

Virginia Criminal Sentencing Commission

REPORT ON PAROLE-ELIGIBLE AND GERIATRIC INMATES IN STATE CORRECTIONAL FACILITIES

**To The Governor, General Assembly, and
Chief Justice of Virginia**



Commonwealth of Virginia

Richmond, September 1, 2009

HON. F. BRUCE BACH
CHAIRMAN

Commonwealth of Virginia



RICHARD P. KERN, PH.D.
DIRECTOR

100 NORTH NINTH STREET
RICHMOND, VIRGINIA 23219
TEL (804) 225-4398
FAX (804) 786-3934

Supreme Court of Virginia Virginia Criminal Sentencing Commission

September 1, 2009

To: The Honorable Timothy M. Kaine, Governor of Virginia
The Honorable John W. Marshall, Secretary of Public Safety
The Honorable Charles J. Colgan, Chairman, Senate Finance Committee
The Honorable Lacey E. Putney, Chairman, House Appropriations Committee
The Honorable Henry L. Marsh, III, Chairman, Senate Courts of Justice Committee
The Honorable David B. Albo, Chairman, House Courts of Justice Committee
The Honorable Kenneth W. Stolle, Co-Chair, Virginia State Crime Commission
The Honorable Janet D. Howell, Co-Chair, Virginia State Crime Commission
The Honorable Leroy R. Hassell, Sr., Chief Justice of Virginia

Earlier this year, the General Assembly directed the Virginia Criminal Sentencing Commission to conduct a special study of parole-eligible offenders and geriatric inmates who remain in the state's prison population. Item 48 (B) of Chapter 781 of the 2009 Acts of Assembly requires the Sentencing Commission to review the status of all offenders housed in state facilities operated by the Virginia Department of Corrections who are subject to consideration for parole and to determine the number of such offenders who have already served, or within the next six years will serve, an amount of time in prison that is equal to or more than the sentence that would be recommended by the current sentencing guidelines system. This provision also requires the Sentencing Commission to review the numbers and types of older offenders who may be eligible for geriatric release.

The Sentencing Commission's study is now complete and this report is respectfully submitted for your review. The Sentencing Commission would like to thank Helen Fahey, Chairwoman of the Virginia Parole Board, as well as Richard Crossen, Helen Hinshaw and Warren McGehee of the Virginia Department of Corrections for their invaluable assistance throughout the course of this project.

Sincerely,

A handwritten signature in black ink, appearing to read "F. Bruce Bach".

F. Bruce Bach
Chairman

Preface

This report has been prepared and submitted to fulfill the requirements of Item 48 (B) of Chapter 781 of the 2009 Acts of Assembly. This provision requires the Virginia Criminal Sentencing Commission to review the status of all offenders housed in state facilities operated by the Virginia Department of Corrections who are subject to consideration for parole and to determine the number of such offenders who have already served, or within the next six years will serve, an amount of time in prison that is equal to or more than the amount of time for which they would have been sentenced for the same offense, given the same circumstances, under the current sentencing guidelines system. This provision also requires the Sentencing Commission to review the numbers and types of older offenders who may be eligible for geriatric release. This report is respectfully submitted to satisfy these requirements.

The Virginia Criminal Sentencing Commission would like to thank Helen Fahey, Chairwoman of the Virginia Parole Board, as well as Richard Crossen, Helen Hinshaw and Warren McGehee of the Virginia Department of Corrections for their invaluable assistance throughout the course of this project.

Table of Contents

| | |
|--|----|
| Executive Summary | 1 |
| Introduction | 5 |
| Identification of Parole-Eligible Inmates | 8 |
| Characteristics of Parole-Eligible Inmates | 10 |
| Study Methodology | 13 |
| Findings | 17 |
| Inmates Eligible for Geriatric Release | 22 |

Executive Summary

The 2009 General Assembly directed the Virginia Criminal Sentencing Commission to conduct a special study of parole-eligible offenders and geriatric inmates who remain in the state's prison population. Item 48 (B) of Chapter 781 of the 2009 Acts of Assembly requires the Sentencing Commission to review the status of all offenders in the custody of the Department of Corrections (DOC) who are subject to consideration for parole and to determine the number of such offenders who have already served, or within the next six years will serve, an amount of time in prison that is equal to or more than the sentence that would be recommended by the current sentencing guidelines system. The sentencing guidelines in use today are an integral part of Virginia's truth-in-sentencing system enacted in 1994. Item 48 (B) also requires the Sentencing Commission to review the numbers and types of older offenders who may be eligible for geriatric release under the provisions of § 53.1-40.01.

In 1994, the General Assembly passed legislation to abolish discretionary parole release and to establish a system known as "truth-in-sentencing" in Virginia. Parole was abolished for all felonies committed on or after January 1, 1995. Felony offenders must now serve at least 85% of their prison or jail terms. An important component of the reform, a new system of sentencing guidelines was implemented. These apply to all felons sentenced under the no-parole system. The sentencing guidelines for violent offenders (those with current or prior convictions for violent crimes) now recommend sentences that are significantly longer than the terms violent felons typically served under the parole system prior to 1995. Although parole was abolished for offenders committing felonies on or after January 1, 1995, offenders who committed their crimes prior to that date remain eligible for parole consideration. The geriatric release provision was enacted as part of truth-in-sentencing reform. An inmate convicted of a non-capital felony offense who has reached the age of 60 having served 10 years, or the age of 65 having served five years, is eligible for geriatric release. Originally applicable only to offenders sentenced under truth-in-sentencing laws, the 2001 General Assembly extended this provision to all prison inmates.

As of December 31, 2008, there were a total of 38,256 state-responsible inmates in Virginia. Nearly all of these offenders had been assigned an inmate number on DOC's automated information system and could be categorized as either parole-eligible or not parole-eligible. At the end of 2008, 28,993 (80%) of the 36,232 classified inmates had been sentenced exclusively under the no-parole/truth-in-sentencing system. For the current study, the Sentencing Commission examined the 3,735 inmates confined on December 31, 2008, who were serving a prison term solely for parole-eligible (non-capital) offenses. Inmates serving for a combination of parole-eligible and no-parole felonies were excluded. Analysis revealed that murder/manslaughter, rape/sexual assault, abduction, and robbery offenses account for 88% of the parole-eligible offenders included in the study.

The Sentencing Commission was able to score the guidelines for 3,341 of the parole-eligible inmates. If an inmate had multiple sentencing events associated with the current prison term, the total guidelines recommendation was calculated by summing the recommendations from all of the relevant sentencing events. This results in a total recommendation that assumes consecutive sentences. By statute in Virginia, sentences are to run consecutively unless the judge specifies in the court order that all or a portion of a sentence is to run concurrent to that for another offense. The time served in custody as of December 31, 2008, was calculated by DOC for each inmate.

The study has certain limitations. The sentencing guidelines recommendation computed for each inmate is based on offenses identified in the automated data available to the Sentencing Commission. Any offenses outside of the automated data could not be included in the scoring of the sentencing guidelines for that inmate. In addition, the total sentence recommendation for an inmate is based on only those sentencing events covered by the guidelines (there are a small number of offenses not covered by the guidelines). Perhaps most significantly, the sentencing guidelines do not account for prior parole violations (parole violations are not scored on the guidelines and, therefore, do not increase the guidelines recommendation). Moreover, a probation violation associated with the inmate's current prison term that was handled in a separate hearing, apart from any felony offense, cannot be included in the guidelines scoring (those probation violations are not captured in the automated data available to the Sentencing Commission).

