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**VIRGINIA CRIMINAL  
SENTENCING  
COMMISSION**

2009 ANNUAL REPORT

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## Virginia Criminal Sentencing Commission Members

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and Confirmed by the General Assembly

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Chairman, Nellysford

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SUPREME COURT OF VIRGINIA  
VIRGINIA CRIMINAL SENTENCING COMMISSION

December 1, 2009

To: The Honorable Leroy Rountree Hassell, Sr., Chief Justice of Virginia  
The Honorable Timothy M. Kaine, Governor of Virginia  
The Honorable Members of the General Assembly of Virginia  
The Citizens of Virginia

Section 17.1-803 of the *Code of Virginia* requires the Virginia Criminal Sentencing Commission to report annually upon its work and recommendations. Pursuant to this statutory obligation, we respectfully submit for your review the *2009 Annual Report* of the Criminal Sentencing Commission.

This report details the work of the Commission over the past year. The report includes a detailed analysis of judicial compliance with the felony sentencing guidelines during fiscal year 2009. Additionally, per a directive from the 2009 General Assembly, this report provides the Commission's full special study of parole-eligible and geriatric offenders who remain in the state-responsible inmate population. Also included are the results of the Commission's study of juveniles who are convicted in circuit courts that was initiated at the request of the Virginia Crime Commission. The Commission's recommendations to the 2010 Session of the Virginia General Assembly are also contained in 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.

Sincerely,

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

F. Bruce Bach  
Chairman



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# 1

## Introduction

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

### Overview

The Virginia Criminal Sentencing Commission is required by § 17.1-803 of the *Code of Virginia* to report annually to the General Assembly, the Governor and the Chief Justice of the Supreme Court of Virginia. To fulfill its statutory obligation, the Commission respectfully submits this report.

The report is organized into five chapters. The remainder of the Introduction chapter provides a general profile of the Commission and an overview of its various activities and projects during 2009. The Guidelines Compliance chapter that follows provides a comprehensive analysis of compliance with the sentencing guidelines during fiscal year (FY) 2009. Results from the Commission's most recent project, a study of parole-eligible inmates remaining in the state's inmate population, are presented in the third chapter of the report. The fourth chapter describes the Commission's most recent findings related to juveniles convicted in Virginia's circuit courts. In the report's final chapter, the Commission presents its recommendations for revisions to the felony sentencing guidelines system.

### Commission Profile

The Virginia Criminal Sentencing Commission is comprised of 17 members as authorized in the *Code of Virginia* § 17.1-802. The Chairman of the Commission is appointed by the Chief Justice of the Supreme Court of Virginia, must not be an active member of the judiciary and must be confirmed by the General Assembly. The Chief Justice also appoints six judges or justices to serve on the Commission. 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. In the original legislation, five members of the Commission were to be appointed by the General Assembly, with the Speaker of the House of Delegates designating three members and the Senate Committee on Privileges and Elections selecting two members. The 2005 General Assembly modified this provision. Now, the Speaker of the House of Delegates has two appointments, while the Chairman of the House Courts of Justice Committee, or another member of the Courts Committee appointed by the chairman, must serve as the third House appointment. Similarly, the Senate Committee on Rules makes only one appointment and the other appointment must be filled by the Chairman of the Senate Courts of Justice Committee or a designee from that committee. The 2005

## ● Commission Meetings

The full membership of the Commission met four times during 2009. These meetings, held in the Supreme Court of Virginia, were held on March 16, June 8, September 21 and November 9. Minutes for each of these meetings are available on the Commission's website ([www.vcsc.virginia.gov](http://www.vcsc.virginia.gov)).

amendment did not affect existing members whose appointed terms had not expired; instead, this provision became effective when the terms of two legislative appointees expired on December 31, 2006. The Chairman of the Senate Courts of Justice Committee joined the Commission in 2007, as did a member of the House Courts of Justice Committee. The final member of the Commission, Virginia's Attorney General, serves by virtue of his office.

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

## Monitoring and Oversight

Section 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. This section of the *Code* also requires judges to announce during court proceedings for each case that the guidelines forms have been reviewed. After sentencing, the guidelines worksheets are signed by the judge and become a part of the official record of each case. The clerk of the circuit court is responsible for sending the completed and signed worksheets to the Commission.

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

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



### **Training, Education and Other Assistance**

The Commission provides sentencing guidelines assistance in a variety of forms: training and education seminars, training materials and publications, a website, and assistance via the "hotline" phone system. Training and education are ongoing activities of the Commission. The Commission 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. In addition, the Commission conducts sentencing guidelines seminars for new members of the judiciary and other criminal justice system professionals. Having all sides equally versed in the completion of guidelines worksheets is essential to a system of checks and balances that ensures the accuracy of sentencing guidelines.

In 2009, the Commission offered 36 training seminars across the Commonwealth. As in previous years, Commission staff conducted training for attorneys and probation officers new to Virginia's sentencing guidelines. The six-hour seminars introduce participants to the sentencing guidelines and provide instruction on correct scoring of the guidelines worksheets. The seminars also introduce new users to the probation violation guidelines and the two offender risk assessment instruments that are incorporated into Virginia's guidelines system. Seminars for experienced guidelines users were also provided. These courses are approved by the Virginia State Bar, enabling participating attorneys to earn Continuing Legal Education credits. The Commission continued to provide a guidelines-related ethics class for attorneys, conducted in conjunction with the Virginia State Bar. The Virginia State Bar has approved this class for one hour of Continuing Legal Education Ethics credit. Finally, the Commission regularly conducts sentencing guidelines training at the Department of Corrections' Training Academy as part of the curriculum for new probation officers.

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

The Commission will continue to place a priority on providing sentencing guidelines training on request to any group of criminal justice professionals. The Commission is also willing to provide an education program on guidelines and the no-parole sentencing system to any interested group or organization. If an individual is interested in training, he or she can contact the Commission and place his or her name on a waiting list. Once there is enough interest, a seminar is presented in a locality convenient to the majority of individuals on the list.

In addition to providing training and education programs, the Commission maintains a website and a "hotline" phone system. By visiting the website, a user can learn about upcoming training sessions, access Commission reports, look up Virginia Crime Codes (VCCs) and utilize on-line versions of the sentencing guidelines forms. The "hotline" phone (804.225.4398) 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 hotline continues to be an important resource for guidelines users around the Commonwealth.

### **Projecting the Impact of Proposed Legislation**

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

During the 2009 General Assembly session, the Commission prepared 117 impact statements on proposed legislation. These proposals fell into five categories: 1) legislation to increase the felony penalty class of a specific crime; 2) legislation to increase the penalty class of a specific crime from a misdemeanor to a felony; 3) legislation to add a new mandatory minimum penalty for a specific crime; 4) legislation to expand or clarify an existing crime; and 5) legislation that would create a new criminal offense. The Commission utilizes its computer simulation forecasting program to estimate the projected impact of these proposals on the prison system. The estimated impact on the juvenile offender population is provided by Virginia's Department of Juvenile Justice. In most instances, the projected impact and accompanying analysis of a bill is presented to the General Assembly within 24 to 48 hours after the Commission is notified of the proposed legislation. When requested, the Commission provides pertinent oral testimony to accompany the impact analysis.

### **Prison and Jail Population Forecasting**

Forecasts of offenders confined in state and local correctional facilities are essential for criminal justice budgeting and planning in Virginia. The forecasts are used to estimate operating expenses and future capital needs and to assess the impact of current and proposed criminal justice policies. Since 1987, the Secretary of Public Safety has utilized an approach known as "consensus forecasting" to develop the offender population forecasts. This process brings together policy makers, administrators and technical experts from all branches of state government. The process is structured through committees. The Technical Advisory Committee is composed of experts in statistical and quantitative methods from several agencies. While individual members of this Committee generate the various prisoner forecasts, the Committee as a whole carefully scrutinizes each forecast according to the highest statistical standards. Select forecasts are presented to the Secretary's Liaison Work Group, which evaluates the forecasts and provides guidance and oversight for the Technical Advisory Committee. It includes deputy directors and senior managers of criminal justice and budget agencies, as well as staff of the House

Appropriations and Senate Finance Committees. Forecasts accepted by the Work Group then are presented to the Policy Advisory Committee. Led by the Secretary of Public Safety, this committee reviews the various forecasts, making any adjustments deemed necessary to account for emerging trends or recent policy changes, and selects the official forecast for each prisoner population. The Policy Committee is made up of agency directors, lawmakers and other top-level officials from Virginia's executive, legislative, and judicial branches, as well as representatives of Virginia's law enforcement, prosecutor, sheriff, and jail associations.

While the Commission is not responsible for generating the prison or jail population forecast, it participates in the consensus forecasting process. In years past, Commission staff members have served on the Technical Advisory Committee and the Commission's Deputy Director has served on the Policy Advisory Committee. Since 2006, the Commission's Deputy Director has chaired the Technical Advisory Committee at the request of the Secretary of Public Safety. The Secretary presented the most recent prisoner forecasts to the General Assembly in a report submitted in October 2009.

### **Study of Crimes Committed in the Presence of Children**

In 2008, the Commission embarked upon a multi-year research project likely to be one of the first of its kind in the nation. Members of the Commission approved a comprehensive study of crimes committed in the presence of children, noting that crimes can have a profound effect on the health and welfare of the children who witness them, even when they are not the direct victims. The goal is to identify crimes witnessed by children, to describe the nature of such crimes, and to determine how courts respond to and utilize information concerning the presence of children during the commission of the crime when sentencing the offender. This project will entail unique and groundbreaking research. Based on analysis of the data, the Commission may consider revising the sentencing guidelines to account for the presence of children during the commission of an offense.

Because existing criminal justice databases lack sufficient detail to identify offenses witnessed by children, this research requires a special data collection process. The Commission contacted Commonwealth's attorneys around the state for help in identifying cases that meet the study's criteria. By going to the Commission's website, prosecutors are able to enter the offender's identifying information and electronically transmit it to Commission staff for data storage and analysis. Commission staff will examine each case in detail and record pertinent information for each, including the number of witnesses, the age of the witness, the relationship between the witness and the offender, the location of the offense, the most serious injury sustained by the victim, if applicable, and the location of the witness relative to the offense.

Because of the uniqueness of this study, it is not certain how long the data collection phase must last to ensure that a sufficient number of cases for analysis will be achieved. Data collection is proceeding and will extend into 2010.



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# 2

## Guidelines Compliance

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### **Introduction**

On January 1, 2010, Virginia's truth-in-sentencing system will reach its fifteenth anniversary. Beginning January 1, 1995, the practice of discretionary parole release from prison was abolished and the existing system of sentence credits awarded to inmates 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% off in sentence credits, 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 for 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 guideline recommendations up to six times longer than the historical time served in prison by similar offenders. In more than 300,000 felony cases sentenced under truth-in-sentencing laws, judges have agreed with guidelines recommendations in more than three out of every four cases.

This report will focus on cases sentenced from the most recent year of available data, FY2009 (July 1, 2008, through June 30, 2009). Compliance is examined in a variety of ways in this report, and variations in data over the years are highlighted throughout.

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

### Case Characteristics

In FY2009, six judicial circuits contributed more guidelines cases than any of the other judicial circuits in the Commonwealth. Those circuits - the Fredericksburg area (Circuit 15), Richmond City (Circuit 13), Norfolk (Circuit 4), Fairfax County (Circuit 19), Virginia Beach (Circuit 2), and the Harrisonburg area (Circuit 26) - comprised one-third (33%) of all worksheets received in FY2009. In addition, two other circuits submitted over 1,000 guidelines forms

during the year: Henrico County (Circuit 14) and the Radford area (Circuit 27).

During FY2009, the Commission received a total of 26,049 sentencing guidelines worksheets. Of the total, however, 861 worksheets contained errors or omissions that affect the analysis of the case. For the purposes of conducting a clear evaluation of sentencing guidelines in effect for FY2009, the remaining sections of this chapter pertaining to judicial concurrence with the guidelines focus only on those 25,188 cases for which guidelines forms were complete and recommendations were calculated correctly.

