felony marijuana sale crimes. Although the new crime has the same statutory penalty range as the crimes it replaced, it carries a mandatory minimum three-year term of incarceration and the prosecutor must allege, subject to proof, that the offender had previously been convicted for at least two prior felony sales of marijuana. Pre/Post-Sentence Investigation (PSI) data for FY1997 and FY1998, indicate a median sentence for the sale of a Schedule I or II drug of almost four years (45 months) when the offender has at least two similar prior sale convictions.

The Commission recommends that a third or subsequent felony sale of marijuana be added to the Drug-Other sentencing guidelines. The new crime would be scored in the same manner as a sale of five or more pounds of marijuana. An offender convicted of this crime would be recommended for a term of incarceration that includes prison, and would receive a base Primary Offense score of 19 months. As the crime carries a mandatory minimum term of incarceration, per the Commission's policy toward mandatory minimum sentences, any part of the sentence recommendation that falls below the mandatory minimum will be replaced by the mandatory minimum on the guidelines cover sheet.

RECOMMENDATION 12

Amend the Drug-Other sentencing guidelines by adding all crimes under §18.2-258.1 (obtaining drugs by fraud, deceit, or forgery) as covered offenses

Issue

Currently, several of the crimes defined by §18.2-258.1 are not covered by the sentencing guidelines.

Analysis

Section 18.2-258.1 of the Code of Virginia defines six related crimes having to do with obtaining drugs by forgery, fraud or deceit. Presently, only one of these crimes, obtaining drugs by fraud, is covered by the guidelines. The five other crimes (furnishing false prescription information in records, using a fictitious or revoked distribution license, assuming the title of doctor or pharmacist to obtain drugs, uttering a false prescription, and affixing a forged label to a prescription) are not currently covered by the sentencing guidelines system.

The Commission recommends that the five crimes delineated by §18.2-258.1 not covered by the Drug-Other sentencing guidelines be added as guidelines offenses. These five prescription fraud crimes would be scored the same as obtaining drugs by fraud (the offense currently covered). According to the FY1998 through FY2000 sentencing guidelines database, only 9% of obtaining drugs by fraud cases are recommended for a term of incarceration that includes prison. Because the majority of offenders convicted of this crime have little or no prior record, more than three-fourths (78%) are recommended for probation without an active term of incarceration. For this crime, judges sentence in accordance with the guidelines recommendation 85% of the time. Review of historical sentencing practices for crimes in violation of §18.2-258.1 suggests that the six offenses defined in this Code section are sentenced similarly. The Commission projects that these offenses, if added to the guidelines with the proposed scores, would yield rates of compliance comparable to the rate for the crime under §18.2-258.1 that is already covered by the guidelines.

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APPENDICES

APPENDIX 1

Judicial Reasons for Departure from Sentencing Guidelines: Property, Drugs, and Miscellaneous Offenses

Reasons for MITIGATION	Burglary of Dwelling	Burglary of Other Struct.	Sch. I/II Drugs	Other Drugs	Fraud	Larceny	Misc
No reason given	2%	1.4%	5.4%	13.5%	5%	6.9%	6.6%
Minimal property or monetary loss	1	1.4	0	0	1.1	1.4	1.3
Minimal circumstances/facts of the case	0	1.4	1.2	1.9	4.2	3.1	10.5
Small amount of drugs involved in the case	0	0	2.5	1.9	0	0	0
Offender and victims are friends	0	0	0	0	1.1	0.7	0
Little or no injury/offender did not intend to harm; victim requested lenient sentence	0	0	0	0	1.1	1	0
Offender has no prior record	0	1.4	0.5	0	1.1	0	0
Offender has minimal prior record	2	0	4.5	13.5	3.8	1.4	9.2
Offender's criminal record overstates his degree of criminal orientation	0	0	0.9	0	1.1	1	1.3
Offender cooperated with authorities	12.7	8.3	10.6	23.1	6.9	7.2	3.9
Offender is mentally or physically impaired	2.9	4.2	4.2	5.8	3.8	2.1	3.9
Offender has emotional or psychiatric problems	1	1.4	1.2	0	3.8	2.1	1.3
Offender has drug or alcohol problems	0	0	0.5	0	0.4	1	0
Offender has good potential for rehabilitation	14.7	11.1	15.7	25	26.7	18.9	18.4
Offender shows remorse	0	0	0	0	1.5	0.3	1.3
Age of Offender	5.9	5.6	2.2	0	3.1	3.1	2.6
Multiple charges are being treated as one criminal event	0	0	0	0	0.4	0	0
Sentence recommended by Commonwealth's attorney or probation officer	3.9	0	3.3	1.9	6.9	3.8	3.9
Weak evidence or weak case	3.9	1.4	3.3	1.9	2.7	5.5	5.3
Plea agreement	8.8	9.7	16	17.3	10.7	18.9	23.7
Sentencing consistency with codefendant or with similar cases in the jurisdiction	2	0	0.3	0	0.8	0.3	0
Offender already sentenced by another court or in previous proceeding for other offenses	6.9	8.3	2.8	0	7.3	6.2	3.9
Offender will likely have his probation revoked	1	0	0	0	0.4	0.3	0
Offender is sentenced to an alternative punishment to incarceration	46.1	44.4	33.2	13.5	18.7	19.6	10.5
Guidelines recommendation is too harsh	1	1.4	0.3	0	2.7	0.7	1.3
Judge rounded guidelines minimum to nearest whole year	2.9	2.8	1.4	0	1.5	2.4	0
Other mitigating factors	2	12.5	6.6	1.9	7.8	5.9	5.2