For each parole-eligible inmate reviewed, the total high-end guidelines recommendation was compared to the time served in custody as of December 31, 2008. For 2,635 (or 78.9%) of the 3,341 parole-eligible inmates examined, the time served through the end of 2008 was less than the total high-end guidelines recommendation. For these inmates, the time served to that date was within the guidelines recommendation that the offender would have received had he been sentenced under the no-parole system. For 706 (21.1%) of the parole-eligible inmates, the time served in custody as of December 31, 2008, had exceeded the range recommended by the guidelines.

It is important to note that many factors may have an impact on an offender's sentence, his parole-eligibility date, and ultimate length-of-stay. While the sentencing guidelines account for numerous factors related to the offense and the offender, the guidelines cannot account for every aspect of a case. For offenders serving an unusually long period of time in prison, there may be one or more aggravating circumstances not addressed by the guidelines. Compliance with Virginia's sentencing guidelines is discretionary. Judges are free to depart and need only record a written reason when doing so. Overall, compliance with the sentencing guidelines for offenders sentenced under truth-in-sentencing is quite high, approximately 80%. In roughly half of all departures, however, judges give sentences that fall above the range recommended by the guidelines. Judges may take aggravating factors into account when imposing a sentence and the Parole Board may consider such factors when reviewing an inmate for parole release. It should also be noted that juries often recommend sentences that are substantially longer than sentences given by judges in comparable cases. Although judges by law can suspend a portion of a jury

sentence, they do so infrequently. An inmate's total sentence directly impacts how long he must serve prior to reaching his first parole eligibility date. Furthermore, inmates who have been returned to prison for probation and parole violations serve additional incarceration time and are less likely to be released to parole thereafter. Finally, inmates who have exhibited non-compliant or disruptive behavior while incarcerated will earn fewer good conduct credits and, therefore, will serve longer before reaching the first parole review. Institutional behavior may also affect the Parole Board's decision to grant parole.

The Sentencing Commission further analyzed the 706 parole-eligible inmates who had served beyond the total high-end guidelines recommendation. Among inmates whose length-of-stay had exceeded the guidelines, robbery was the most common offense, with more than one-third (238) of the inmates convicted of this crime. The Sentencing Commission identified 80 parole-eligible inmates convicted of assault and 82 inmates convicted of burglary offenses who, according to the available data, had served more time than the current sentencing guidelines would recommend. Among inmates serving for assault, all had been convicted of malicious wounding, aggravated malicious wounding, or assault by mob and nearly one-third had a previous probation or parole revocation. Among inmates with burglary as their most serious offense, 16% had been convicted of a burglary with intent to commit murder, rape, robbery or arson and, overall, 26% committed the crime with a deadly weapon. In addition, more than half of the burglary offenders had multiple sentencing events associated with the current term of incarceration and more than two-thirds had a prior probation or parole revocation.

The analysis revealed 80 parole-eligible inmates convicted of drug offenses who had served beyond the high-end of the guidelines recommendation. All of these offenders were convicted of manufacture, sale, or distribution of a Schedule I or II drug, or possession with intent to distribute, under § 18.2-248. Data indicate that nearly three out of every four of the parole-eligible drug offenders had been revoked from parole at least once. Well over one-third of these inmates had two or more parole revocations. If probation violations are included, 84% have been revoked from community supervision in the past. Similarly, the majority of parole-eligible inmates convicted of larceny or fraud offenses had previous revocations. Only two of the 28 parole-eligible inmates convicted of larceny or fraud did not have a prior revocation of probation or parole.

The legislative directive requires the Sentencing Commission to determine the number of parole-eligible inmates who have already served, or within the next six years will serve, an amount of time in prison that is equal to or more than the sentence that would be recommended by today's sentencing guidelines. The following table presents this information. Some inmates are expected to reach their mandatory release date before their time served in custody will surpass the high-end of the guidelines. These inmates have been excluded from the table.

**Parole-Eligible Inmates Whose Time Served in Custody
Has Exceeded or Will Exceed the Guidelines High-End Recommendation
by December 31, 2014**

Additional Inmates:

| 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 |
|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| 706 | 46 | 46 | 44 | 43 | 33 | 42 |

These figures exclude inmates who are expected to reach their mandatory release date before their time served in custody will surpass the guidelines high-end recommendation

Per the legislative directive, the Sentencing Commission also identified offenders in the state's inmate population who are eligible for geriatric release under § 53.1-40.01. As of December 31, 2008, the number of eligible inmates had reached 575. Of the total, 115 inmates had been sentenced exclusively under the no-parole/truth-in-sentencing system. Because truth-in-sentencing is applicable to felonies committed on or after January 1, 1995, a relatively small number of offenders sanctioned under truth-in-sentencing provisions have qualified for geriatric release consideration.

Approximately half of the geriatric-eligible inmates are between the ages of 60 and 64. The median time served for these inmates is 21 years, well over the 10-year minimum needed to qualify for geriatric release. The remaining eligible inmates are age 65 or more and have served at least five years. The median time served for these geriatric-eligible inmates was 17 years.

The number of inmates eligible for geriatric release is projected to increase in 2009 and 2010. By the end of 2009, 711 inmates will qualify. This number will grow to 882 by the end of 2010. A portion of these inmates may reach their mandatory parole release date (if they are parole-eligible) or the expiration of their sentence (if they were sentenced under no-parole laws) before they become eligible for geriatric release consideration.

Introduction

The 2009 General Assembly directed the Virginia Criminal Sentencing Commission to conduct a special study of parole-eligible offenders who remain in the state-responsible inmate population. Item 48 (B) of Chapter 781 of the 2009 Acts of Assembly requires the Sentencing Commission to review the status of all offenders in the custody of the Department of Corrections (DOC) who are subject to consideration for parole and to determine the number of such offenders who have already served, or within the next six years will serve, an amount of time in prison that is equal to or more than the sentence that would be recommended by the current sentencing guidelines system. The sentencing guidelines in use today are an integral part of Virginia's truth-in-sentencing system enacted in 1994. Item 48 (B) also requires the Sentencing Commission to review the numbers and types of older offenders who may be eligible for geriatric release under the provisions of § 53.1-40.01.

Abolition of Parole and Enactment of Truth-in-Sentencing in Virginia

In 1994, the General Assembly passed legislation to abolish discretionary parole release and to implement a system known as "truth-in-sentencing" in Virginia. The practice of discretionary parole release from prison was eliminated for any felony committed on or after January 1, 1995, and the existing system of awarding inmates sentence credits for good behavior was significantly revised. Felony offenders must now serve at least 85% of their prison or jail terms. An offender committed to prison or sentenced to jail under truth-in-sentencing may not earn more than 15% off of his prison sentence.