Figure 1  
Number and Percentage of Cases Received by Circuit, FY2009

Judicial Circuit	Cases	Percentage	Rank
15	1,782	6.8%	1
13	1,453	5.6	2
4	1,438	5.5	3
19	1,413	5.4	4
2	1,361	5.2	5
26	1,224	4.7	6
14	1,128	4.3	7
27	1,080	4.1	8
23	987	3.8	9
12	985	3.8	10
1	981	3.8	11
25	936	3.6	12
24	930	3.6	13
3	804	3.1	14
16	750	2.9	15
22	747	2.9	16
31	737	2.8	17
7	733	2.8	18
10	680	2.6	19
29	638	2.4	20
5	634	2.4	21
9	607	2.3	22
28	555	2.1	23
8	549	2.1	24
20	548	2.1	25
6	501	1.9	26
17	471	1.8	27
30	376	1.4	28
18	361	1.4	29
21	354	1.4	30
11	306	1.2	31
<b>TOTAL</b>	<b>26,049</b>		

### Compliance Defined

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



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

Compliance by rounding provides for a modest rounding allowance in instances when the active sentence handed down by a judge or jury is very close to the range recommended by the guidelines. For example, a judge would be considered in compliance with the guidelines if he or she 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 five percent 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 through the use of diversion options in habitual traffic cases resulted from amendments to § 46.2-357(B2 and B3) of the *Code of Virginia*, effective July 1, 1997. The amendment allows judges to suspend the mandatory minimum 12-month incarceration term required in felony habitual traffic cases if they sentence the offender to a Detention Center or Diversion Center Incarceration Program. For cases sentenced since the effective date of the legislation, the Commission considers either mode of sanctioning of these offenders to be in compliance with the sentencing guidelines.

### Overall Compliance with the Sentencing Guidelines

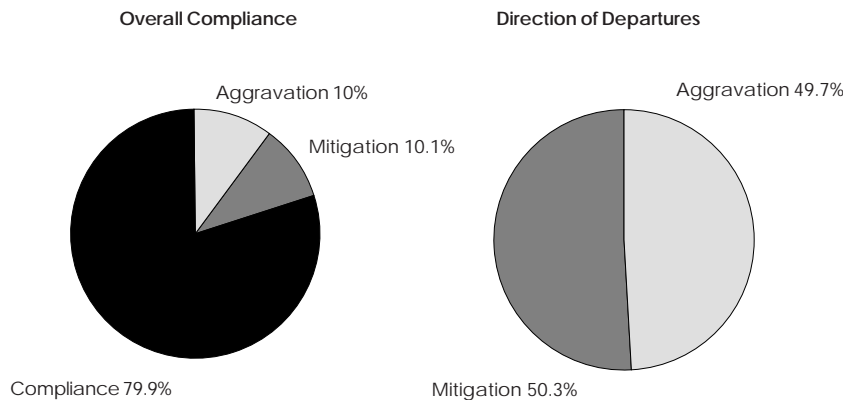
The overall compliance rate summarizes the extent to which Virginia's judges concur with recommendations provided by the sentencing guidelines, both in type of disposition and in length of incarceration. Between FY1995 and FY1998, the overall compliance rate remained around 75%, increased steadily between FY1999 and FY2001, and then decreased slightly in FY2002. For the past six fiscal years, the compliance rate has hovered at 80%. During FY2009, judges continued to agree with the sentencing guidelines recommendations in approximately 79.9% of the cases (Figure 2).

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 FY2009. The "mitigation" rate, or the rate at which judges sentence offenders to sanctions considered less severe than the guidelines recommendation, was 10.1% for the fiscal year. Thus, of the FY2009 departures, 49.7% were cases of aggravation while 50.3% were cases of mitigation.

### Dispositional Compliance

Since the inception of truth-in-sentencing in 1995, the correspondence between dispositions recommended by the guidelines and the actual dispositions imposed in Virginia's circuit courts has been quite high. Figure 3 illustrates judicial concurrence in FY2009 with the type of disposition recommended by the guidelines. For instance, of all felony offenders recommended for more than six months of incarceration during FY2009, judges sentenced nearly 87% to terms in excess of six months (Figure 3). 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 active incarceration.

Figure 2  
Overall Guidelines Compliance and Direction of Departures, FY2009  
N=25,188



Judges have also typically agreed with guidelines recommendations for other types of dispositions. In FY2009, 78% of offenders received a sentence resulting in confinement of six months or less when such a penalty was recommended. In some cases, judges felt probation to be a more appropriate sanction than the recommended jail term, and in other cases offenders recommended for a short term of incarceration received a sentence of more than six months. Finally, 71% 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.

Since July 1, 1997, sentences to the state's former Boot Camp, and current Detention Center and Diversion Center programs, have been defined as incarceration sanctions for the purposes of the sentencing guidelines. Although the state's Boot Camp program was discontinued in 2002, the Detention and Diversion Center programs have continued as sentencing options for judges. The Commission recognized that these programs are more restrictive than probation supervision in the community. In 2005, the Virginia Supreme Court concluded that participation in the Detention Center program is a form of incarceration (*Charles v. Commonwealth*). Because the Diversion

Center program also involves a period of confinement, the Commission defines both the Detention Center and the Diversion Center programs as incarceration terms under the sentencing guidelines. Since 1997, the Detention and Diversion Center programs have been counted as six months of confinement. However, effective July 1, 2007, the Department of Corrections extended these programs by an additional four weeks. Therefore, beginning in FY2008, a sentence to either the Detention or Diversion Center program counted as seven months of confinement for sentencing guideline purposes.

Figure 3  
Recommended Dispositions and Actual Dispositions, FY2009

Recommended Disposition	Actual Disposition		
	Probation	Incarceration 1 day-6 mos.	Incarceration >6 mos.
Probation	71.2%	23.8%	5.0%
Incarceration 1 day - 6 months	11.7%	77.6%	10.7%
Incarceration > 6 months	5.6%	7.7%	86.7%

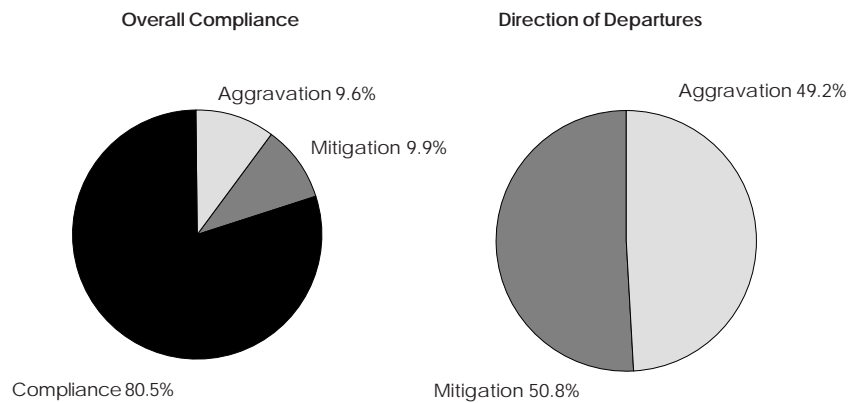
### Durational Compliance

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 FY2009 cases was approximately 81%, indicating that judges, more often than not, agree with the length of incarceration recommended by the guidelines in jail and prison cases (Figure 4). Among FY2009 cases not in durational compliance, departures tended slightly more toward mitigation than aggravation.

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. When the guidelines recommended more than six months of incarceration and judges sentenced within

Figure 4  
Durational Compliance and Direction of Departures,  
FY2009\*



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

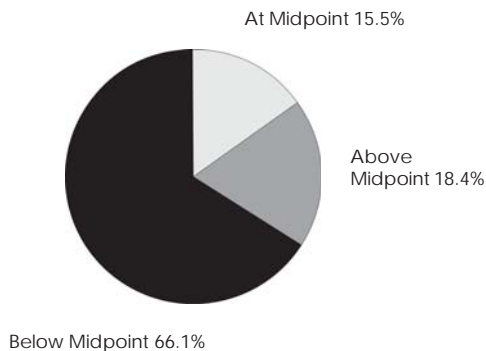
the recommended range, only a small share (16% of offenders in FY2009) were given prison terms exactly equal to the midpoint recommendation (Figure 5). Most (66%) of the cases in durational compliance with recommendations over six months resulted in sentences below the recommended midpoint. For the remaining 18% of these incarceration cases sentenced within the guidelines range, the sentence exceeded the midpoint recommendation. This pattern of sentencing within the range has been consistent since the truth-in-sentencing guidelines took effect in 1995, indicating that judges, overall, have favored the lower portion of the recommended range.

Overall, durational departures from the guidelines are typically less than one year above or below the recommended range, indicating that disagreement with the guidelines recommendation is, in most cases, not extreme. Offenders receiving shorter than recommended incarceration sentences (sentences less any suspended time) short of the guidelines by a median of nine months (Figure 6). For offenders receiving longer than recommended incarceration sentences, the effective sentence exceeded the guidelines range by a median (the middle value, where half are lower and half are higher) of eleven months.

**Figure 6**  
Median Length of Durational Departures, FY2009



**Figure 5**  
Distribution of Sentences within Guidelines Range, FY2009\*



\* Analysis includes only cases recommended for more than six months of incarceration.

### Reasons for Departure from the Guidelines

Compliance with the truth-in-sentencing guidelines is voluntary. Although not obligated to sentence within guidelines recommendations, judges are required by § 19.2-298.01 of the *Code of Virginia* to submit to the Commission their reason(s) for sentencing outside the guidelines range. Each year, as the Commission deliberates upon recommendations for revisions to the guidelines, the opinions of the judiciary, as reflected in their departure reasons, are an important part of the analysis. 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 FY2009, 10.1% of guideline cases resulted in sanctions below the guidelines recommendation. The most frequently cited reasons for sentencing below the guidelines recommendation were: the acceptance of a plea agreement, the defendant's cooperation with law enforcement, a sentence recommendation provided by the Commonwealth's Attorney, mitigating offense circumstances, a sentence to an alternative sanction other than the recommended incarceration period, and the defendant's minimal prior record. Although other reasons for mitigation were reported to the Commission in FY2009, only the most frequently cited reasons are noted here. For 551 of the 2,552 mitigating cases, a departure reason could not be discerned.

Judges sentenced 10% of the FY2009 cases to terms more severe than the sentencing guidelines recommendation, resulting in "aggravation" sentences. The most frequently cited reasons for sentencing above the guidelines recommendation were: the acceptance of a plea agreement, the severity or degree of prior record, the flagrancy of the offense, the defendant's poor potential for being rehabilitated, a sentence recommended by a jury, and the degree of victim injury. Many other reasons were cited by judges to explain aggravation sentences but with much less frequency than the reasons listed here. For 497 of the 2,521 cases sentenced above the guidelines recommendation, the Commission could not ascertain a departure reason.

Appendices 1 and 2 contain detailed summaries of the reasons for departure from guidelines recommendations for each of the 15 guidelines offense groups.

## Compliance by Circuit

Since the onset of truth-in-sentencing, compliance rates and departure patterns have varied across Virginia's 31 judicial circuits. FY2009 continues to show differences among judicial circuits in the degree to which judges within each circuit concur with guidelines recommendations (Figure 7). The map and accompanying table on the following pages identify the location of each judicial circuit in the Commonwealth.