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

Reasons for AGGRAVATION	Burglary of Dwelling	Burglary of Other Struct.	Sch. I/II Drugs	Other Drugs	Fraud	Larceny	Misc
No reason given	0%	5.9%	7.3%	3.7%	7.1%	9.6%	8.4%
Extreme property or monetary loss	0	2.9	0	0	6.3	13	0
The offense involved a high degree of planning	2.3	8.8	0.2	3.7	3.6	2.1	0
Aggravating circumstances/flagrancy of offense	28.7	8.8	3	9.3	11.6	18.5	20.6
Offender used a weapon in commission of the offense	2.3	0	1.5	2.8	0	0.7	4.6
Offender's true offense behavior was more serious than offenses at conviction	3.4	8.8	4.8	4.6	2.7	5.1	0.8
Extraordinary amount of drugs or purity of drugs involved in the case	0	0	4.1	8.3	0	0	0
Aggravating circumstances relating to sale of drugs	0	0	0.5	0.9	0	0	0
Offender immersed in drug culture	0	0	4	8.3	0	0	0
Victim injury	0	0	0	0	0	0	2.3
Previous punishment of offender has been ineffective	0	0	3.3	1.9	2.7	0	1.5
Offender was under some form of legal restraint at time of offense	1.1	5.9	5.1	5.6	0.9	3.4	1.5
Offender's criminal record understates the degree of his criminal orientation	14.9	14.7	9.9	7.4	14.3	11	22.1
Offender has previous conviction(s) or other charges for the same type of offense	5.7	2.9	11.9	9.3	11.6	6.2	15.3
Offender failed to cooperate with authorities	0	0	2.8	0	2.7	2.1	0.8
Offender has drug or alcohol problems	1.1	0	2	0.9	2.7	1.4	3.1
Offender has poor rehabilitation potential	3.4	17.6	2.6	3.7	5.4	2.1	6.1
Offender shows no remorse	1.1	0	1.2	0.9	0.9	3.4	0.8
Jury sentence	5.7	0	4	1.9	2.7	1.7	8.4
Plea agreement	11.5	17.6	19.3	13	23.2	15.1	6.9
Community sentiment	2.3	0	3.3	1.9	1.8	0.3	0
Sentencing consistency with codefendant or with other similar cases in the jurisdiction	0	0	0.5	0	0	0.3	0
Judge wanted to teach offender a lesson	0	0	0.3	0.9	0	0.7	0
The offender was sentenced to boot camp, detention center or diversion center	11.5	17.6	7.8	11.1	7.1	7.2	6.1
Guidelines recommendation is too low	6.9	11.8	5.6	6.5	5.4	8.6	5.3
Mandatory minimum penalty is required in the case	0	0	2.6	6.5	0	1	0
Other reason for aggravation	7.8	2.9	9	4.6	7.2	9.2	11.5

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

APPENDIX 2

Judicial Reasons for Departure from Sentencing Guidelines: Offenses Against the Person

Reasons for MITIGATION	Assault	Homicide	Kidnapping	Robbery	Rape	Sexual Assault
No reason given	2.9%	0%	0%	3.2%	0%	4.7%
Minimal circumstances/facts of the case	1	20	25	4.2	3.6	4.7
Offender was not the leader or active participant in offense	0	0	0	6.3	0	0
Offender and victim are related or friends	6.9	0	12.5	0	3.6	4.7
Little or no victim injury/offender did not intend to harm; victim requested lenient sentence	11.8	0	12.5	2.1	3.6	0
Victim was a willing participant or provoked the offense	4.9	0	0	0	0	2.3
Offender has no prior record	0	0	0	0	3.6	0
Offender has minimal prior criminal record	8.8	0	12.5	8.4	10.7	9.3
Offender's criminal record overstates his degree of criminal orientation	0	0	0	0	0	0
Offender cooperated with authorities or aided law enforcement	2.9	20	0	14.7	0	9.3
Offender has emotional or psychiatric problems	4.9	6.7	12.5	4.2	7.1	2.3
Offender is mentally or physically impaired	6.9	6.7	12.5	0	3.6	4.7
Offender has drug or alcohol problems	2	0	0	0	0	0
Offender has good potential for rehabilitation	8.8	6.7	12.5	6.3	10.7	9.3
Offender shows remorse	0	6.7	0	0	3.6	2.3
Age of offender	3.9	0	0	15.8	7.1	7
Jury sentence	0	6.7	0	3.2	17.9	2.3
Sentence was recommended by Commonwealth's attorney or probation officer	6.9	6.7	12.5	1.1	3.6	11.6
Weak evidence or weak case against the offender	11.8	0	12.5	9.5	28.6	16.3
Plea agreement	21.6	20	0	12.6	14.3	16.3
Sentencing consistency with codefendant or with other similar cases in the jurisdiction	0	0	0	2.1	0	0
Offender already sentenced by another court or in previous proceeding for other offenses	3.9	0	0	5.3	3.6	0
Offender will likely have his probation revoked	1	0	0	2.1	0	0
Offender is sentenced to an alternative punishment to incarceration	0	6.7	0	9.5	0	2.3
Guidelines recommendation is too harsh	1	0	0	3.2	0	2.3
Judge rounded guidelines minimum to nearest whole year	4.9	6.7	0	4.2	0	4.7
Other reasons for mitigation	4.9	0	12.5	0	3.6	2.3