The truth-in-sentencing legislation adopted by the General Assembly also contained provisions for a new system of sentencing guidelines. The provisions mandate sentencing guideline 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 prior to 1995. In contrast, recommendations for nonviolent offenders with no prior record of violence are tied to the amount of time those offenders historically served under the parole system. These sentencing guidelines became effective January 1, 1995, and are applicable to all felons sentenced under the no-parole system. Judicial compliance with the guidelines is discretionary, but if a judge sentences outside the recommended range, he or she must record a written reason for the departure.

While parole was abolished for offenders committing felonies on or after January 1, 1995, offenders who committed their crimes prior to that date remain eligible for parole consideration.

Overview of the Parole Process

The authority to grant discretionary parole rests exclusively with the Virginia Parole Board. An inmate is eligible for discretionary parole release after serving a certain portion of his sentence. An inmate must be released on mandatory parole six months prior to the expiration of his sentence. An inmate's discretionary parole eligibility date is calculated based on a formula that accounts for the number of times an offender has previously been committed to the Department of Corrections and the amount of credits earned by the inmate for good conduct and behavior while incarcerated. The proportion of the sentence that must be served increases based on the number of previous prison commitments. In general, an inmate serving his first commitment to the Department is eligible for discretionary parole release after serving one-fourth of his sentence or 12 years (whichever is less), but an inmate serving in the Department for the second time is required to serve one-third of sentence or 13 years, and so on. While all of the good conduct allowance (GCA) awarded to an inmate is credited toward the mandatory parole release date, only half of the allowance is credited toward discretionary parole eligibility. GCA is awarded by the Department at four fixed levels. At the highest level (Level 1), inmates are awarded 30 days of credit for every 30 days served. At the lowest level (Level 4), inmates are awarded no time at all. When an inmate reaches his first discretionary parole eligibility date, he is interviewed by Parole Board staff and is considered by the Board for release to a parole officer for supervision in the community. If denied parole release at his first eligibility date, the inmate is reconsidered on an annual basis thereafter.

There are certain specific provisions in the *Code of Virginia* that may affect an inmate's parole eligibility. Under § 53.1-151(B1), any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery with a deadly weapon, or any combination of these offenses (when the offenses were not part of a common act, transaction or scheme) is not eligible for parole and must satisfy his entire sentence (less any good conduct credit awarded). These inmates are sometimes referred to as "three-time losers." Furthermore, under § 53.1-151(B2), any person convicted of three separate felony offenses of manufacturing, selling, giving, distributing, or possessing with the intent to distribute a controlled substance (when such offenses were not part of a common act, transaction or scheme, and the offender was at liberty in between each conviction) is not eligible for parole.

Specific provisions also apply to felons given life sentences. Any felon sentenced to life imprisonment for the first time is eligible for parole after serving fifteen years. Unless otherwise ineligible for parole, an offender given a life sentence for capital murder or first-degree murder of a child under the age of eight is eligible for parole only after serving twenty-five years (§ 53.1-151(C)). A felon given two or more life sentences who is not otherwise ineligible for parole must serve 20 years to reach parole eligibility; this is increased to 30 years if the offender was convicted of capital murder (§ 53.1-151(D)). Additionally, a felon convicted of an offense and sentenced to life imprisonment after being paroled from a previous life sentence is not eligible for parole release (§ 53.1-151(E)).

Finally, any person who has been convicted of i) murder in the first degree, ii) rape in violation of § 18.2-61, iii) forcible sodomy, iv) object sexual penetration, or v) aggravated sexual battery and who has been sentenced to a term of years is eligible for parole, upon a first

commitment to the Department of Corrections, after serving two-thirds of the sentence or fourteen years (whichever is less). If such person has been previously committed to the Department, he is eligible for parole after serving three-fourths of the term of imprisonment imposed or fifteen years (§53.1-151(E1)).

Virginia's Geriatric Release Provision

The geriatric release provision was enacted as part of the abolition of parole and truth-in-sentencing reform package passed by the General Assembly in 1994. Under § 53.1-40.01, any person serving a sentence for a felony offense other than a Class 1 felony (i) who has reached the age of sixty-five or older, having served at least five years of his sentence or (ii) who has reached the age of sixty or older, having served at least ten years of his sentence may petition the Parole Board for conditional release. Originally applicable only to offenders sentenced under truth-in-sentencing laws, the 2001 General Assembly expanded this provision to apply to all prison inmates.

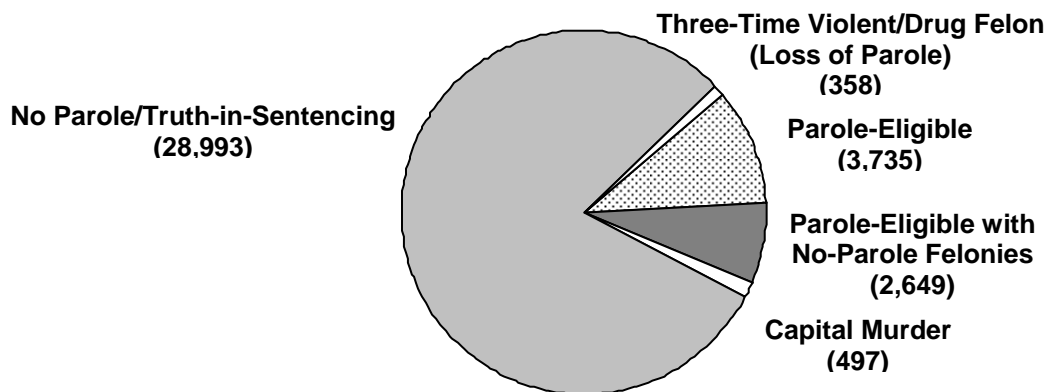
Identification of Parole-Eligible Inmates

Felony offenders who receive a sentence of one year or more to serve are the responsibility of the Virginia Department of Corrections (DOC). The total state-responsible population includes inmates confined in state prison facilities as well as those state inmates being housed in the local and regional jails around the Commonwealth. As of December 31, 2008, there were a total of 38,256 state-responsible inmates in Virginia's prisons and jails. On that date, 36,232 of those offenders had been assigned an inmate number on DOC's automated information system and could be categorized as either parole-eligible or not parole-eligible.

At the end of 2008, 28,993 (80%) of the 36,232 classified inmates had been sentenced exclusively under the no-parole/truth-in-sentencing system (Figure 1). These inmates committed all of their felony offenses after the abolition of parole in 1995. Such felons must serve at least 85% of the incarceration sentence ordered by the court and may earn a maximum of 15% off in sentence credits. Analysis revealed that 358 inmates confined on that day had lost their eligibility for parole because they had been convicted of a third violent felony or drug distribution offense (§ 53.1-151(B1 and B2)). Another 497 inmates had been sentenced to prison following conviction for a capital murder offense.¹

Figure 1

**State-Responsible Prison Inmates as of December 31, 2008
By Type of Sentence**



Based on offenders assigned an inmate number on DOC's automated information system who could be categorized as either parole-eligible or not parole-eligible (36,232 inmates).

¹ Unless otherwise ineligible for parole under specific provisions of § 53.1-151, offenders convicted of capital murder who are given a life sentence are eligible for parole release. This study did not examine offenders whose most serious offense was capital murder (as defined in § 18.2-31) because Virginia's sentencing guidelines do not cover capital crimes.