In FY2009, 43% of the state's 31 circuits exhibited compliance rates at or above 80%, while the remaining 57% reported compliance rates between 75% and 79%. There are likely many reasons for the variations in compliance across circuits. For instance, 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

**Figure 7**  
**Compliance by Circuit - FY2009\***  
N=25,188

Circuit Name	Circuit	Compliance	Mitigation	Aggravation	Total
Radford Area	27	91.1%	5.5%	3.4%	1,018
Bristol Area	28	89.5	5.4	5.2	542
Prince William Area	31	86.9	6.6	6.5	725
Loudoun Area	20	86.1	6.5	7.4	524
Newport News	7	84.0	8.3	7.6	707
Virginia Beach	2	82.8	10.3	6.9	1,326
Alexandria	18	82.3	10.7	7.0	356
Hampton	8	82.2	10.6	7.2	540
Harrisonburg Area	26	81.3	11.1	7.6	1,189
Henrico	14	80.9	11.2	7.9	1,088
Roanoke Area	23	80.8	12.7	6.4	966
Chesapeake	1	80.8	7.8	11.5	951
Staunton Area	25	80.6	10.6	8.8	897
Arlington Area	17	79.7	5.2	15.1	464
South Boston Area	10	79.7	13.3	7.0	670
Fairfax	19	79.0	10.0	11.0	1,305
Danville Area	22	78.7	6.7	14.6	732
Richmond City	13	78.0	14.8	7.1	1,421
Suffolk Area	5	77.8	8.6	13.5	613
Portsmouth	3	77.7	7.6	14.7	780
Buchanan Area	29	77.4	6.3	16.3	620
Martinsville Area	21	77.1	17.6	5.3	341
Chesterfield Area	12	76.7	10.4	12.9	957
Lee Area	30	76.6	10.6	12.8	359
Lynchburg Area	24	76.5	14.2	9.3	913
Norfolk	4	76.2	14.7	9.1	1,389
Charlottesville Area	16	76.1	11.3	12.7	728
Sussex Area	6	75.7	12.6	11.8	485
Fredericksburg Area	15	75.4	8.6	16.0	1,717
Williamsburg Area	9	75.1	7.2	17.7	566
Petersburg Area	11	74.6	10.4	15.1	299

● Forty-three percent of the state's 31 circuits exhibited compliance rates at or above 80%.

● Fifty-seven percent reported compliance rates between 75% and 79%.

\*Excludes cases submitted on outdated guidelines forms and cases with missing information and errors.

**Virginia Localities and Judicial Circuits**

Accomack .....	2	Fairfax City .....	19
Albemarle .....	16	Fairfax County .....	19
Alexandria .....	18	Falls Church .....	17
Alleghany .....	25	Fauquier .....	20
Amelia .....	11	Floyd .....	27
Amherst .....	24	Fluvanna .....	16
Appomattox .....	10	Franklin City .....	5
Arlington .....	17	Franklin County .....	22
Augusta .....	25	Frederick .....	26
Bath .....	25	Fredericksburg .....	15
Bedford City .....	24	Galax .....	27
Bedford County .....	24	Giles .....	27
Bland .....	27	Gloucester .....	9
Botetourt .....	25	Goochland .....	16
Bristol .....	28	Grayson .....	27
Brunswick .....	6	Greene .....	16
Buchanan .....	29	Greensville .....	6
Buckingham .....	10	Halifax .....	10
Buena Vista .....	25	Hampton .....	8
Campbell .....	24	Hanover .....	15
Caroline .....	15	Harrisonburg .....	26
Carroll .....	27	Henrico .....	14
Charles City .....	9	Henry .....	21
Charlotte .....	10	Highland .....	25
Charlottesville .....	16	Hopewell .....	6
Chesapeake .....	1	Isle of Wight .....	5
Chesterfield .....	12	James City .....	9
Clarke .....	26	King and Queen .....	9
Clifton Forge .....	25	King George .....	15
Colonial Heights .....	12	King William .....	9
Covington .....	25	Lancaster .....	15
Craig .....	25	Lee .....	30
Culpeper .....	16	Lexington .....	25
Cumberland .....	10	Loudoun .....	20
Danville .....	22	Louisa .....	16
Dickenson .....	29	Lunenburg .....	10
Dinwiddie .....	11	Lynchburg .....	24
Emporia .....	6		
Essex .....	15		



Madison ..... 16

Manassas ..... 31

Martinsville ..... 21

Mathews ..... 9

Mecklenburg ..... 10

Middlesex ..... 9

Montgomery ..... 27

Nelson ..... 24

New Kent ..... 9

Newport News ..... 7

Norfolk ..... 4

Northampton ..... 2

Northumberland ..... 15

Norton ..... 30

Nottoway ..... 11

Orange ..... 16

Page ..... 26

Patrick ..... 21

Petersburg ..... 11

Pittsylvania ..... 22

Poquoson ..... 9

Portsmouth ..... 3

Powhatan ..... 11

Prince Edward ..... 10

Prince George ..... 6

Prince William ..... 31

Pulaski ..... 27

Radford ..... 27

Rappahannock ..... 20

Richmond City ..... 13

Richmond County ..... 15

Roanoke City ..... 23

Roanoke County ..... 23

Rockbridge ..... 25

Rockingham ..... 26

Russell ..... 29

Salem ..... 23

Scott ..... 30

Shenandoah ..... 26

Smyth ..... 28

South Boston ..... 10

Southampton ..... 5

Spotsylvania ..... 15

Stafford ..... 15

Staunton ..... 25

Suffolk ..... 5

Surry ..... 6

Sussex ..... 6

Tazewell ..... 29

Virginia Beach ..... 2

Warren ..... 26

Washington ..... 28

Waynesboro ..... 25

Westmoreland ..... 15

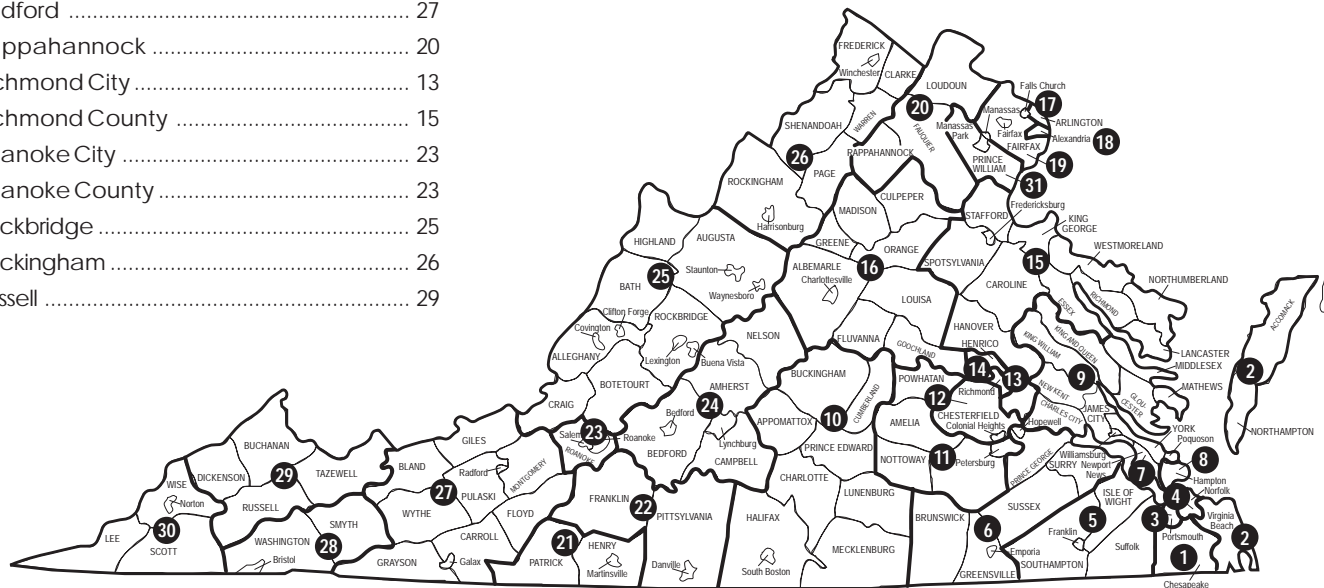
Williamsburg ..... 9

Winchester ..... 26

Wise ..... 30

Wythe ..... 27

York ..... 9



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.

In FY2009, the highest rate of judicial agreement with the sentencing guidelines (91%) was in Circuit 27 (Radford area). Concurrence rates of 84% or higher were also found in Circuit 28 (Bristol area), Circuit 31 (Prince William County area), Circuit 20 (Loudoun area), and Circuit 7 (Newport News). The lowest compliance rates among judicial circuits in FY2009 were reported in Circuit 11 (Petersburg area), Circuit 9 (Williamsburg area), Circuit 15 (Fredericksburg, Stafford, Hanover, King George, Caroline, Essex, etc.), and Circuit 6 (Sussex area).

The highest mitigation rates were found in Circuit 21 (Martinsville area), Circuit 13 (Richmond City), Circuit 4 (Norfolk), and Circuit 24 (Lynchburg area). Martinsville had a mitigation rate of 18% for the fiscal year; both Richmond and Norfolk circuits recorded mitigation rates around 15%, and the Lynchburg area had a mitigation rate of 14%. With regard to high mitigation rates, it would be too simplistic to assume that this reflects areas with lenient sentencing habits. Intermediate punishment programs are not uniformly available throughout the Commonwealth, and those jurisdictions with better access to these sentencing options may be using them as intended by the General Assembly. These sentences generally would appear as mitigations from the guidelines. Inspecting aggravation rates reveals that Circuit 9 (Williamsburg area) had the highest aggravation rate at 18%, followed by Circuit 29 (Buchanan County area) and Circuit 15 (Fredericksburg area) at 16%. Lower compliance rates in these latter circuits are a reflection of the relatively high aggravation rates.

Appendices 3 and 4 present compliance figures for judicial circuits by each of the 15 sentencing guidelines offense groups.

### Compliance by Sentencing Guidelines Offense Group

In FY2009, as in previous years, judicial agreement with the guidelines varied when comparing the 15 offense groups (Figure 8). For FY2009, compliance rates ranged from a high of 85% in the fraud offense group to a low of 62% in robbery cases. In general, property and drug offenses exhibit rates of compliance higher than the violent offense categories. The violent offense groups (assault, rape, sexual assault, robbery, homicide and kidnapping) had compliance rates at or below 74% whereas many of the property and drug offense categories had compliance rates above 82%.

During the last fiscal year, judicial concurrence with guidelines recommendations remained relatively stable, fluctuating two percentage points or less, for most offense groups. However, compliance on the Burglary/Other Structure worksheets increased by six percentage points, primarily due to a decrease in the mitigation rate for statutory burglary of a structure (other than dwelling) with intent to commit larceny, etc. In FY2009, compliance for this offense was nearly 78% and both mitigation and aggravation were evenly split, 11% respectively. Between FY2004 and FY2008, compliance was as low as 71%, with mitigation rates as high as 17%. Between FY2004 and FY2008, in one out of five cases in which jail or prison was recommended the judge sentenced the defendant to an incarceration term below

Figure 8  
Compliance by Offense - FY2009

Offense	Compliance	Mitigation	Aggravation	Total
Fraud	85.3%	8.9%	5.8%	2,758
Drug/Other	83.9	4.9	11.2	1,235
Larceny	83.5	8.2	8.2	5,397
Drug/Schedule I/II	82.0	9.0	9.0	7,578
Traffic	81.1	7.1	11.9	2,091
Burg./Other Structure	78.8	11.3	9.9	595
Weapon	78.2	11.4	10.5	555
Assault	73.9	14.3	11.8	1,568
Miscellaneous	71.5	12.5	16.0	337
Burglary/Dwelling	67.7	15.5	16.8	993
Kidnapping	66.4	12.5	21.1	128
Rape	65.8	23.8	10.4	202
Sexual Assault	65.7	13.1	21.2	542
Murder/Homicide	64.5	12.7	22.7	251
Robbery	62.4	26.7	10.9	958
<b>Total</b>	<b>79.9</b>	<b>10.1</b>	<b>10.0</b>	<b>25,188</b>

the guidelines range. The mitigating sentence was, on average, ten months below the guidelines recommended range of incarceration. Although compliance for this offense group increased in FY2009, further monitoring of this shifting departure pattern with respect to burglary of a structure (other than dwelling) will be necessary in coming years.