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

Reasons for AGGRAVATION	Assault	Homicide	Kidnapping	Robbery	Rape	Sexual Assault
No reason given	3.8%	0%	0%	0%	0%	1.8%
The offense involved a high degree of planning	0	2.6	0	0	0	0
Aggravating circumstances/flagrancy of offense	19	28.2	18.2	29.3	45.5	36.4
Offender used a weapon in commission of the offense	0	2.6	0	6.9	0	0
Offender's true offense behavior was more serious than offenses at conviction	5.7	7.7	0	3.4	0	12.7
Offender is related to or is the caretaker of the victim	0	0	0	0	0	1.8
Offense was an unprovoked attack	1.9	0	0	0	0	0
Offender knew of victim's vulnerability	1	5.1	0	1.7	27.3	14.5
The victim(s) wanted a harsh sentence	0	0	0	3.4	0	3.6
Extreme violence or severe victim injury	13.3	5.1	0	5.2	0	0
Previous punishment of offender has been ineffective	0	0	0	0	0	0
Offender was under some form of legal restraint at time of offense	2.9	0	9.1	1.7	0	0
Offender's record understates the degree of his criminal orientation	6.7	10.3	9.1	12.1	9.1	1.8
Offender has previous conviction(s) or other charges for the same offense	3.8	2.6	9.1	1.7	0	1.8
Offender failed to cooperate with authorities	1.9	0	0	1.7	0	0
Offender has drug or alcohol problems	0	2.6	0	0	0	0
Offender has poor rehabilitation potential	9.5	2.6	27.3	8.6	9.1	5.5
Offender shows no remorse	1	5.1	0	6.9	0	5.5
Jury sentence	22.9	33.3	18.2	20.7	27.3	1.8
Plea agreement	13.3	2.6	9.1	0	0	14.5
Guidelines recommendation is too low	12.4	10.3	9.1	13.8	0	12.7
Mandatory minimum penalty is required in the case	1.9	2.6	0	1.7	0	0
Other reasons for aggravation	3.9	0	9.1	10.3	18.2	10.8

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

APPENDIX 3

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

Burglary of Dwelling

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	90.5%	4.7%	4.8%	21
2	66.0	25.5	8.5	47
3	86.4	0.0	13.6	22
4	73.9	21.7	4.4	46
5	84.6	7.7	7.7	13
6	63.6	9.1	27.3	11
7	64.3	28.6	7.1	14
8	92.9	7.1	0.0	14
9	43.7	25.0	31.3	16
10	69.2	19.2	11.6	26
11	50.0	16.7	33.3	18
12	72.7	27.3	0.0	11
13	72.0	0.0	28.0	25
14	76.5	11.8	11.7	17
15	60.0	20.0	20.0	25
16	85.7	0.0	14.3	21
17	66.7	11.1	22.2	18
18	57.2	35.7	7.1	14
19	62.5	5.0	32.5	40
20	76.9	7.7	15.4	13
21	83.3	16.7	0.0	6
22	61.3	9.7	29.0	31
23	73.1	19.2	7.7	26
24	67.7	25.8	6.5	31
25	75.0	20.8	4.2	24
26	75.0	22.2	2.8	36
27	90.0	6.7	3.3	30
28	46.1	23.1	30.8	13
29	62.5	16.7	20.8	24
30	82.4	17.6	0.0	17
31	73.3	20.0	6.7	15
Total	**71.0%**	**15.6%**	**13.4%**	**685**

Burglary of Other Structure

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	66.7%	0.0%	33.3%	12
2	84.6	15.4	0.0	26
3	85.7	14.3	0.0	7
4	85.7	14.3	0.0	21
5	76.9	15.4	7.7	13
6	50.0	50.0	0.0	10
7	73.3	20.0	6.7	15
8	100.0	0.0	0.0	2
9	72.7	18.2	9.1	11
10	76.5	17.6	5.9	17
11	80.0	0.0	20.0	5
12	50.0	0.0	50.0	4
13	68.4	21.1	10.5	19
14	63.2	26.3	10.5	19
15	83.3	11.1	5.6	18
16	84.2	10.5	5.3	19
17	90.9	0.0	9.1	11
18	73.3	20.0	6.7	15
19	60.0	26.7	13.3	15
20	50.0	33.3	16.7	6
21	90.0	10.0	0.0	10
22	88.2	5.9	5.9	17
23	43.7	50.0	6.3	16
24	78.9	21.1	0.0	19
25	64.7	17.6	17.7	17
26	81.3	12.5	6.2	16
27	87.5	8.3	4.2	24
28	40.0	30.0	30.0	10
29	25.0	25.0	50.0	8
30	44.5	33.3	22.2	9
31	100.0	0.0	0.0	2
Total	**72.9%**	**17.9%**	**9.2%**	**413**