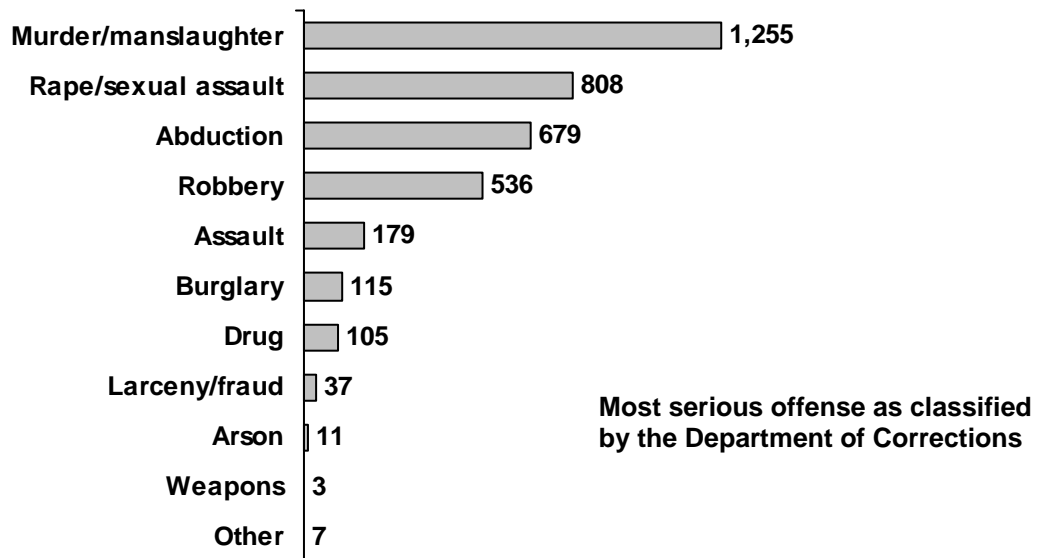
Examination of the remaining inmate population revealed two types of inmates eligible for parole: inmates serving a prison term for felonies committed prior to the abolition of parole in 1995 (3,735 inmates) and inmates serving time for multiple felonies, where some offenses were committed before, and others were committed after, the abolition of parole (2,649 inmates). Inmates sentenced for felonies committed before and after the abolition of parole must complete the sentence for the no-parole felony first before they begin serving the sentence for which they are parole-eligible.

Characteristics of Parole-Eligible Inmates

The Sentencing Commission examined the 3,735 inmates confined on December 31, 2008, who were serving a prison term solely for parole-eligible (non-capital) offenses. According to DOC's classification of each inmate's most serious offense,² the most common offense among these parole-eligible inmates was murder or manslaughter. More than one-third (1,255) of the inmates had been convicted of a murder or manslaughter charge (Figure 2). This was followed by rape/sexual assault (808 inmates), abduction (679 inmates), and robbery (536 inmates). Together, murder/manslaughter, rape/sexual assault, abduction, and robbery offenses account for 88% of the parole-eligible offenders remaining in the inmate population. Data indicate that most of the inmates categorized by DOC under abduction had also been convicted of rape, sodomy, or robbery.

Figure 2

**Parole-Eligible Prison Inmates as of December 31, 2008
by Most Serious Offense²
(3,735 Inmates)**



Excludes inmates also serving a sentence for a felony committed under the no-parole/truth-in-sentencing system

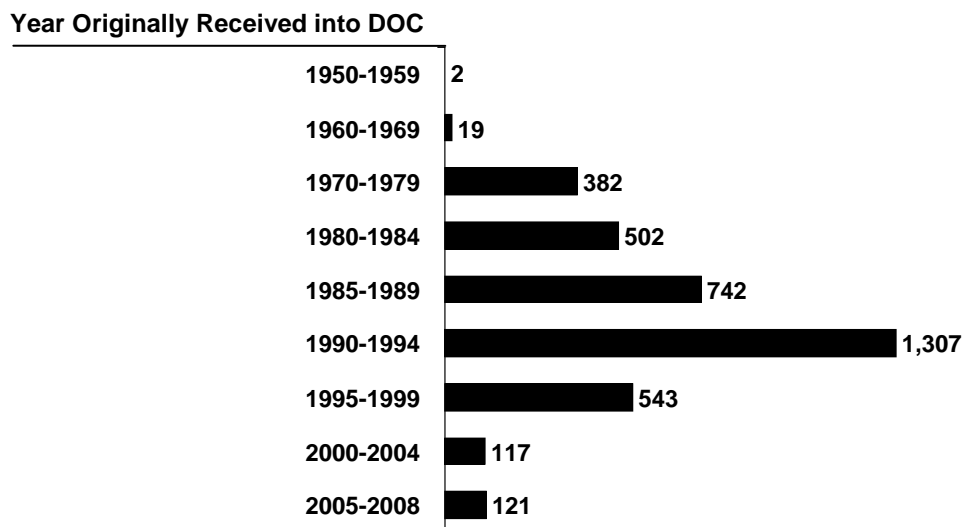
² This is based on the most serious offense as assigned by the Department of Corrections (DOC). The most serious offense assigned by DOC may not be the same as the most serious offense identified by Virginia's sentencing guidelines.

While a small number of parole-eligible inmates were originally received by DOC in the 1950s or 1960s, most of the inmates remaining in the parole-eligible population were received by DOC in the 1980s or 1990s. More than one-third (1,307) of the inmates were originally received between 1990 and 1994 alone (Figure 3). Another one-third (1,244) were received sometime during the 1980s. Some parole-eligible inmates were received into DOC after 1994. Parole was abolished for offenses committed on or after January 1, 1995; however, there are several reasons why a parole-eligible offender might be received into DOC after that date. An offender who committed crimes prior to 1995 may not have been arrested or convicted until sometime after that date. An offender who committed crimes in Virginia prior to 1995 may have been serving a sentence in another state or in federal prison and only recently been returned to serve his sentence in Virginia. Finally, offenders whose crime was committed prior to 1995 may still be on probation or subject to a suspended sentence. Should a judge revoke the offender’s probation and impose a prison sentence, the offender will be eligible for parole release based on the date of the original offense.

A number of parole-eligible inmates have been paroled on their original sentences and have subsequently returned to DOC. More than half (51%) of the offenders originally received by the DOC prior to 1975 have been paroled at least once for their original offense. Their current incarceration may be the result of a parole violation or a DOC sentence for a new parole-eligible offense coupled with a parole violation.