The Miscellaneous worksheets saw a five percentage point increase in compliance during FY2009. Effective July 1, 2008, two new child abuse and neglect offenses were added to the Miscellaneous worksheets: gross/reckless care of child (§ 18.2-371.1(B)) and cruelty and injuries to a child (§ 40.1-103). Compliance rates for these two offenses were 80% and 75%, respectively, which helped to increase overall compliance for the Miscellaneous worksheets. Beginning in FY2009, point values for victim injury were also increased for the child abuse offense already covered by the guidelines (§ 18.2-371.1(A)); an offense that results in serious physical injury now receives a higher number of points. Although these changes were made, FY2009 still shows a 36% aggravation rate for child abuse offenses that involve serious physical injury under § 18.2-371.1(A).

In FY2009, compliance with the guidelines for weapons offenses also increased five percentage points. Changes were made to the Weapons worksheet in FY2009 for the crime of making a false statement on a criminal history consent form required for purchasing a firearm. Specifically, the weapons guidelines were revised to increase the likelihood that some offenders convicted of making a false statement on a firearm consent form would be recommended for probation or up to six months of incarceration rather than incarceration for a term of more than six months. Compliance for this offense in FY2007 and FY2008 was 64%, with more than one-third (34%) being sentenced below the guidelines recommendation. In FY2009, primary offense points were adjusted and a new factor was added to the Section A worksheet to add additional points for cases in which the basis for the false statement was a prior felony conviction for a person crime, or other prior felony conviction within four years of the current offense, a prior domestic assault misdemeanor conviction, or if the defendant was subject to a protective order at the time of the offense. These changes seem to have had a positive effect in capturing judicial sentencing practices because the compliance rate in FY2009 for a false statement on a firearm consent form increased to 79%, with mitigation dropping to less than 17%.

Since 1995, departure patterns have differed across offense groups, and FY2009 was no exception. During this time period, the robbery and rape offense groups showed the highest mitigation rates with approximately one-quarter of cases (27% and 24%) resulting in sentences below the guidelines. This mitigation pattern has been consistent with both rape and robbery offenses since the abolition of parole in 1995. The most frequently cited mitigation reasons provided by judges in robbery cases include the acceptance of a plea agreement, the defendant's cooperation with law enforcement, or, because of the defendant's age, a commitment to the Department of Juvenile Justice. The most frequently cited mitigation reasons provided by judges in rape cases include the acceptance of a plea agreement, the victim's request that the offender receive a more lenient sentence, the victim's refusal to testify, a recommendation from the Commonwealth's Attorney, or the defendant's minimal prior record.

In FY2009, offenses with the highest aggravation rates were murder/homicide, at 23%, and sexual assault (other than rape, sodomy, etc.) and kidnapping, each at 21%. In murder/homicide cases, the influence of jury trials and extreme case circumstances have historically contributed to higher aggravation rates. The most frequently cited aggravating departure reasons in sexual assault cases in FY2009 included the acceptance of a plea agreement, the flagrancy of the offense, the type of victim involved (such as a child), and the poor rehabilitation potential of the offender. The most frequently cited aggravating departure reasons in kidnapping cases in FY2009 included the flagrancy of the offense, imposition of a jury sentence, the acceptance of a plea agreement, and the type of victim involved.

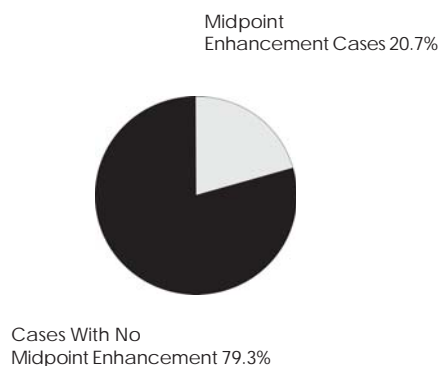
### Compliance under Midpoint Enhancements

Section 17.1-805, formerly § 17-237, of the *Code of Virginia* describes the framework for what are known as "midpoint enhancements." These are 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. By design, midpoint enhancements produce sentence recommendations for violent offenders that are significantly greater than the time that was served by offenders convicted of such crimes prior to the enactment of truth-in-sentencing laws. Offenders who are convicted of a violent crime or who have been previously convicted of a violent crime are recommended for incarceration terms up to six times longer than the terms served by offenders fitting similar profiles under the parole system. Midpoint enhancements are triggered for homicide, rape, 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. Category I and II offenses are defined in § 17.1-805.

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 FY2009 cases, 79% of the cases did not involve midpoint enhancements of any kind (Figure 9). 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.

Figure 9  
Application of Midpoint Enhancements,  
FY2009

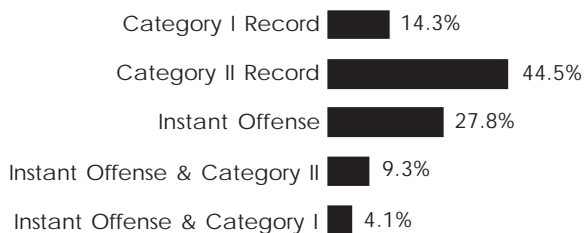


Of the FY2009 cases in which midpoint enhancements applied, the most common midpoint enhancement was for a Category II prior record. Approximately 45% of the midpoint enhancements were of this type, applicable to offenders with a nonviolent instant offense but a violent prior record defined as Category II (Figure 10). In FY2009, another 14% 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 28% of the midpoint enhancements in FY2009. The most substantial midpoint enhancements target offenders with a combination of instant and prior violent offenses. About 9% qualified for enhancements for both a current violent offense and a Category II prior record. Only a small percentage of cases (4%) received the most extreme midpoint enhancements, triggered by a combination of a current violent offense and a Category I prior record. Since the inception of the truth-in-sentencing guidelines, judges have departed from the guidelines

recommendation more often in midpoint enhancement cases than in cases without enhancements. In FY2009, compliance was 69% when enhancements applied, which is significantly lower than compliance in all other cases (83%). Thus, compliance in midpoint enhancement cases is suppressing the overall compliance rate. When departing from enhanced guidelines recommendations, judges are choosing to mitigate in three out of every four departures.

Among FY2009 midpoint enhancement cases resulting in incarceration, judges departed from the low end of the guidelines range by an average of 26 months (Figure 11). The median mitigation departure (the middle value, where half are lower and half are higher) was 14 months.

**Figure 10**  
Type of Midpoint Enhancements Received, FY2009



**Figure 11**  
Length of Mitigation Departures  
in Midpoint Enhancement Cases, FY2009



Compliance, while generally lower in midpoint enhancement cases than in other cases, varies across the different types and combinations of midpoint enhancements (Figure 12). In FY2009, as in previous years, enhancements for a Category II prior record generated the highest rate of compliance of all midpoint enhancements (74%). Compliance in cases receiving enhancements for a Category I prior record was significantly lower (61%). Compliance for enhancement cases involving a current violent offense, but no prior record of violence, was 67%. Those cases involving a combination of a current violent offense and a Category II prior record yielded a compliance rate of 68%, while those with the most significant midpoint enhancements, for both a violent instant offense and a Category I prior record, yielded a lower compliance rate of 54%.

Due to the high rate of mitigation departures, analysis of departure reasons in midpoint enhancement cases focuses on downward departures from the guidelines. Judges sentence below the guidelines recommendation in one out of every four midpoint enhancement cases. The most frequently cited reasons for departure include: the acceptance of a plea agreement, the defendant's cooperation with law enforcement, the recommendation of the Commonwealth's Attorney, or minimal offense circumstances.

**Figure 12**  
**Compliance by Type of Midpoint Enhancement, FY2009**

	Compliance	Mitigation	Aggravation	Number of Cases
None	82.7%	6.7%	10.6%	19,979
Category I Record	61.2	34.9	3.9	746
Category II Record	73.7	19.6	6.7	2,318
Instant Offense	67.4	20.1	12.5	1,448
Instant Offense & Category I	54.0	40.3	5.7	211
Instant Offense & Category II	67.9	24.5	7.6	486
<b>Total</b>				<b>25,188</b>

● Overall, judges sentence below the guidelines recommendation in one out of every four midpoint enhancement cases.



### Juries and the Sentencing Guidelines

There are three general methods by which Virginia's criminal cases are adjudicated: guilty pleas, bench trials, and jury trials. Felony cases in the Commonwealth's circuit courts overwhelmingly are resolved through guilty pleas from defendants or plea agreements between defendants and the Commonwealth. During the last fiscal year, 88% of guidelines cases were sentenced following guilty pleas (Figure 13). Adjudication by a judge in a bench trial accounted for 11% of all felony guidelines cases. During FY2009, 1.5% of felony guidelines cases involved jury trials. In a small number of cases, some of the charges were adjudicated by a judge while others were adjudicated by a jury, after which the charges were combined into a single sentencing hearing.

Since FY1986, there has been a generally declining trend in the percentage of jury trials among felony convictions in circuit courts (Figure 14). Under the parole system in the late 1980s, the percent of jury convictions of all felony convictions was as high as 6.5% before starting to decline in FY1989. In 1994, the General Assembly enacted provisions for a system of bifurcated jury trials. In bifurcated trials, the jury establishes the guilt or innocence of the defendant in the first phase of the trial and then, in a second phase, the jury makes its sentencing decision. When 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, jury convictions dropped slightly, to fewer than 4% of all felony convictions. This was the lowest rate recorded up to that time.

Figure 13 Percentage of Cases Received by Method of Adjudication, FY2009

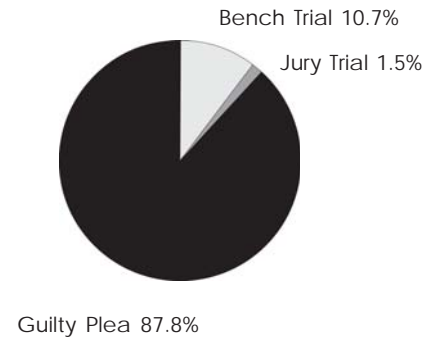
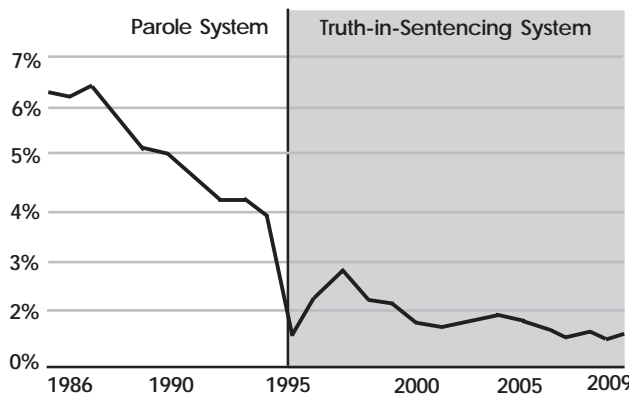


Figure 14 Percent of Felony Convictions Adjudicated by Juries FY1986-FY2009 Parole System v. Truth-in-Sentencing (No Parole) System