Other Drugs

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	73.7%	5.3%	21.0%	19
2	84.8	9.8	5.4	92
3	71.5	7.1	21.4	14
4	73.3	6.7	20.0	30
5	100.0	0.0	0.0	5
6	88.9	0.0	11.1	9
7	73.9	0.0	26.1	23
8	81.8	9.1	9.1	11
9	78.6	7.1	14.3	14
10	89.5	5.3	5.2	19
11	62.5	25.0	12.5	8
12	55.6	0.0	44.4	9
13	77.8	3.7	18.5	27
14	66.7	0.0	33.3	36
15	60.5	15.8	23.7	38
16	66.7	4.7	28.6	21
17	59.1	13.6	27.3	22
18	100.0	0.0	0.0	7
19	81.1	11.3	7.6	53
20	94.1	0.0	5.9	34
21	100.0	0.0	0.0	9
22	44.4	0.0	55.6	9
23	71.9	9.4	18.7	32
24	78.3	8.7	13.0	23
25	63.6	18.2	18.2	22
26	81.5	11.1	7.4	27
27	82.6	8.7	8.7	46
28	86.7	13.3	0.0	15
29	64.5	3.2	32.3	31
30	100.0	0.0	0.0	12
31	85.7	14.3	0.0	21
Total	**77.1%**	**7.7%**	**15.2%**	**738**

Schedule I/II Drugs

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	88.4%	5.2%	6.4%	155
2	78.4	16.1	5.5	347
3	83.0	13.3	3.7	464
4	82.7	11.2	6.1	617
5	78.7	3.7	17.6	108
6	59.3	18.5	22.2	108
7	86.6	6.6	6.8	530
8	83.7	9.5	6.8	147
9	73.2	14.6	12.2	82
10	83.0	14.1	2.9	135
11	87.9	4.7	7.4	190
12	71.1	10.8	18.1	83
13	72.7	10.8	16.5	612
14	78.3	10.0	11.7	180
15	69.8	14.2	16.0	162
16	80.7	8.7	10.6	150
17	76.8	6.6	16.6	151
18	72.4	20.7	6.9	116
19	79.7	11.6	8.7	310
20	87.6	9.3	3.1	97
21	70.4	14.8	14.8	54
22	65.7	4.2	30.1	216
23	68.7	14.4	16.9	166
24	73.9	8.7	17.4	195
25	87.0	8.7	4.3	92
26	69.6	23.0	7.4	135
27	85.6	10.3	4.1	97
28	73.4	18.8	7.8	64
29	53.7	19.5	26.8	41
30	66.7	33.3	0.0	12
31	87.3	10.3	2.4	126
Total	**78.5%**	**11.1%**	**10.4%**	**5,942**

Fraud

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	94.0%	6.0%	0.0%	83
2	88.3	8.8	2.9	137
3	77.8	13.9	8.3	36
4	89.0	11.0	0.0	145
5	78.6	11.9	9.5	42
6	81.3	12.4	6.3	32
7	83.9	12.9	3.2	62
8	88.7	11.3	0.0	53
9	74.4	10.2	15.4	39
10	85.5	12.7	1.8	55
11	92.8	3.6	3.6	28
12	79.0	17.8	3.2	62
13	85.8	7.1	7.1	99
14	80.6	13.9	5.5	108
15	74.1	15.3	10.6	85
16	80.0	16.8	3.2	95
17	87.1	7.0	5.9	85
18	75.6	15.5	8.9	45
19	79.1	10.7	10.2	177
20	95.8	4.2	0.0	48
21	78.9	17.3	3.8	52
22	78.9	8.4	12.7	71
23	83.8	13.7	2.5	80
24	76.6	22.1	1.3	77
25	91.5	4.9	3.6	82
26	78.1	16.4	5.5	73
27	91.1	8.9	0.0	79
28	76.5	17.6	5.9	34
29	59.5	19.1	21.4	42
30	73.9	17.4	8.7	23
31	75.6	19.8	4.6	86
TOTAL	82.6%	12.2%	5.2%	2,215

Larceny

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	90.7%	6.0%	3.3%	215
2	87.5	6.9	5.6	319
3	83.6	10.9	5.5	110
4	83.5	12.6	3.9	334
5	85.6	6.0	8.4	83
6	80.4	8.7	10.9	46
7	90.7	6.5	2.8	108
8	95.0	3.7	1.3	80
9	90.4	3.8	5.8	52
10	85.1	8.1	6.8	74
11	78.7	8.5	12.8	47
12	75.5	8.6	15.9	151
13	80.1	6.4	13.5	141
14	82.2	7.1	10.7	280
15	79.5	10.6	9.9	132
16	87.7	4.9	7.4	81
17	86.9	3.6	9.5	221
18	83.0	6.0	11.0	100
19	77.8	9.5	12.7	243
20	91.0	4.5	4.5	89
21	93.0	4.2	2.8	72
22	77.4	4.8	17.8	84
23	75.6	16.8	7.6	131
24	79.1	17.0	3.9	129
25	93.7	3.2	3.1	95
26	90.1	5.4	4.5	111
27	95.6	1.1	3.3	90
28	85.7	2.9	11.4	35
29	69.2	12.8	18.0	39
30	84.0	4.0	12.0	25
31	81.9	12.8	5.3	133
TOTAL	84.3%	8.0%	7.7%	3,850