Figure 3

**Parole-Eligible Inmates as of December 31, 2008
by Year Originally Received into the Department of Corrections
(3,735 Inmates)**

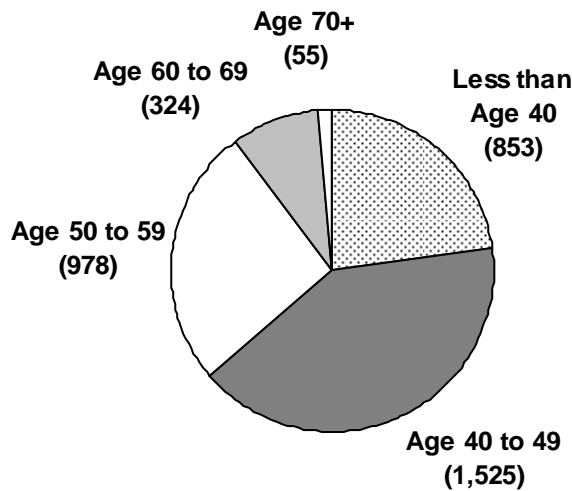


**Excludes inmates also serving a sentence for a felony
committed under the no-parole/truth-in-sentencing system**

Of the parole-eligible inmates studied, the largest share were between the ages of 40 to 49. Data indicate that 1,525 (41%) of the inmates fell into this age group (Figure 4). This is followed by inmates between the ages of 50 to 59 (978 inmates, or 26%). A total of 379 of these inmates were at least 60 years of age as of December 31, 2008. Some, though not all, of these older inmates were eligible for geriatric release on that date. Eligibility criteria are not based on age alone but on a combination of age and time served. To be eligible for geriatric release, an inmate must have reached the age of 60 having served 10 years or the age of 65 having served five years of his sentence. Examination of inmates eligible for geriatric release is addressed later in this report.

Figure 4

**Parole-Eligible Inmates as of December 31, 2008
by Age
(3,735 Inmates)**



Excludes inmates also serving a sentence for a felony committed under the no-parole/truth-in-sentencing system

Study Methodology

As specified in Item 48 (B) of Chapter 781 of the 2009 Acts of Assembly, the objective of this study is to compare the amount of time served by parole-eligible inmates in DOC custody to the sentence that would be recommended by the sentencing guidelines in use today. The Sentencing Commission's methodological approach is outlined below.

Data Sources

The sentencing guidelines take into account the offenses committed, specific elements of the offense, the legal status of the offender at the time he committed the offense(s), and numerous aspects of the offender's prior record. To obtain the detailed information required to score the guidelines for the parole-eligible inmates under review, the Sentencing Commission utilized two primary sources of data.

Pre/Post-Sentence Investigation (PSI) Reporting System. In the majority of felony cases, a DOC probation or parole officer will prepare a pre-sentence report for the court or, if a pre-sentence report was not ordered, a post-sentence report will likely be prepared. The PSI report, standardized and automated since 1985, contains a wealth of information about the offense and the offender. The PSI captures detail regarding the crimes for which the offender has been convicted, the circumstances of those crimes (including the type of weapon and how it was used, the extent of the victim's injury, the victim's age, the offender's role in the offense, his relationship to the victim, etc.), his prior adult record, any juvenile record, family and marital information, education background, military service, employment history, extent of alcohol and drug use, as well as any substance abuse or mental health treatment experiences. For the current study, the PSI database was matched to the parole-eligible inmates under review and all PSI records that could be associated with the inmate's current term of incarceration were selected.

Virginia Parole Board Data. Some of the inmates who remain in the parole-eligible inmate population were sentenced to prison prior to 1985 and, therefore, no automated PSI records exist for them. Since no automated PSI information was available for those inmates, the Virginia Parole Board created a new database for parole-eligible inmates designed to supplement the PSI system. The Parole Board's database contains information very similar to that contained in the PSI report. The Parole Board also automated narrative descriptions found in pre-1985 reports of the offenses committed by inmates reviewed for parole. The Parole Board provided both types of information to the Sentencing Commission. The Sentencing Commission reviewed the available offense narratives for inmates without an automated PSI and supplemented the data provided by the Parole Board to capture additional factors that are necessary for scoring the sentencing guidelines.

Exclusion of Inmates

Certain inmates are excluded from the subsequent analyses presented in this report. For 202 of the 3,735 parole-eligible inmates identified for the study, the Commission could not find a PSI record or an automated Parole Board record. Presumably, these inmates have not yet served sufficient incarceration time on their sentence to become eligible for parole (e.g., they have not reached their first parole-eligibility date). However, without offense and criminal history information, a guidelines recommendation cannot be calculated. Consequently, these inmates were removed from the analysis.

In addition, 40 inmates were serving a prison term for offenses not covered by the sentencing guidelines.³ While guidelines have been developed for the vast majority of felony offenses defined in the *Code of Virginia*, there are a small number of crimes for which guidelines do not exist when that crime is the most serious offense in the case. These offenses occur so infrequently that the Sentencing Commission cannot identify sufficient cases to develop guidelines. Because guidelines cannot be computed for inmates serving time for solely non-guidelines offenses, they were removed from the analysis. Another seven inmates were removed because the available offense information contained only probation violations without any reference to the original felony offense. Since the guidelines cannot be computed without knowing the original felony offense, these inmates were also removed from the analysis.

Finally, 145 cases were removed from the analysis because the automated data sources provided contradictory information about the inmate's offenses. Without correct offense information, the sentencing guidelines cannot be scored accurately. Therefore, these inmates were not included in analyses presented in this report.

Selecting the Primary Offense

Virginia's sentencing guidelines are scored for each sentencing event. A sentencing event consists of all offenses and their associated counts for which the offender is sentenced before the same court at the same time. All offenses sentenced together comprise one sentencing event regardless of multiple offense dates, arrest dates, indictment dates, conviction dates, case/docket numbers, or separate PSI reports. The primary offense must be selected in order to complete the appropriate set of guidelines worksheets. The primary, or most serious, offense for sentencing guidelines purposes is the offense that carries the highest statutory maximum penalty provided in the *Code of Virginia*. The primary offense for the guidelines may not be the same offense recorded by DOC as the most serious offense. If two or more offenses in the sentencing event have the same statutory maximum penalty, the crime which receives the highest primary offense score on the sentence length worksheet of the guidelines is chosen as the primary offense. The remaining offenses are scored as additional offenses on the worksheets. If the offense with the highest statutory maximum is a non-guidelines offense, the sentencing guidelines are not completed and a recommendation cannot be calculated for that sentencing event.

³ The non-guidelines offenses included: attempted capital murder, arson of an occupied dwelling or church, escape by an inmate without force, inmate making or possessing a weapon, distribution of 100 grams or more of heroin, and possession of a saw-off shotgun during the commission of a violent crime.

Scoring the Sentencing Guidelines

After excluding the inmates described above, the sentencing guidelines were scored via computer program for the remaining 3,341 parole-eligible inmates.

Data revealed that a large share of inmates were serving a prison term for multiple offenses and that many inmates had multiple sentencing events associated with the current term of incarceration. Using automated PSI and Parole Board records, each discrete sentencing event was identified. For each inmate, guidelines recommendations were calculated for all sentencing events that could be associated with the inmate's current term of incarceration.

For offenders recommended for prison, the guidelines are presented to the judge in the form of a range with a low, midpoint, and a high recommendation. If an inmate had multiple sentencing events associated with the current prison term, the total guidelines recommendation was calculated by summing the recommendations from all of the relevant sentencing events. This results in a total recommendation that assumes consecutive sentences. By statute in Virginia, sentences are to run consecutively unless the judge specifies in the court order that all or a portion of a sentence is to run concurrent to that for another offense.

Time Served in Custody

The time served in custody as of December 31, 2008, was calculated by DOC for each inmate and provided to the Sentencing Commission.