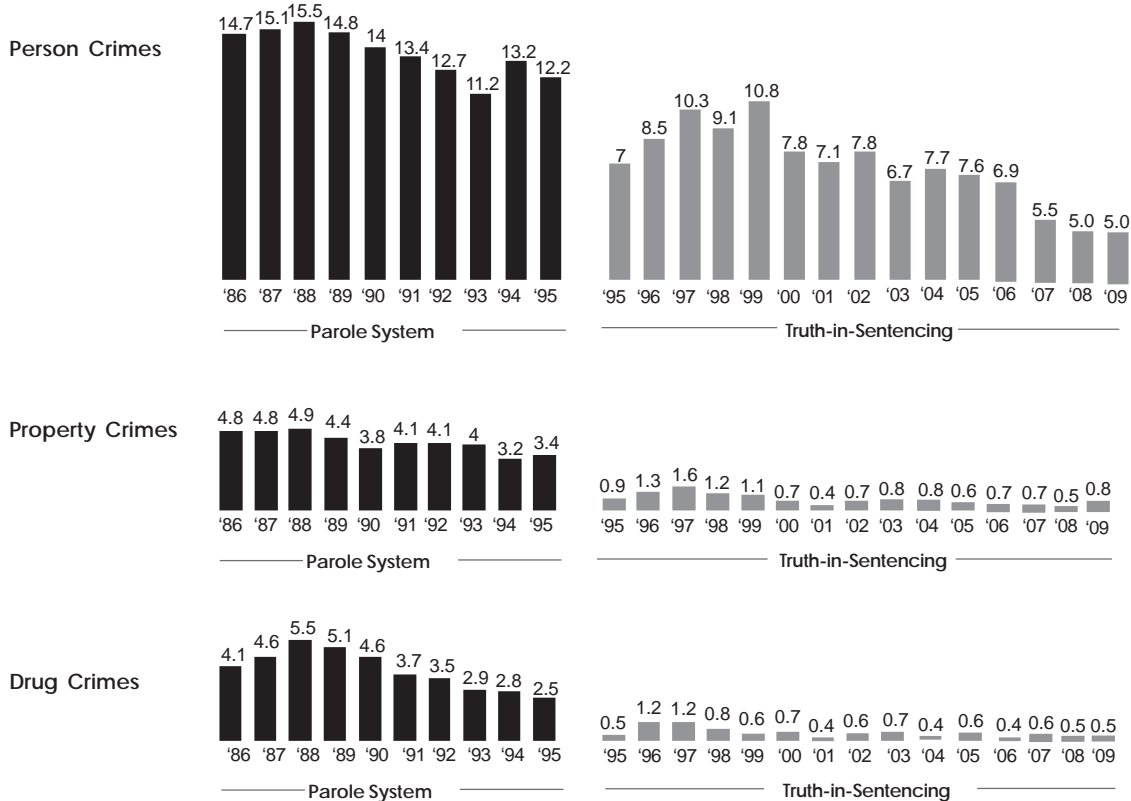


- Since FY1986, there has been a generally declining trend in the percentage of jury trials among felony convictions in circuit courts.
- When the bifurcated trials became effective on July 1, 1994 (FY1995), jurors in Virginia, for the first time, were presented with information on the offender's prior criminal record to assist them in making a sentencing decision.

Among the early cases subjected to the new truth-in-sentencing provisions, implemented during the last six months of FY1995, jury adjudications sank to just over 1%. During the first complete fiscal year of truth-in-sentencing (FY1996), just over 2% of the cases were resolved by jury trials, which is 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 reduction in jury trials. Since FY2000, the percentage of jury convictions has remained less than 2%.

Inspecting jury data by offense type reveals very divergent patterns for person, property and drug crimes. Under the parole system, jury cases comprised 11%-16% of felony convictions for person crimes. This rate was typically three to four times the rate of jury trials for property and drug crimes (Figure 15). However, with the implementation of truth-in-sentencing, the percent of convictions decided by juries dropped dramatically for all crime types. In FY2008 and FY2009, the rate of jury convictions for person crimes dropped to its lowest since truth-in-sentencing was enacted (5%). The percent of felony convictions resulting from jury trials for property and drug crimes has declined to less than 1% under truth-in-sentencing.

**Figure 15**  
Percent of Felony Convictions Adjudicated by Juries FY1986-FY2009  
Parole System v. Truth-in-Sentencing (No Parole) System



Since the implementation of the truth-in-sentencing system, Virginia's juries typically have handed down sentences more severe than the recommendations of the sentencing guidelines. In FY2009, as in previous years, a jury sentence was far more likely to exceed the guidelines recommendation than a sentence given by a judge following a guilty plea or bench trial. By law, juries are not allowed to receive any information regarding the sentencing guidelines.

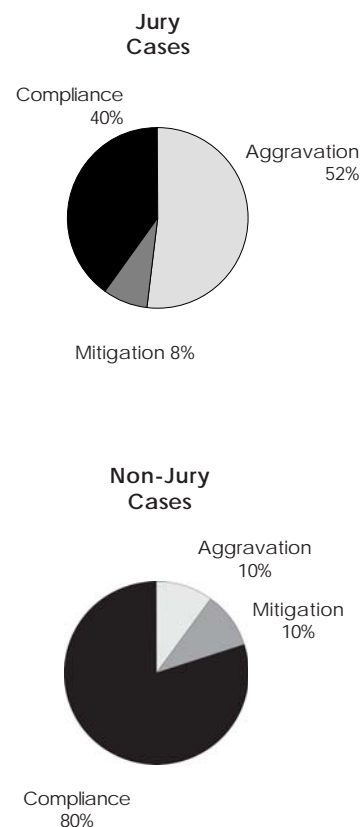
In FY2009, the Commission received 376 cases adjudicated by juries. While the compliance rate for cases adjudicated by a judge or resolved by a guilty plea was at 80% during the fiscal year, sentences handed down by juries concurred with the guidelines only 40% of the time (Figure 16). In fact, sentences recommended by a jury were more likely to fall above the guidelines than within the recommended range. This pattern of jury sentencing vis-à-vis the guidelines has been consistent since the truth-in-sentencing guidelines became effective in 1995.

In jury cases in which the final sentence fell short of the guidelines, it did so by a median value of 11 months (Figure 17). 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 four and one-half years.

Two of the jury cases received in FY2009 by the Commission involved a juvenile offender tried as an adult in circuit court. According to § 16.1-272 of the *Code of Virginia*, juveniles may be adjudicated by a jury in circuit court; however, any sentence must be handed down by the court without the intervention of a jury. Therefore, juries are not permitted to recommend sentences for juvenile offenders. Rather, circuit court judges are responsible for formulating sanctions for juvenile offenders. There are many options for sentencing these juveniles, including commitment to the Department of Juvenile Justice. Because judges, and not juries, must sentence in these cases, they are excluded from the previous analysis.

In cases of adults adjudicated by a jury, judges are permitted by law to lower a jury sentence. Typically, however, judges have chosen not to amend sanctions imposed by juries. In FY2009, judges modified only 24% of jury sentences.

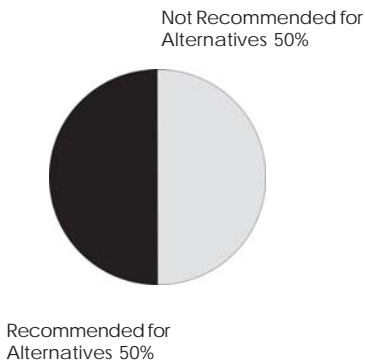
**Figure 16**  
Sentencing Guidelines Compliance in Jury and Non-Jury Cases, FY2009



**Figure 17**  
Median Length of Durational Departures in Jury Cases, FY2009



**Figure 18**  
**Percentage of Eligible Nonviolent Offenders Recommended for Alternatives through Risk Assessment, FY2009 (6,704 cases)**



**Compliance and Nonviolent Offender Risk Assessment**

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

More than two-thirds of all guidelines received by the Commission for FY2009 were for nonviolent offenses. However, only 40% of these nonviolent offenders were eligible for risk assessment evaluation. The goal of the nonviolent risk assessment instrument is to divert low-risk offenders, who are recommended for incarceration on the guidelines, to an alternative sanction other than prison or

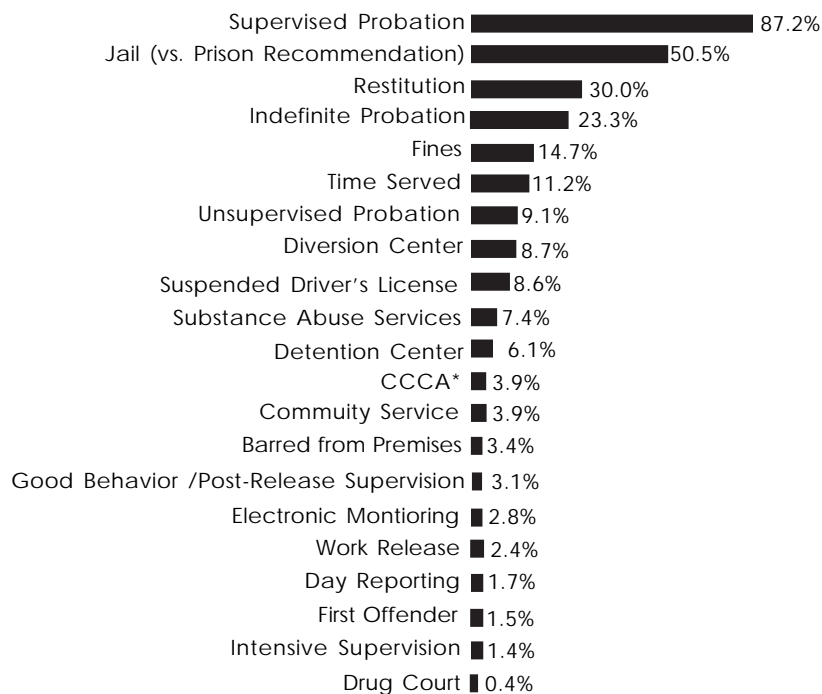
jail. Therefore, nonviolent offenders who are recommended for probation/no incarceration on the guidelines are not eligible for the assessment. Furthermore, the instrument is not to be applied to offenders convicted of distributing one ounce or more of cocaine, those who have a current or prior violent felony conviction, or those who must be sentenced to a mandatory minimum term of incarceration required by law. In addition to those not eligible for risk assessment, there were 3,144 nonviolent offense cases for which a risk assessment instrument was not completed and submitted to the Commission.

Among the FY2009 eligible offenders for whom a risk assessment form was received (6,704 cases), 50% were recommended for an alternative sanction by the risk assessment instrument (Figure 18). A large portion of offenders recommended for an alternative sanction through risk assessment were given some form of alternative punishment by the judge. In FY2009, 41% of offenders recommended for an alternative were sentenced to an alternative punishment option.

Among offenders recommended for and receiving an alternative sanction through risk assessment, judges utilized supervised probation more often than any other option (Figure 19). In addition, in half of the cases in which an alternative was recommended, judges sentenced the offender to a shorter term of incarceration in jail (less than twelve months) rather than the longer prison sentence recommended by the traditional guidelines range. Other frequent sanctions included restitution (30%), indefinite probation (23%), fines (15%),

and a sentence of time served while awaiting trial (11%). The Department of Corrections' Diversion Center and Detention Center programs were cited in 9% and 6% of the cases, respectively. Other alternatives cited include unsupervised probation, substance abuse services, programs under the Comprehensive Community Corrections Act (CCCA), electronic monitoring, work release, day reporting, and first offender status under § 18.2-251.

**Figure 19**  
Types of Alternative Sanctions Imposed, FY2009



\* Any program established through the Comprehensive Community Corrections Act

When a nonviolent offender is recommended for an alternative sanction via the risk assessment instrument, a judge is considered to be in compliance with the guidelines if he or she chooses to sentence the defendant to a term within the traditional incarceration period recommended by the guidelines or if the judge chooses to sentence the offender to an alternative form of punishment. For drug offenders eligible for risk assessment, the overall guidelines compliance rate is 84%, but a portion of this compliance reflects the use of an alternative punishment option as recommended by the risk assessment tool (Figure 20). In 23% of these drug cases, judges have complied with the recommendation for an alternative sanction. Similarly, in fraud cases with offenders eligible for risk assessment, the overall compliance rate is 88%. In 34% of these fraud cases, judges have complied

by utilizing alternative punishment when it was recommended. Finally, among larceny offenders eligible for risk assessment, the compliance rate is 84%. Judges utilized an alternative, as recommended by the risk assessment tool, in 9% of larceny cases. The lower usage of alternatives for larceny offenders is due primarily to the fact that larceny offenders are recommended for alternatives at a lower rate than drug and fraud offenders. The National Center for State Courts, in its evaluation of Virginia's risk assessment tool, and the Commission, during the course of its validation study, found that larceny offenders are the most likely to recidivate among nonviolent offenders.