Miscellaneous

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	89.8%	3.4%	6.8%	59
2	87.1	3.2	9.7	93
3	75.0	12.5	12.5	16
4	85.6	6.0	8.4	83
5	87.0	0.0	13.0	46
6	77.8	16.7	5.5	36
7	96.7	1.6	1.7	61
8	91.3	4.3	4.4	23
9	80.0	2.5	17.5	40
10	85.7	7.1	7.2	42
11	90.2	4.9	4.9	41
12	81.4	2.3	16.3	43
13	81.8	5.5	12.7	55
14	85.7	3.6	10.7	28
15	90.5	2.1	7.4	95
16	85.6	6.0	8.4	83
17	69.2	7.7	23.1	26
18	55.6	0.0	44.4	9
19	85.9	2.8	11.3	71
20	82.0	7.7	10.3	39
21	88.2	5.9	5.9	34
22	78.2	7.7	14.1	78
23	79.7	4.4	15.9	69
24	86.4	8.2	5.4	110
25	84.3	3.9	11.8	51
26	85.7	8.6	5.7	70
27	85.4	4.9	9.7	41
28	83.3	0.0	16.7	18
29	95.0	5.0	0.0	20
30	75.0	25.0	0.0	8
31	85.0	10.0	5.0	20
TOTAL	85.1%	5.3%	9.6%	1,508

APPENDIX 4

Sentencing Guidelines Compliance by Judicial Circuit: Offenses Against the Person

Assault

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	94.1%	5.9%	0.0%	17
2	85.7	3.6	10.7	56
3	71.4	26.5	2.1	49
4	76.9	16.9	6.2	65
5	80.6	6.5	12.9	31
6	81.8	9.1	9.1	22
7	83.7	7.0	9.3	43
8	68.0	8.0	24.0	25
9	80.0	0.0	20.0	25
10	84.4	12.5	3.1	32
11	85.7	7.1	7.2	28
12	76.5	11.8	11.7	17
13	76.3	9.2	14.5	76
14	80.0	10.0	10.0	20
15	78.6	14.3	7.1	42
16	80.5	9.8	9.7	41
17	62.5	18.8	18.7	16
18	73.3	6.7	20.0	15
19	76.9	12.8	10.3	39
20	83.3	5.6	11.1	18
21	71.4	14.3	14.3	28
22	79.3	3.5	17.2	29
23	62.1	20.7	17.2	29
24	78.4	9.8	11.8	51
25	80.0	13.3	6.7	30
26	70.5	6.8	22.7	44
27	81.0	19.0	0.0	21
28	50.0	0.0	50.0	10
29	71.4	14.3	14.3	14
30	100.0	0.0	0.0	2
31	85.2	11.1	3.7	27
TOTAL	77.8%	10.9%	11.3%	962

Kidnapping

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	33.4%	33.3%	33.3%	3
2	100.0	0.0	0.0	2
3	50.0	0.0	50.0	4
4	60.0	20.0	20.0	5
5	100.0	0.0	0.0	3
6	0.0	0.0	0.0	0
7	100.0	0.0	0.0	2
8	50.0	25.0	25.0	4
9	75.0	0.0	25.0	4
10	50.0	50.0	0.0	2
11	0.0	0.0	0.0	0
12	100.0	0.0	0.0	1
13	72.7	18.2	9.1	11
14	0.0	50.0	50.0	2
15	0.0	100.0	0.0	1
16	100.0	0.0	0.0	3
17	50.0	0.0	50.0	2
18	100.0	0.0	0.0	2
19	50.0	0.0	50.0	4
20	100.0	0.0	0.0	1
21	0.0	0.0	0.0	0
22	100.0	0.0	0.0	2
23	100.0	0.0	0.0	2
24	100.0	0.0	0.0	2
25	0.0	0.0	0.0	0
26	100.0	0.0	0.0	1
27	100.0	0.0	0.0	1
28	0.0	0.0	0.0	0
29	0.0	0.0	0.0	0
30	0.0	0.0	0.0	0
31	0.0	0.0	0.0	0
TOTAL	70.3%	12.5%	17.2%	64

Homicide

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	100.0%	0.0%	0.0%	4
2	57.1	0.0	42.9	7
3	90.0	10.0	0.0	10
4	68.8	12.5	18.7	16
5	50.0	12.5	37.5	8
6	60.0	20.0	20.0	5
7	62.5	12.5	25.0	8
8	50.0	33.3	16.7	6
9	50.0	50.0	0.0	2
10	80.0	20.0	0.0	5
11	100.0	0.0	0.0	5
12	60.0	0.0	40.0	5
13	70.8	4.2	25.0	24
14	71.4	0.0	28.6	7
15	66.7	16.7	16.6	6
16	100.0	0.0	0.0	4
17	100.0	0.0	0.0	1
18	100.0	0.0	0.0	4
19	66.7	0.0	33.3	12
20	100.0	0.0	0.0	4
21	80.0	0.0	20.0	5
22	80.0	0.0	20.0	5
23	54.5	36.4	9.1	11
24	100.0	0.0	0.0	5
25	0.0	0.0	100.0	2
26	0.0	0.0	100.0	2
27	100.0	0.0	0.0	1
28	66.7	0.0	33.3	3
29	100.0	0.0	0.0	1
30	100.0	0.0	0.0	3
31	45.5	0.0	54.5	11
TOTAL	69.8%	8.3%	21.9%	192