Limitations of the Study

The scoring of sentencing guidelines is based on the automated data available through the Pre/Post-Sentence Investigation (PSI) Reporting System and the Parole Board. If the inmate was convicted of other offenses not specifically identified in the automated data, these could not be included in the scoring of the sentencing guidelines and, therefore, were not included in the total guidelines recommendation for that inmate. Also, a small number of inmates had multiple sentencing events with at least one event that could be scored on the guidelines, along with another event that could not be scored (typically because the most serious offense for that sentencing event was not covered by the guidelines). Thus, the total sentence recommendation for that inmate is based on only those sentencing events covered by the guidelines.

DOC data indicate that some inmates have been granted discretionary parole release in the past but have been returned to prison for violations of the conditions of parole supervision. These inmates continue to be eligible for parole and they are reviewed annually by the Parole Board. While the Parole Board may consider prior parole violations when reviewing an inmate, parole violations do not increase the sentencing guidelines recommendation. In contrast, previous probation violations are scored on the sentencing guidelines as part of an offender's prior record. Probation violations associated with the inmate's current term of incarceration are also scored if they were sentenced in the same event as a new felony offense. However, a

probation violation associated with the inmate's current prison term that was handled in a separate hearing, apart from any new felony offense, cannot be included in the guidelines scoring; those probation violations are not included in the automated data available to the Sentencing Commission. In that particular circumstance, the probation violation is not included in the total computed sentencing guidelines recommendation.

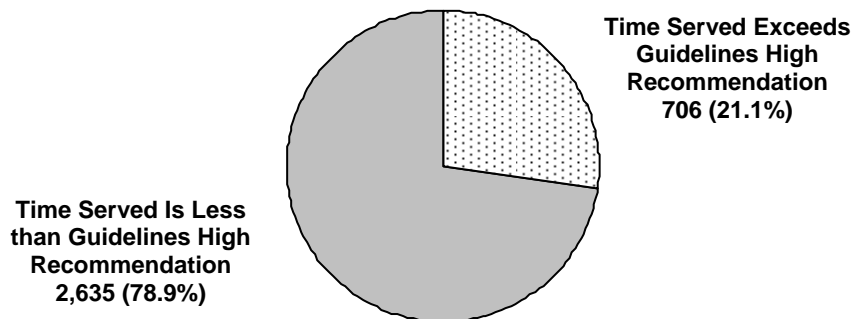
Findings

The current sentencing guidelines were scored as described above for the 3,341 inmates included in the analysis. For offenders recommended for prison, the guidelines are presented to the judge in the form of a range with a low, midpoint, and a high recommendation. The total guidelines recommendation was calculated by summing the recommendations across all sentencing events identified for each inmate and the current term of incarceration. The total high-end guidelines recommendation is the total of all of the high-end recommendations from all of the sentencing events associated with that inmate's current prison term.

For each parole-eligible inmate reviewed, the total high-end guidelines recommendation was compared to the time served in custody as of December 31, 2008. For 2,635 (or 78.9%) of the parole-eligible inmates, the time served through the end of 2008 was within the total high-end guidelines recommendation (Figure 5). For these inmates, the time served to that date was within the guidelines recommendation the offender would have received had he been sentenced under the no-parole system. For 706 (21.1%) of the parole-eligible inmates examined, the time served in custody as of December 31, 2008, had exceeded the range recommended by the guidelines.

Figure 5

**Sentencing Guidelines High-End Recommendation versus
Time Served in Custody (as of December 31, 2008)
(3,341 Inmates)**



It is important to note that many factors may have an impact on an offender's sentence, his parole-eligibility date, and ultimate length-of-stay. While the sentencing guidelines account for numerous factors related to the offense and the offender, the guidelines cannot account for every aspect of a case. For offenders serving an unusually long period of time in prison, there may be one or more aggravating circumstances not addressed by the guidelines. For example, the guidelines do not explicitly account for the vulnerability of a victim who is elderly or

disabled. Compliance with Virginia's sentencing guidelines is discretionary. Judges are free to depart and need only record a written reason when doing so. Overall, compliance with the sentencing guidelines is quite high, approximately 80%. In roughly half of all departures, however, judges give sentences that fall above the range recommended by the guidelines. The rate of upward departures varies by offense. For example, in FY2008, one in five offenders convicted of sexual assault was given a sentence above the guidelines. While the rate of upward departures is generally lower for property and drug offenses, such departures do occur in 5% to 10% of property and drug cases. Judges may take aggravating factors into account when imposing a sentence and the Parole Board may consider such factors when reviewing an inmate for parole release. It should also be noted that juries often recommend sentences that are substantially longer than sentences given by judges in comparable cases. Although judges by law can suspend a portion of a jury sentence, they do so infrequently.

Moreover, an inmate's total sentence directly impacts how long he must serve prior to becoming eligible for parole release. Of the total 706 inmates who had served in excess of the guidelines recommendation, 58 had been given a life sentence, another seven were serving two or more life sentences, and 10 inmates were sentenced to 100 years or more. Inmates with single life or multiple life sentences must satisfy at least 15 or 20 years, respectively, before they reach their first parole eligibility date, while inmates of 100 years or more must satisfy at least 12 years. Specific provisions of § 53.1-151 may also apply to these inmates that would require additional time to be satisfied before parole can be considered. In fact, 10 of the 706 inmates whose time in custody exceeded the guidelines recommendation had not yet reached their first parole eligibility date and the Parole Board had not ever considered these inmates for release. Other inmates serving life sentences or extremely long sentences may have recently reached their first eligibility date and had only one or two annual reviews by the Parole Board. Under the truth-in-sentencing system, where inmates must serve at least 85% of the incarceration sentence, the Sentencing Commission defines a sentence of 36 years or more as equivalent to a life sentence. This figure was based on the difference between the average age of offenders sentenced to prison and the average male life expectancy.

Furthermore, inmates who have been returned to prison for probation and parole violations serve additional incarceration time and are less likely to be granted parole thereafter. The Parole Board considers prior probation and parole violations when reviewing an inmate for discretionary parole release. As noted above, prior probation violations are scored on the sentencing guidelines, but prior parole violations are not scored and do not increase the guidelines recommendation.

Finally, inmates who have exhibited non-compliant or disruptive behavior while incarcerated will earn fewer good conduct credits. Because one-half of an inmate's good conduct credit is applied to reduce the period of time he must serve before reaching his first parole-eligibility date, an inmate with few credits will serve longer before becoming eligible for his first parole review. Institutional behavior may also affect the Parole Board's decision to grant parole.