Figure 20

Compliance Rates for Nonviolent Offenders Eligible for Risk Assessment, FY2009

	Mitigation	Compliance		Aggravation	Number of Cases	Overall Compliance
		Traditional Range	Adjusted Range			
Drug	6%	61%	23%	10%	3,481	84%
Fraud	8%	54%	34%	4%	1,179	88%
Larceny	9%	75%	9%	7%	2,044	84%
Overall	7%	64%	21%	8%	6,704	85%

### **Compliance and Sex Offender Risk Assessment**

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

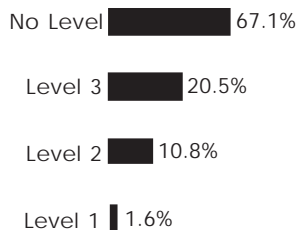
Effectively, risk assessment means developing profiles or composites based on overall group outcomes. Groups are defined by having a number of factors in common that are statistically relevant to predicting repeat offending. Those groups exhibiting a high degree of re-offending are labeled high risk.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

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

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

The low end and the midpoint remain unchanged. Increasing the upper end of the recommended range provides judges the flexibility to sentence higher risk sex offenders to terms above the traditional guidelines range and still be in compliance with the guidelines. This approach allows the judge to incorporate sex offender risk assessment into the sentencing decision while providing the judge with flexibility to evaluate the circumstances of each case.

**Figure 21**  
Sex Offender Risk Assessment Levels for Sexual Assault Offenders, FY2009\*  
N=434



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

During FY2009, there were 542 offenders convicted of an offense covered by the sexual assault guidelines (this group does not include offenders convicted of rape, forcible sodomy or object sexual penetration). The sex offender risk assessment instrument does not apply to certain guidelines offenses, such as bestiality, bigamy, non-forcible sodomy, prostitution, and child pornography or child solicitation (these comprised 108 of the 542 cases in FY2009). Of the remaining 434 sexual assault cases for which the risk assessment was applicable, the majority (67%) were not assigned a level of risk by the sex offender risk assessment instrument (Figure 21). Approximately 21% of applicable sexual assault guidelines cases resulted in a Level 3 risk classification, with an additional 11% assigned to Level 2. Less than 2% of offenders reached the highest risk category of Level 1.

Under the sex offender risk assessment, the upper end of the guidelines range is extended by 300%, 100% or 50% for offenders assigned to Level 1, 2 or 3, respectively. Judges have begun to utilize these extended ranges when sentencing sex offenders. For sexual assault offenders reaching Level 1 risk, 14% were given sentences within the extended guidelines range (Figure 22). Judges used the extended guidelines range in 28% of the Level 2 and 11% of Level 3 risk cases. Judges rarely sentenced Level 1, 2 or 3 offenders to terms above the extended guidelines range provided in these cases. However, offenders who scored less than 28 points on the risk assessment instrument (who are not assigned a risk category and receive no guidelines adjustment) were less likely to be sentenced in compliance with the guidelines (59%) and the most likely to receive a sentence that was an upward departure from the guidelines (28%).

**Figure 22**  
Other Sexual Assault Compliance Rates By Risk Assessment Level, FY2009\*

	Mitigation	Compliance		Aggravation	Number of Cases	Overall Compliance
		Traditional Range	Adjusted Range			
Level 1	14%	72%	14%	0%	7	86%
Level 2	15%	55%	28%	2%	47	83%
Level 3	18%	65%	11%	6%	89	76%
No Level	13%	59%	0%	28%	291	59%
Overall	14%	60%	6%	20%	434	66%

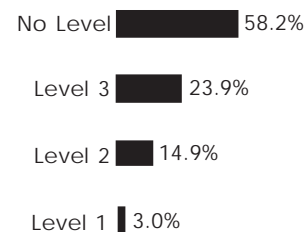
\*Excludes cases missing the sex offender risk assessment portion of the Other Sexual Assault worksheet.



In FY2009, there were 202 offenders convicted of offenses covered by the Rape guidelines (which cover the crimes of rape, forcible sodomy, and object penetration). Among offenders convicted of these crimes, over one-half (58%) were not assigned a risk level by the Commission's risk assessment instrument. Approximately 24% of rape cases resulted in a Level 3 adjustment—a 50% increase in the upper end of the traditional guidelines range recommendation (Figure 23). An additional 15% received a Level 2 adjustment (100% increase). The most extreme adjustment (300%) affected 3% of Rape guidelines cases.

Two of the six rape offenders reaching the Level 1 risk group were sentenced within the guidelines range, and one was sentenced within the extended high end of the range (Figure 24). As shown below, 20% of offenders with a Level 2 risk classification and 17% of offenders with a Level 3 risk classification were given prison sentences within the adjusted range of the guidelines. With extended guidelines ranges available for higher risk sex offenders, judges rarely sentenced Level 1, 2 or 3 offenders above the expanded guidelines range.

**Figure 23**  
Sex Offender Risk Assessment Levels for Rape Offenders, FY2009\*  
N=202



\*Excludes cases missing the sex offender risk assessment portion of the Rape worksheet.

**Figure 24**  
Rape Compliance Rates By Risk Assessment Level, FY2009\*

	Mitigation	Compliance			Number of Cases	Overall Compliance
		Traditional Range	Adjusted Range	Aggravation		
Level 1	33%	33%	17%	17%	6	50%
Level 2	23%	53%	20%	3%	30	73%
Level 3	23%	54%	17%	6%	48	71%
No Level	24%	62%	0%	14%	117	62%
<b>Overall</b>	<b>24%</b>	<b>58%</b>	<b>8%</b>	<b>10%</b>	<b>201</b>	<b>66%</b>

\*Excludes cases missing the sex offender risk assessment portion of the Rape worksheet.



# 3

## Parole-Eligible and Geriatric Inmates

### 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

*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.*

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 his 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**

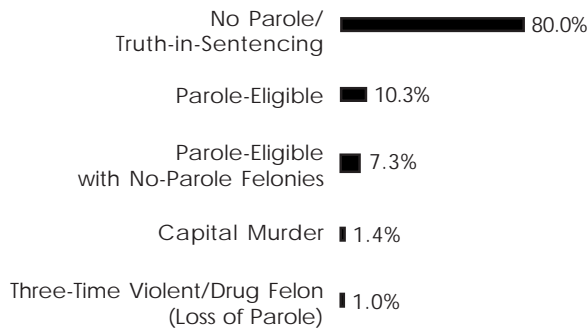
The geriatric release provision was enacted as part of the abolition of parole and truth-in-sentencing reform package passed by the General Assembly in 1994. Under § 53.1-40.01, any person serving a sentence for a felony offense other than a Class 1 felony (i) who has reached the age of sixty-five or 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 25). 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 1% of inmates (358) 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 1.4% of inmates (497) had been sentenced to prison following conviction for a capital murder offense.

**Figure 25**  
**Percentage of State-Responsible Prison Inmates as of December 31, 2008, by Type of Sentence**



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 (10%, or 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 (7%, or 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.

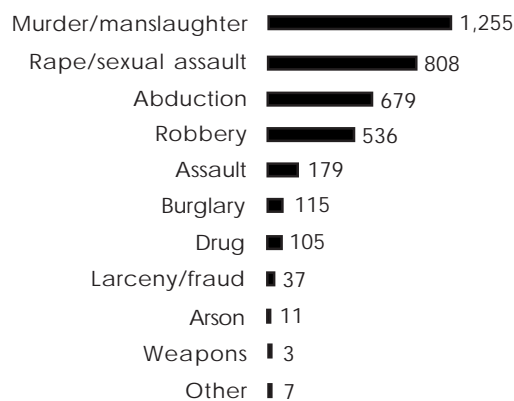
### Characteristics of Parole-Eligible Inmates

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, 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 26). 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.

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 27). 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

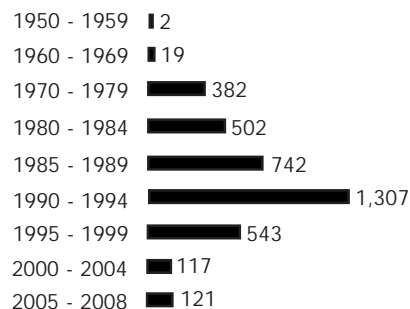
arrested or convicted until sometime after that date. An offender who committed crimes in Virginia prior to 1995 may have been serving a sentence in another state or in federal prison and only recently been returned to serve his sentence in Virginia. Finally, offenders whose crime was committed prior to 1995 may still be on probation or subject to a suspended sentence. Should a judge revoke the

**Figure 26**  
Number of Parole-Eligible Prison Inmates as of December 31, 2008 by Most Serious Offense\* (3,735 Inmates)



*\* 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. Analysis excludes inmates also serving a sentencing for a felony committed under the no-parole/truth-in-sentencing system.*

**Figure 27**  
Number of Parole-Eligible Prison Inmates as of December 31, 2008 by Year Originally Received into the Department of Corrections (3,735 Inmates)



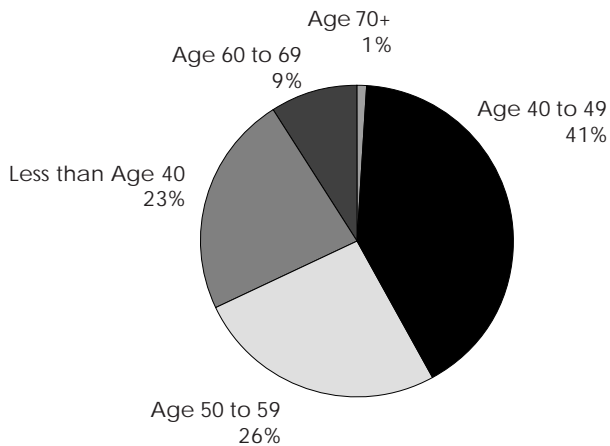
*Analysis excludes inmates also serving a sentencing for a felony committed under the no-parole/truth-in-sentencing system.*

offender's probation and impose a prison sentence, the offender will be eligible for parole release based on the date of the original offense.

Additionally, 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.

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 28). 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 chapter.

**Figure 28**  
 Percentage of Parole-Eligible Inmates as of December 31, 2008  
 by Age  
 (3,735 Inmates)



*Analysis excludes inmates also serving a sentencing 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. 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.

### *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.

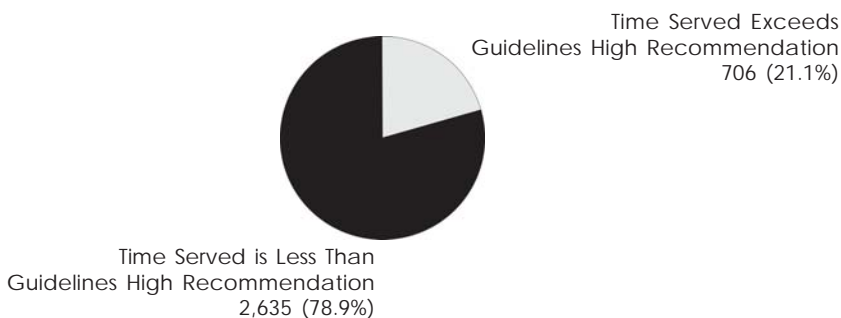
DOC data indicate that some inmates have been granted discretionary parole release in the past but have been returned to prison for violations of the conditions of parole supervision. These inmates continue to be eligible for parole and they are reviewed annually by the Parole Board. While the Parole 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 29). 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 29**  
 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.