Robbery

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	84.0%	16.0%	0.0%	25
2	76.4	14.5	9.1	55
3	66.7	29.2	4.1	24
4	66.7	24.5	8.8	57
5	50.0	10.0	40.0	10
6	62.5	25.0	12.5	16
7	73.5	5.9	20.6	34
8	80.8	15.4	3.8	26
9	66.7	16.7	16.6	6
10	90.0	10.0	0.0	10
11	77.3	18.2	4.5	22
12	46.2	7.7	46.1	13
13	73.9	13.0	13.1	46
14	70.0	30.0	0.0	30
15	66.7	18.5	14.8	27
16	84.6	7.7	7.7	13
17	76.0	24.0	0.0	25
18	58.4	8.3	33.3	12
19	72.0	24.0	4.0	25
20	80.0	0.0	20.0	5
21	75.0	8.3	16.7	12
22	57.1	14.3	28.6	14
23	64.3	35.7	0.0	14
24	84.6	7.7	7.7	13
25	50.0	37.5	12.5	8
26	50.0	25.0	25.0	16
27	78.6	21.4	0.0	14
28	71.4	0.0	28.6	7
29	50.0	0.0	50.0	4
30	0.0	0.0	0.0	0
31	71.4	28.6	0.0	14
TOTAL	**70.8%**	**18.1%**	**11.1%**	**597**

Rape

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	80.0%	0.0%	20.0%	5
2	76.9	7.7	15.4	13
3	83.3	16.7	0.0	6
4	75.0	25.0	0.0	8
5	50.0	33.3	16.7	6
6	57.1	42.9	0.0	7
7	75.0	16.7	8.3	12
8	85.7	14.3	0.0	7
9	100.0	0.0	0.0	1
10	83.3	16.7	0.0	6
11	100.0	0.0	0.0	3
12	83.3	0.0	16.7	6
13	83.3	16.7	0.0	12
14	60.0	40.0	0.0	5
15	100.0	0.0	0.0	7
16	100.0	0.0	0.0	11
17	100.0	0.0	0.0	3
18	60.0	20.0	20.0	5
19	75.0	25.0	0.0	8
20	66.7	0.0	33.3	3
21	0.0	0.0	0.0	0
22	100.0	0.0	0.0	2
23	85.7	14.3	0.0	7
24	75.0	0.0	25.0	8
25	62.5	25.0	12.5	8
26	66.7	33.3	0.0	9
27	25.0	50.0	25.0	4
28	80.0	20.0	0.0	5
29	33.4	33.3	33.3	3
30	0.0	0.0	0.0	0
31	66.7	33.3	0.0	3
TOTAL	**76.0%**	**16.9%**	**7.1%**	**183**

Sexual Assault

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	83.3%	11.1%	5.6%	18
2	74.2	9.7	16.1	31
3	100.0	0.0	0.0	5
4	83.3	16.7	0.0	18
5	54.5	18.2	27.3	11
6	88.9	0.0	11.1	9
7	77.8	0.0	22.2	9
8	71.4	14.3	14.3	7
9	61.5	23.1	15.4	13
10	66.7	0.0	33.3	12
11	78.6	14.3	7.1	14
12	62.5	12.5	25.0	8
13	76.9	7.7	15.4	13
14	0.0	50.0	50.0	2
15	76.2	9.5	14.3	21
16	72.7	9.1	18.2	11
17	66.7	16.7	16.6	6
18	50.0	50.0	0.0	2
19	60.5	7.9	31.6	38
20	91.7	0.0	8.3	12
21	50.0	0.0	50.0	4
22	70.0	0.0	30.0	10
23	40.0	0.0	60.0	5
24	83.3	11.1	5.6	18
25	46.2	46.1	7.7	13
26	68.4	26.3	5.3	19
27	81.8	18.2	0.0	11
28	83.3	16.7	0.0	6
29	50.0	50.0	0.0	2
30	66.7	0.0	33.3	3
31	73.7	21.0	5.3	19
TOTAL	**71.6%**	**13.0%**	**15.4%**	**370**