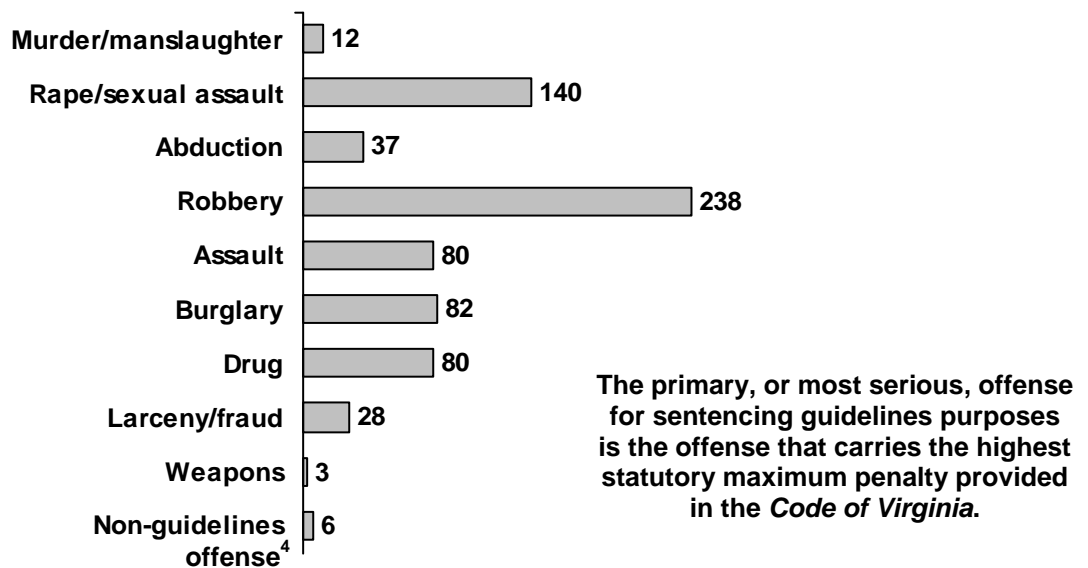
The Sentencing Commission further analyzed the 706 parole-eligible inmates who had served beyond the total high-end guidelines recommendation. Since, as noted above, a number of offenders were serving their current term of incarceration due to multiple sentencing events,

the primary offense for the entire incarceration event was selected from the sentencing events in the same manner as the primary offense is selected within each sentencing event. While murder/manslaughter was by far the most common offense among parole-eligible inmates overall, only 12 inmates serving time for murder or manslaughter had remained incarcerated beyond the range recommended by the guidelines (Figure 6). Among inmates whose length-of-stay had exceeded the guidelines, robbery was the most common offense, with more than one-third (238) of the inmates convicted of this crime as their most serious offense.

The Sentencing Commission identified 80 parole-eligible inmates convicted of assault and 82 inmates convicted of burglary offenses who, according to the available data, had served more time than the current sentencing guidelines would recommend (Figure 6). Among inmates serving for assault, all had been convicted of malicious wounding, aggravated malicious wounding, or assault by mob. Further analysis revealed that nearly one-third of assault inmates had a previous probation or parole revocation. It is important to note that, since malicious and aggravated malicious wounding have higher statutory maximum penalties than attempted first or second-degree murder (which carry a statutory maximum of 10 years), a number of attempted murders are prosecuted as malicious or aggravated malicious wounding. Among inmates with burglary as their most serious offense, 16% had been convicted of a burglary with intent to commit murder, rape, robbery or arson. Overall, 26% committed the burglary with a deadly weapon. In addition, more than half of the burglary offenders had multiple sentencing events associated with the current term of incarceration. According to PSI and DOC data, more than two-thirds of inmates incarcerated for burglary had a prior probation or parole revocation.

Figure 6

Parole-Eligible Inmates Whose Time Served in Custody (as of December 31, 2008) Exceeded the Guidelines High-End Recommendation (706 Inmates)



⁴ These inmates remained in the study because they had also been convicted of other offenses that are covered by the sentencing guidelines.

Analysis revealed 80 parole-eligible inmates convicted of drug offenses who had served beyond the high-end of the guidelines recommendation. For all of these offenders, the primary offense for the incarceration event was distribution of, possession with intent to distribute, etc., a Schedule I/II drug. As noted above, the primary offense is selected based upon the offense with the highest statutory maximum. Since the sale of a Schedule I/II drug has a statutory maximum of 40 years, it would be selected as the primary offense even if it is sentenced with a malicious wounding (a 20-year maximum) or voluntary manslaughter (10-year maximum), for example. A large number of inmates serving for drug offenses had previous probation or parole violations. PSI and DOC data indicate that nearly three out of every four of the parole-eligible drug offenders had been revoked from parole at least once. In fact, well over one-third of these inmates had two or more parole revocations. If probation violations are included, 84% have been revoked from community supervision in the past.

A sample of 15 inmates serving for drug offenses was reviewed manually. Only one of the 15 inmates was still serving on his original sentence (this inmate had a 75-year sentence to serve and had a prior robbery conviction); the other 14 inmates examined had one or more of the following: 1) one or more revocations of probation and/or parole, 2) a prior incarceration term in another state or in federal prison, or 3) a conviction for a new crime.

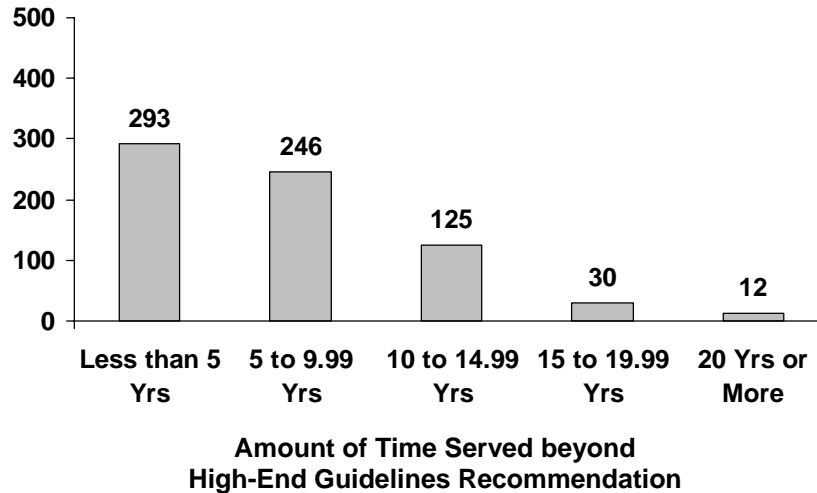
Similarly, the majority of parole-eligible inmates convicted of larceny or fraud offenses had prior revocations. Only two of the 28 inmates with a larceny or fraud as their most serious offense did not have a prior revocation of probation or parole. A sample of five larceny/fraud inmates was reviewed manually. Four of the five have had multiple probation/parole revocations, while the remaining inmate had an extensive criminal history.

Next, the Sentencing Commission calculated the amount of time the 706 inmates had served beyond the high end of the guidelines recommendation. As of December 31, 2008, 293 inmates had served less than five years beyond the high end of the guidelines recommendation (Figure 7). Another 246 inmates had served more than five but less than 10 years in excess of the guidelines range. The remaining inmates had served, at that point, at least 10 years more than what the high end of the guidelines would have recommended.

The Sentencing Commission closely inspected all inmates who, according to the available data, had served 15 years or more beyond the total high-end recommendation of the guidelines, as well as all inmates incarcerated for larceny and fraud offenses who had served 10 years or more beyond than the guidelines. Parole Board records for these inmates were reviewed manually to verify the computations.