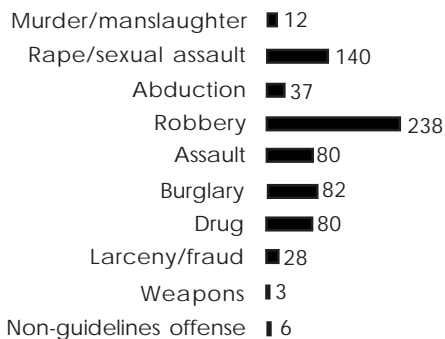
Furthermore, inmates who have been returned to prison for probation and parole violations serve additional incarceration time and are less likely to be granted parole thereafter. The Parole Board considers prior probation and parole violations when reviewing an inmate for discretionary parole release. 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 30). 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 30). Among inmates serving time 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

**Figure 30**  
 Number of Parole-Eligible Prison Inmates Whose Time in Custody (as of December 31, 2008) Exceeded the Guidelines High-End Recommendation (706 Inmates)



*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.*

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.

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, for example, a malicious wounding (a 20-year maximum) or voluntary manslaughter (10-year maximum). A large number of inmates serving time 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.

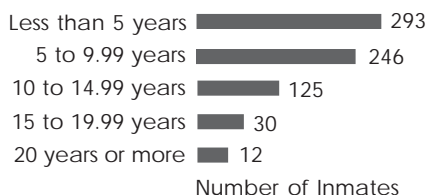
Similarly, the majority of parole-eligible inmates convicted of larceny or fraud offenses had prior revocations. Only two of the 28 inmates with a larceny or fraud as their most serious offense did not have a prior revocation of probation or parole. A sample of five larceny/fraud inmates was reviewed 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 31). 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.

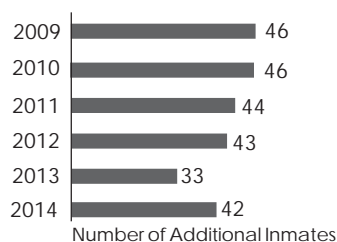
The Sentencing Commission closely inspected all inmates who, according to the available data, had served 15 years or more beyond the total high-end recommendation of the guidelines, as well as all inmates incarcerated for larceny and fraud offenses who had served 10 years or more beyond the guidelines.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

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. Figure 32 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 31**  
**Amount of Time Served beyond the High-End Guidelines Recommendation (as of December 31, 2008)**  
**(706 Inmates)**



**Figure 32**  
**Parole-Eligible Inmates Whose Time Served in Custody Has Exceeded or Will Exceed the Guidelines High-End Recommendation by December 31, 2014**



*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 33). 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.

Approximately half of the geriatric-eligible inmates are between the ages of 60 and 64 (Figure 34). 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.

Geriatric-eligible inmates have most often been convicted of first-degree murder, rape, or other sexual assault offenses. 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.

**Figure 33**  
**Prison Inmates Eligible for Geriatric Release as of December 31, 2008**

	State-Responsible Prison 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.

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 35). 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 35**  
Projected Number of Geriatric-Eligible Inmates, 2009 through 2010

Year	Inmates Eligible for Geriatric Release
2008	575
2009	711
2010	882

*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.*

**Figure 34**  
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	12 yrs.
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.



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# 4 – Juveniles Convicted in Circuit Court

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## **Introduction**

The 2006 General Assembly directed the Virginia State Crime Commission, a legislative branch agency, to study Virginia's juvenile justice system and the provisions in the *Code of Virginia* pertaining to juvenile delinquency. During the course of its multi-year study, the State Crime Commission has requested assistance from a variety of other agencies, including the Virginia Criminal Sentencing Commission.

In 2006 and again in 2009, the Criminal Sentencing Commission was asked to provide information on a particular aspect of the juvenile justice system: juveniles transferred to the circuit court to be tried as adults. Information was compiled and presented to the full membership of the State Crime Commission during meetings in October 2006 and June 2009.

## **Provisions Related to Juvenile Transfer**

Section 16.1-269.1 of the *Code of Virginia* outlines the criteria and procedures for transferring juveniles to circuit court for trial as adults. The youngest age at which a juvenile can be transferred to circuit court is 14. For any offense that would be a felony if committed by an adult, the Commonwealth's attorney has the discretion to request a transfer hearing. The juvenile court may retain jurisdiction or, if certain conditions are satisfied, approve the transfer of the juvenile to circuit court.

*The 2006 General Assembly directed the Virginia State Crime Commission, a legislative branch agency, to study Virginia's juvenile justice system.*

The juvenile court is required (per § 16.1-269.1(B)) to hold a preliminary hearing in every case in which a juvenile 14 years of age or older is charged with murder (under §§ 18.2-31, 18.2-32 or 18.2-40) or aggravated malicious wounding (§ 18.2-51.2) and, upon finding probable cause, must certify the charge (and all ancillary charges) to the grand jury, which divests the juvenile court of jurisdiction. In addition, the court must hold a preliminary hearing (per § 16.1-269.1(C)) when a juvenile is charged with certain other violent offenses (such as felony murder, malicious wounding, robbery and rape) if the Commonwealth's attorney gives notice that he or she intends to pursue transfer; upon finding probable cause in such cases, the court must certify the charge or charges to the grand jury. In any hearing required by § 16.1-269.1(B) or (C), if the court does not find probable cause that the juvenile committed the offense charged or if the petition or warrant is dismissed by the court, the Commonwealth's attorney may seek a direct indictment in the circuit court.

Per § 16.1-271, any juvenile who is tried and convicted in a circuit court as an adult must be treated as an adult in any criminal proceeding resulting from any subsequent criminal acts and in any pending allegations of delinquency that have not been disposed of by the juvenile court at the time of the circuit court conviction.

### **Data Sources**

The *Code of Virginia* (§ 19.2-298.01) requires the preparation of sentencing guidelines worksheets in nearly all felony cases tried in circuit court. The guidelines worksheets must be presented to the court and the judge is required to review and consider the suitability of the guidelines recommendation before imposing sentence. Judicial compliance with Virginia's sentencing guidelines is discretionary. The guidelines cover approximately 95% of felony cases in Virginia's circuit courts and, therefore, should account for nearly all felony offenders.

For the analysis completed in 2006, the Criminal Sentencing Commission utilized data contained in its own sentencing guidelines information system. Using guidelines data, the Criminal Sentencing Commission identified offenders who were under the age of 18 at the time the offense was committed and convicted in circuit court of a felony covered by the guidelines. The package of information presented to the State Crime Commission included the number of juvenile offenders convicted of a felony in circuit court for fiscal year (FY) 2001 through FY2005 and the types of offenses committed by these juveniles. Using information recorded by circuit court judges on the sentencing guidelines forms, disposition information was also reported.

Subsequent to the 2006 analysis, the Criminal Sentencing Commission worked with Virginia's Department of Juvenile Justice (DJJ) to gather additional detail regarding dispositions for juveniles convicted in circuit court. This work revealed that the Criminal Sentencing Commission had not been receiving sentencing guidelines forms for all juveniles convicted of felonies in circuit courts across the Commonwealth. For FY2001 through FY2008, the Criminal Sentencing Commission had received guidelines forms for only 60% of these cases.

By statute, sentencing guidelines apply in such cases and there are no exceptions for juvenile offenders tried and convicted as adults. There appears to be a misconception among some judges, prosecutors, or court clerks that the guidelines do not apply in these circumstances. The forms are either not being prepared for the court or, if they are prepared, they are not being forwarded to the Criminal Sentencing Commission upon conclusion of the case. The Criminal Sentencing Commission will attempt to address this misconception in training and elsewhere.

For the 2009 analysis, the Criminal Sentencing Commission supplemented its own guidelines data with data from other sources, particularly the Department of Juvenile Justice. Data from the Department of Corrections, the Virginia Supreme Court, Pre/Post-Sentence Investigation (PSI) reports, and local and regional jails were also included. Therefore, the 2009 study greatly expands upon earlier work and is more comprehensive.

Despite this substantial data collection effort, this analysis is limited in two ways. First, these data do not distinguish between the three main types of cases: 1) juveniles who have been transferred to circuit court to be tried as adults, 2) juvenile cases where the Commonwealth's attorney chooses to directly indict the juvenile in circuit court (per § 16.1-269.1), and 3) juveniles automatically treated as adults in circuit court because they have previously been convicted as an adult (pursuant to § 16.1-271). At present, the three types of cases cannot be differentiated. Second, these data only capture felony convictions. Data are incomplete for cases in which the juvenile was found not guilty or the charge was reduced to a misdemeanor; therefore, the cases were excluded from the study. Nonetheless, the analysis presented to the State Crime Commission in 2009 is by far the most comprehensive look to date at juveniles convicted in circuit courts across the Commonwealth.

### Findings

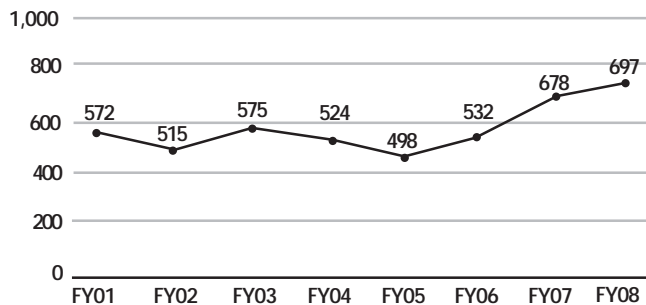
For the purposes of this analysis, the term “juveniles” refers to persons who were under the age of 18 at the time of the offense.

Between FY2001 and FY2006, the number of cases in which a juvenile was convicted of a felony in circuit court fluctuated between 500 and 600 per year (Figure 36). This includes all cases that could be identified across multiple data sources. For this study, as well as the 2006 study, a case was defined as a sentencing event. A sentencing event consists of all offenses (and counts) for which the offender is sentenced before the same court at the same time. A few juveniles (roughly one in ten) had more than one sentencing event in circuit court. Each distinct sentencing event was counted for this analysis.

In the last two fiscal years, the number of juvenile cases has risen to nearly 700 each year. This is an increase of approximately one-third. Reasons for the escalation in juvenile cases have not yet been identified.

Examining the data by age reveals that only a few of the cases involved juveniles who were age 14 at the time of the offense. During the eight-year period examined (FY2001-FY2008), 185 of the 4,591 juveniles convicted of felonies in circuit court were 14 years of age when the offense was committed (Figure 37). This represents 4% of the total number of cases. The largest share of cases involved juveniles who were 17 when they committed the crime. Because felony case processing time averages approximately 10 months, many of the juveniles who were 17 at the time of the offense had turned 18 by the time they were sentenced.

**Figure 36**  
 Juveniles Convicted of Felonies in Circuit Court, FY2001 - FY2008  
 4,591 Cases



*Note: For purposes of this analysis, “juveniles” refers to persons who were under the age of 18 at the time of the offense.*

**Figure 37**  
 Juveniles Convicted of Felonies in  
 Circuit Court, FY2001 – FY2008  
 by Age at Offense

Age of Offense	Number	Percent
14	185	4.0%
15	626	13.6%
16	1,222	26.6%
17	2,558	55.7%
<b>TOTAL</b>	<b>4,591</b>	<b>100.0%</b>



For each case in the study, the Criminal Sentencing Commission identified the most serious offense resulting in conviction. The most serious offense was selected based on the offense with the highest statutory maximum penalty as defined in the *Code of Virginia*. If two or more offenses had the same statutory maximum penalty, sentencing guidelines rules were applied to determine the most serious offense in the case. Among juveniles convicted of felonies in circuit court, the most common offense was robbery. Robbery was the most serious offense in one-third of these cases (Figure 38). The next most common offense was felony assault, which comprised 15% of the cases examined. In 12% of the cases, the juvenile was convicted of felony larceny or fraud. Approximately 8% of the juvenile offenders in the study had been convicted of offenses involving

Schedule I or II drugs, such as cocaine, heroin, or methamphetamine. Murder/manslaughter convictions accounted for 6% of the cases. Another 6% of the juveniles had been convicted of burglary of a dwelling. For 5% of the juveniles, the most serious offense was rape, forcible sodomy, or object sexual penetration. Other offenses were less common, each representing less than 5% of the cases. Felony traffic offenses include, for example, eluding police and felony DUI. The miscellaneous category includes offenses such as arson and vandalism.