APPENDIX 5

Types of Larceny Systems Throughout the States

State	Felony Offenses	Felony Dollar Level	Felony Penalty Range	Misdemeanor Offenses	Misdemenor Dollar Level
Alabama	1st Degree theft 2nd Degree theft	more than $1,000 more than $250 to $1,000	2 to 20 yrs 1 yr 1 day to 10 yrs	3rd Degree theft	$250 or less
Alaska	1st Degree theft 2nd Degree theft	$25,000 or more $500 but less than $25,000	up to 10 yrs up to 5 yrs	3rd Degree theft 3rd Degree theft	$50 to less than $500 less than $50
Arizona	Class 2 felony Class 3 felony Class 4 felony Class 5 felony Class 6 felony	$25,000 or more $3,000 but less than $25,000 $2,000 but less than $3,000 $1,000 but less $2,000 $250 but less than $1,000	5 yrs 3.5 yrs 2.5 yrs 1.5 yrs 1 yr	Class 1 misd.	less than $250
Arkansas	Class B felony Class C felony	$2,500 or more more than $500, less than $2,500	5 to 20 yrs 3 to 10 yrs	Class A misd.	$500 or less
California	Grand theft	more than $400	up to 1 yr	Petty theft misd.	more than $50 to $400 $50 or less
Colorado	Class 3 felony Class 4 felony	$15,000 or more $500 but less than $15,000	4 to 8 yrs 2 to 4 yrs	Class 2 misd. Class 3 misd.	$100 but less than $500 less than $100
Connecticut	1st Degree larc. 2nd Degree larc. 3rd Degree larc.	more than $10,000 more than $5,000 to $10,000 more than $1,000 to $5,000	1 to 20 yrs 1 to 10 yrs 1 to 5 yrs	4th Degree larc. 5th Degree larc. 6th Degree larc.	more than $500 to $1,000 more than $250 to $500 $250 or less
Delaware	Class C felony Class E felony Class G felony	more than $100,000 more than $50,000, less than $100,000 $1,000 to $50,000	up to 10 yrs up to 5 yrs up to 2 yrs	Class A misd.	less than $1,000
Florida	Grand theft-1st Grand theft-2nd Grand theft -3rd	$100,000 or more $20,000 but less than $100,000 $300 to $20,000	up to 30 yrs up to 15 yrs up to 5 yrs	Petit theft-1st Petit theft-2nd	$100 but less than $300 less than $100
Georgia	Felony	more than $500	1 to 10 years	Misdemeanor	$500 or less
Hawaii	1st Degree theft 2nd Degree theft	more than $20,000 more than $300 to $20,000	up to 10 yrs up to 5 yrs	3rd Degree theft 4th Degree theft	more than $100 to $300 $100 or less
Idaho	Grand theft	more than $1,000	1 to 20 yrs	Petit theft	$1,000 or less
Illinois	Class 1 felony Class 2 felony Class 3 felony	more than $100,000 more than $10,000, less than $100,000 more than $300 to $10,000	4 to 15 yrs 3 to 7 yrs 2 to 5 years	Class A misd.	$300 or less
Indiana	Class C felony Class D felony	$100,000 or more less than $100,000	2 to 8 yrs 6 months to 3 yrs	All theft with "intent to deprive the other person of its value" is a felony	Not applicable
Iowa	Class C felony Class D felony	more than $10,000 more than $1,000 to $10,000	up to 10 yrs up to 5 yrs	Aggravated misd. Serious misd. Simple misd.	more than $500 to $1,000 more than $100 to $500 $100 or less
Kansas*	Severity Level 7, nonperson felony Severity Level 9, nonperson felony	$25,000 or more more than $500 to $25,000	no jail if no other factor no jail if no other factor	Class A, nonperson misd.	less than $500
Kentucky	Class D felony	$300 or more	1 to 5 years	Class A misd.	less than $300