Figure 7

Amount of Time Served beyond the High-End Guidelines Recommendation (as of December 31, 2008) (706 Inmates)



The legislative directive requires the Sentencing Commission to determine the number of parole-eligible inmates who have already served, or within the next six years will serve, an amount of time in prison that is equal to or more than the sentence that would be recommended by today's sentencing guidelines. The table below presents this information. It should be noted that some inmates are expected to reach their mandatory release date before their time served in custody will surpass the high-end of the guidelines. These inmates are excluded from the table.

Figure 8

Parole-Eligible Inmates Whose Time Served in Custody Has Exceeded or Will Exceed the Guidelines High-End Recommendation by December 31, 2014

Additional Inmates:

| 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 |
|------|------|------|------|------|------|------|
| 706 | 46 | 46 | 44 | 43 | 33 | 42 |

These figures exclude inmates who are expected to reach their mandatory release date before their time served in custody will surpass the guidelines high-end recommendation

Inmates Eligible for Geriatric Release

Item 48 (B) of Chapter 781 of the 2009 Acts of Assembly requires the Sentencing Commission to review the numbers and types of older offenders who may be eligible for geriatric release. The geriatric release provision was adopted as part of the truth-in-sentencing reform package enacted by the General Assembly in 1994. Under § 53.1-40.01, any person serving a sentence imposed upon a conviction for a felony offense other than a Class 1 felony, (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release. Originally applicable only to offenders sentenced under truth-in-sentencing laws, the 2001 General Assembly expanded this provision to apply to all prison inmates.

The rationale for the geriatric release provision is based on empirical evidence. With violent offenders targeted for very lengthy terms of incapacitation under truth-in-sentencing and no discretionary parole release, some prisoners will remain incarcerated well into old age. Research shows that, as offenders age, they are less likely to recidivate (with the exception of certain sex offenders). Some inmates, by virtue of their age and physical condition, are unlikely to pose a threat to public safety. Moreover, cost to the Department of Corrections (DOC), particularly in medical expenses, is significantly higher for older inmates.

As specified in § 53.1-40.01, an inmate must apply to the Parole Board to be considered for release under the geriatric provision. An inmate eligible for discretionary parole release is considered for parole annually once he reaches his parole eligibility date; parole consideration is automatic. According to Parole Board policy, if a parole-eligible inmate chooses to apply for geriatric release, he loses his discretionary parole hearing for that year.

The number of inmates eligible for geriatric release has been increasing. At the end of CY2001, the year that the provision was expanded to include all state inmates, 245 of the 32,946 state inmates had reached the age/time served requirements to be eligible for geriatric release. By the end of CY2008, the number of eligible inmates had more than doubled, reaching 575 (Figure 9). Very few of the eligible inmates were sentenced under the no-parole/truth-in-sentencing system. Because truth-in-sentencing is applicable to felonies committed on or after January 1, 1995, a relatively small number of offenders sanctioned solely under truth-in-sentencing provisions have qualified for geriatric release consideration. Of the 575 inmates eligible at the close of CY2008, 115 were truth-in-sentencing inmates. This number is expected to rise in the coming years.

Figure 9

**Inmates Eligible for Geriatric Release
as of December 31, 2008**

| | State-Responsible Inmate Population | Inmates Eligible for Geriatric Release | | |
|-------------------|--|--|------------------------------------|-------|
| | | Parole System Inmates* | Truth-in- Sentencing Inmates | Total |
| December 31, 2001 | 32,946 | 231 | 14 | 245 |
| December 31, 2004 | 35,916 | 328 | 47 | 375 |
| December 31, 2008 | 38,256 | 460 | 115 | 575 |

* Parole system inmates include offenders who have a combination of parole-eligible felonies and no-parole felonies

Approximately half of the geriatric-eligible inmates are between the ages of 60 and 64 (Figure 10). These inmates have served at least 10 years in prison. According to data from DOC, the median time served for these inmates (the middle value, where half the inmates have served less and half have served more) is 21 years, well over the 10-year minimum needed to qualify. The remaining eligible inmates are age 65 or more and have served at least five years. The median time served for these geriatric-eligible inmates was 12 years in CY2001, but has since risen to 17 years.

Figure 10

Inmates Eligible for Geriatric Release by Age and Time Served

| | Age 60 to 64 and Served at least 10 years | | Age 65 or more and Served at least 5 years | |
|-------------------|---|----------------------------|--|---------------------------|
| | Number | Median Time Served * | Number | Median Time Served* |
| | December 31, 2001 | 112 | 19 yrs. | 133 |
| December 31, 2004 | 184 | 20 yrs. | 191 | 14 yrs. |
| December 31, 2008 | 292 | 21 yrs. | 283 | 17 yrs. |

* Median time served is the middle value, where half of the values are higher and half are lower

Geriatric-eligible inmates have most often been convicted of first-degree murder, rape, or other sexual assault offense. Of the 575 eligible inmates at the end of CY2008, one-third were serving for first-degree murder. Another third were serving for rape/sexual assault. The remaining elder inmates were incarcerated for an array of other crimes, such as robbery, abduction, assault, second-degree murder, drug offenses, burglary, larceny/fraud, manslaughter, and arson.

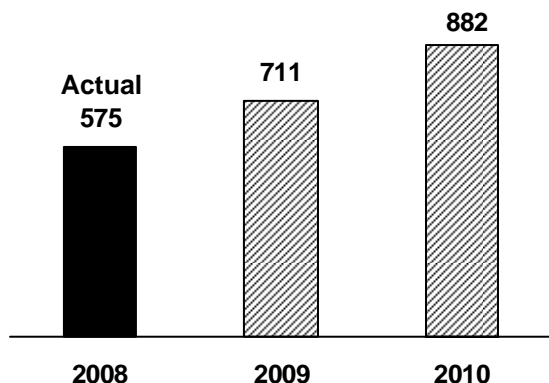
Data from the Parole Board reveals that few eligible inmates have applied to be considered for geriatric release. For example, only 61 (11%) of the 575 eligible inmates submitted an application to the Parole Board in CY2008. This is most likely because the majority of inmates eligible for geriatric release are also eligible for discretionary parole release. Parole-eligible inmates are automatically considered annually by the Parole Board and the inmate need not take any specific action for this to occur. Thus, most parole-eligible prisoners do not bother to apply for geriatric release consideration. The Parole Board has granted geriatric release to 12 inmates since the provision took effect in 1995.

The number of inmates eligible for geriatric release is projected to increase in 2009 and 2010 (Figure 11). By the end of 2009, 711 inmates will qualify. This number will grow to 882 by the end of 2010. A portion of these inmates may reach their mandatory parole release date (if they are parole-eligible) or the expiration of their sentence (if they were sentenced under no-parole laws) before they become eligible for geriatric release consideration.

The number of inmates eligible for geriatric release is expected to continue to grow significantly, as more inmates sentenced under the truth-in-sentencing system reach the necessary age and time-served qualifications for geriatric release.

Figure 11

Projected Number of Geriatric-Eligible Inmates, 2009 and 2010



Projection is based on inmates confined as of December 31, 2008.

A portion of these inmates may reach their mandatory parole release date (if they are parole-eligible) or the expiration of their sentence (if they were sentenced under no-parole laws) before they reach the necessary age and time-served thresholds to qualify for geriatric release.