* Penalty range defined by Sentencing Guidelines rather than Statute

State	Felony Offenses	Felony Dollar Level	Felony Penalty Range	Misdemeanor Offenses	Misdemenor Dollar Level
Louisiana	Felony	$500 or more	up to 10 yrs	Misdemeanor	less than $300
	Felony	$300 but less than $500	up to 2 yrs		
Maine	Class B crime	more than $10,000	up to 10 yrs	Class D crime	more than $1,000 to $2,000
	Class C crime	more than $2,000 to $10,000	up to 5 yrs	Class E crime	$1,000 or less
Maryland	Felony	$300 or more	up to 15 yrs	Misdemeanor	less than $300
Massachusetts	Felony	more than $250	up to 5 yrs	Misdemeanor	$250 or less
Michigan	Felony	$20,000 or more	up to 10 yrs	Misdemeanor	$200 but less than $1,000
	Felony	$1,000 but less than $20,000	up to 5 yrs	Misdemeanor	less than $200
Minnesota	Felony	more than $35,000	up to 20 yrs	Misdemeanor	more than $250 to $500
	Felony	more than $2,500 to $35,000	up to 10 yrs	Misdemeanor	$250 or less
	Felony	more than $500 to $2,500	up to 5 yrs		
Mississippi	Grand larceny	$250 or more	up to 5 yrs	Petit larceny	less than $250
Missouri	Class C felony	$750 or more	up to 7 yrs	Class A misd.	less than $750
Montana	Felony	more than $1,000	up to 10 yrs	Misdemeanor	$1,000 or less
Nebraska	Class III felony	more than $1,500	up to 20 yrs	Class I misd.	more than $200,less than $500
	Class IV felony	$500 to $1,500	up to 5 yrs	Class II	$200 or less
Nevada	Category B felony	$2,500 or more	1 to 10 yrs	Misdemeanor	$25 but less than $250
	Category C felony	$250 but less than $2,500	1 to 5 yrs	Misdemeanor	less than $25
New Hampshire	Class A felony	more than $1,000	up to 7 yrs	Misdemeanor	$500 or less
	Class B felony	more than $500 to $1,000	1 to 7 yrs		
New Jersey	2nd Degree crime	$75,000 or more	5 to 10 yrs	Disorderly Person	$200 or less
	3rd Degree crime	$500 but less than $75,000	3 to 5 yrs		
	4th Degree crime	more than $200 but less than $500	up to 18 months		
New Mexico	2nd Degree felony	more than $20,000	up to 9 yrs	Misdemeanor	more than $100 to $250
	3rd Degree felony	more than $2,500 to $20,000	up to 3 yrs	Petty- Misdemeanor	$100 or less
	4th Degree felony	more than $250 to $2,500	up to 18 months		
New York	Grand larceny-1st	more than $1,000,000	up to 25 yrs	Petit larceny	less than $1,000
	Grand larceny-2nd	more than $50,000 to $1,000,000	up to 15 yrs		
	Grand larceny-3rd	more than $3,000 to $50,000	up to 7 yrs		
	Grand larceny-4th	more than $1,000 to $3,000	up to 4 yrs		
North Carolina*	Class H felony	more than $1,000	5 to 6 months with no other factors	Class 1 misd.	$1,000 or less
North Dakota	Class B felony	more than $10,000	up to 10 yrs	Class B misd.	$250 or less
	Class C felony	more than $500 to $10,000	up to 5 yrs		
Ohio	3rd Degree felony	$100,000 or greater	1 to 5 yrs	1st Degree misd.	less than $500
	4th Degree felony	$5,000 but less than $100,000	6 to 18 months		
	5th Degree felony	$500 but less than $5,000	6 to 12 months		
Oklahoma	Grand larceny	more than $500	up to 5 yrs	Petit larceny	$50 or less
	Grand larceny	more than $50 to $500	up to 1 yr		
Oregon	Aggravated 1st Degree theft	$10,000 or more	up to 10 yrs	2nd Degree theft	less than $750
	1st Degree theft	$750 but less than $10,000	up to 5 yrs		

Types of Larceny Systems Throughout the States

State	Felony Offenses	Felony Dollar Level	Felony Penalty Range	Misdemeanor Offenses	Misdemenor Dollar Level
Pennsylvania*	Felony	more than $100,000	12 to 18 months	Misdemeanor	$200 to $2,000
	Felony	more than $50,000 to $100,000	9 to 16 months	Misdemeanor	$50 but less than $200
	Felony	more than $25,000 to $50,000	6 to 14 months	Misdemeanor	less than $50
	Felony	more than $2,000 to $25,000	1 to 12 months		
Rhode Island	Felony	more than $500	up to 10 yrs	Misdemeanor	$500 or less
South Carolina	Grand larceny	$5,000 or more	up to 10 yrs	Petit larceny	$1,000 or less
	Grand larceny	more than $1,000 but less than $5,000	up to 5 yrs		
South Dakota	Grand theft	more than $500	up to 10 yrs	Petty theft	$100 to $500
				Petty theft	less than $100
Tennessee	Class B felony	$60,000 or more	8 to 30 yrs	Class A misd.	$500 or less
	Class C felony	$10,000 but less than $60,000	3 to 15 yrs		
	Class D felony	$1,000 but less than $10,000	2 to 12 yrs		
	Class E felony	more than $500 but less than $1,000	1 to 6 yrs		
Texas	1st Degree felony	$200,000 or more	5 to 99 yrs	Class A misd.	$500 but less than $1,500
	2nd Degree felony	$100,000 but less than $200,000	2 to 20 yrs	Class B misd.	$50 but less than $500
	3rd Degree felony	$20,000 but less than $100,000	2 to 10 yrs	Class C misd.	less than $50
	state jail felony	$1,500 but less than $20,000	180 days to 2 yrs		
Utah*	2nd Degree felony	$5,000 of more	no jail if no other factor	Class A misd.	$300 but less than $1,000
	3rd Degree felony	$1,000 but less than $5,000	no jail if no other factor	Class B misd.	less than $300
Vermont	Grand larceny	more than $500	up to 10 yrs	Petit larceny	$500 or less
Virginia	Grand larceny		1 to 20 yrs	Simple larceny	less than $200
Washington*	1st Degree theft	more than $1,500	up to 90 days	3rd Degree theft	$250 or less
	2nd Degree theft	more than $250 to $1,500	up to 60 days		
Washington, DC	1st Degree theft	$250 or more	up to 10 yrs	2nd Degree theft	less than $250
West Virginia	Grand larceny	$1,000 or more	1 to 10 years	Petit larceny	less than $1,000
Wisconsin	Class C felony	more than $2,500	up to 15 yrs	Class A	$1,000 or less
	Class E felony	more than $1,000 to $2,500	up to 5 yrs		
Wyoming	Felony	$500 or more	up to 10 yrs	Misdemeanor	less than $500

* Penalty range defined by Sentencing Guidelines rather than Statute

Virginia Crimianl Sentencing Commission

Sentencing Guidelines Hotline:
804-225-4398