By compiling data from multiple data sources, the Criminal Sentencing Commission obtained detailed sentence information for each case. This is by far the most comprehensive picture to date of outcomes for juveniles convicted in circuit court.

**Figure 38**  
**Juveniles Convicted of Felonies in Circuit Court, FY2001 – FY2008**  
**by Most Serious Offense**

Offense	Number	Percentage
Robbery	1,504	33%
Assault	690	15%
Larceny/Fraud	557	12%
Schedule I or II Drugs	389	8%
Murder/Manslaughter	280	6%
Burglary of Dwelling	257	6%
Rape/Forcible Sodomy/Obj. Penetration	247	5%
Burglary of Non-Dwelling	129	3%
Sex Offense	121	3%
Weapon	99	2%
Kidnapping	55	1%
Other Drugs	48	1%
Felony Traffic	28	1%
Miscellaneous	187	4%
<b>TOTAL</b>	<b>4,591</b>	<b>100%</b>

For juveniles convicted in circuit court, the *Code of Virginia* permits judges to utilize a variety of sanctions, both in the juvenile system and the adult corrections system. Sanctions in the juvenile system include juvenile probation, treatment or rehabilitation programs of some kind, post-disposition detention, or commitment to Virginia's Department of Juvenile Justice (DJJ). Should the circuit court judge opt to commit the juvenile to DJJ, there are three types of commitment available: indeterminate commitment, determinate commitment, and blended sentence. For a juvenile with an indeterminate commitment, DJJ determines how long the juvenile will remain in a facility, up to a maximum of 36 months. These juveniles are assigned a length-of-stay range based on guidelines that consider the offender's current offenses, prior offenses, and length of prior record. Failure to complete a mandatory treatment program, such as substance abuse or sex offender treatment, or the commission of institutional offenses, could prolong the actual length of stay beyond the assigned

range. For a juvenile given a determinate commitment to DJJ, the judge sets the commitment period to be served (up to age 21), although the juvenile can be released at the judge's discretion prior to serving the entire term. Nonetheless, determinately-committed juveniles remain in DJJ facilities longer, on average, than juveniles with indeterminate commitments to the Department. The average sentence for all juveniles given a determinate commitment to DJJ is approximately 40 months. Finally, a juvenile given a blended sentence will serve up to age 21 at a DJJ facility, after which he will be transferred to the Department of Corrections (DOC) to serve the remainder of his term in an adult facility. However, judges may review the juvenile's progress prior to transfer to the Department of Corrections and may reconsider the offender's sentence at that time. Punishment options in the adult system range from probation or other community-based programs, to a jail sentence (up to 12 months) or a prison term (one year or more).

For juveniles convicted of felonies in circuit courts in the Commonwealth, the most common disposition was an adult prison sentence. During the eight-year period studied, slightly less than half (45%) of the juvenile offenders were ordered to serve a prison term of at least one year (Figure 39). The median sentence length for these offenders was five years.

Other adult sanctions were also frequently used. Nearly one-third (30%) of the juveniles received a sentence of up to 12 months in jail or a term of probation under the supervision of adult community corrections officers. Altogether, then, 75% of juvenile cases in circuit court resulted in an adult sanction. However, another 2% of these offenders received a blended DJJ/DOC

sentence (described above). These juveniles will serve the first part of their sentence, up to age 21, in a juvenile correctional facility prior to being transferred to DOC to serve the balance of the sentence.

Sanctions in the juvenile system were used less often. Approximately 10% of the juveniles convicted of felonies in circuit court were sentenced to DJJ with a determinate commitment, whereby the judge specifies the period of time the juvenile is to serve. Another 7% were sentenced to DJJ with an indeterminate commitment, meaning that DJJ will determine the juvenile’s length-of-stay. A small percentage of offenders (6%) were given juvenile probation or some other juvenile sanction.

**Figure 39**  
**Juveniles Convicted of Felonies in Circuit Court, FY2001 – FY2008**  
**by Type of Disposition**

Disposition	Number	Percent
Prison	2,049	45%
Jail/Probation (Adult)	1,402	30%
DJJ Determinate	455	10%
DJJ Indeterminate	328	7%
DJJ Probation/Other	257	6%
Blended DOC/DJJ	100	2%
<b>TOTAL</b>	<b>4,591</b>	<b>100%</b>

Outcomes, however, differed by offense. For the most common offense, robbery, more than half (51%) of the juveniles convicted in circuit court ultimately received a prison term, while another 17% were given a jail sentence or adult probation. Approximately 29% of the robbery offenders were committed to DJJ or received some other juvenile sanction (Figure 40). The pattern is very different in larceny and fraud cases. Less than 29% of larceny and fraud offenders went to prison, but 51% received a jail sentence or adult probation term; only 20% were committed to DJJ or were given a juvenile punishment of some kind. In Schedule I or II drug cases, 39% of the juvenile offenders were sentenced to prison, with

more than (52%) getting a jail term or period of adult probation. Only 10% of the Schedule I or II drug offenders were punished with a juvenile sanction. Of the Schedule I/II offenders who were sentenced to prison, the vast majority (88%) had been convicted of a distribution-related offense. The majority (85%) of offenders convicted of simple possession of a Schedule I/II drug as their most serious offense received probation, jail, or a sentence to DJJ.

In contrast, the majority (75%) of the juveniles convicted of murder or manslaughter in circuit court were sentenced to adult prison. A small number of these offenders received a jail term or a blended DJJ/DOC sentence. Fewer than 12% were committed to DJJ.

**Figure 40**  
**Juveniles Convicted of Felonies in Circuit Court, FY2001 – FY2008**  
**by Most Serious Offense and Type of Disposition**

Offense	Prison	Jail/Probation (Adult)	Blended		Total
			Adult/Juvenile Sanction	DJJ/ Juvenile	
Robbery	51%	17%	3%	29%	1,504
Assault	50%	28%	2%	20%	690
Larceny/Fraud	29%	51%	0%	20%	557
Schedule I or II Drugs	39%	52%	0%	10%	389
Murder/Manslaughter	75%	7%	6%	12%	280
Burglary of Dwelling	39%	39%	2%	21%	257
Rape/Forcible Sodomy/Obj. Penetration	33%	20%	4%	43%	247
Miscellaneous	19%	65%	0%	16%	187
Burglary of Non-Dwelling	36%	45%	0%	19%	129
Sex Offense	41%	36%	0%	23%	121
Weapon	53%	23%	2%	22%	99
Kidnapping	66%	13%	4%	18%	55
Other Drugs	25%	67%	0%	8%	48
Felony Traffic	36%	50%	0%	14%	28
<b>TOTAL</b>	<b>45%</b>	<b>30%</b>	<b>2%</b>	<b>23%</b>	<b>4,591</b>

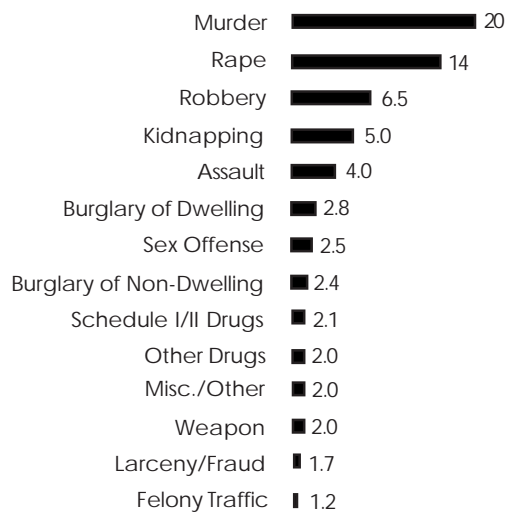
For juveniles convicted of rape, forcible sodomy or object sexual penetration, 33% received a prison sentence. Close to 43% were committed to DJJ or other punishment as a juvenile. This offense category had the highest rate of sentences to DJJ. One possible reason is that DJJ has a three-year sex offender treatment program specifically designed for juvenile offenders. Judges may wish to take advantage of that treatment option for juvenile offenders who have been convicted of sex offenses.

As noted, a prison sentence was the most common disposition for juveniles convicted of felonies in circuit court. Figure 41 shows median prison sentences for juveniles given a prison term. For murder, the median prison sentence was 20 years, while the median prison sentence for rape, forcible sodomy or object sexual penetration was 14 years. Juveniles convicted of robbery were given a median sentence of 6½ years. Larceny and fraud offenses netted a median sentence of just over a year and a half. In general, prison sentences for juveniles convicted in circuit court were roughly comparable to prison sentences given to adult offenders for similar offenses.

The Criminal Sentencing Commission next examined judicial compliance with Virginia’s sentencing guidelines. In 1994, the General Assembly passed legislation to revamp the adult correctional system in the Commonwealth. This legislation abolished discretionary parole release and implemented a system known as “truth-in-sentencing.” Felony offenders

must now serve at least 85% of their prison or jail terms. New sentencing guidelines were implemented in 1995. Under these guidelines, variation in sentencing related, for example, to the offender’s personal characteristics or the geographic location of the court has been reduced. The recommendations for nonviolent offenders with no prior record of violence are tied to the amount of time those offenders historically served prior to the abolition of parole. In contrast, for offenders with current or prior convictions of violent crimes (about one in five offenders), built-in guidelines enhancements trigger sentence recommendations that are significantly longer than historical time served in prison under the parole system. Thus, for violent offenders, the length-of-stay in prison is longer today than prior to the enactment of truth-in-sentencing.

**Figure 41**  
**Juveniles Convicted of Felonies in Circuit Court, FY2001-FY2008**  
**Median Prison Sentences (in Years)**



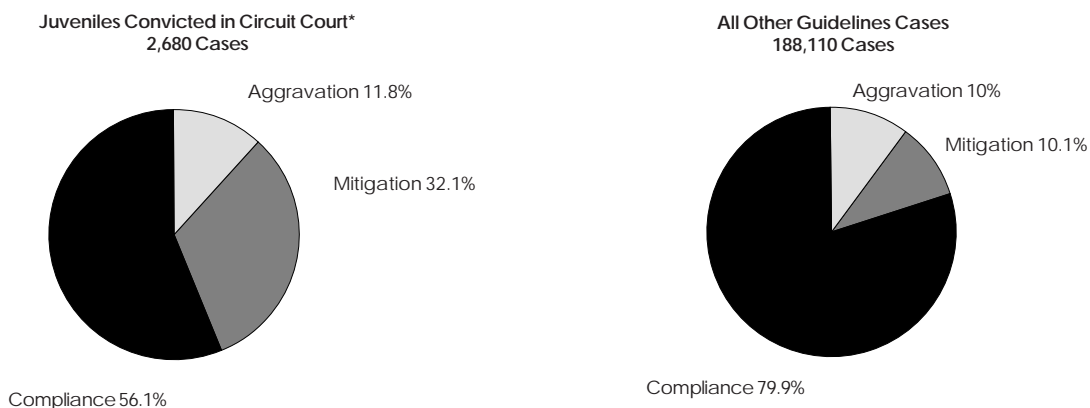
As noted above, the Criminal Sentencing Commission is not receiving all sentencing guidelines forms for juveniles convicted in circuit court. Roughly 60% of the FY2001 through FY2008 cases included sentencing guidelines forms. The compliance information shown here reflects just the subset of cases for which guidelines forms were received.

For juveniles convicted of felonies in circuit court, compliance with the sentencing guidelines was considerably lower than compliance in cases involving offenders who committed the offense as an adult. Compliance among juvenile offenders was 56%, compared to nearly 80% for all other guidelines cases (Figure 42). Part of this divergence in compliance may be related to the larger proportion of juvenile offenders whose most serious offense was a violent crime, whereas the overall number of guidelines cases for adults includes a much larger percentage of drug and property offenders, for which compliance is historically quite high.

Departure patterns were also significantly different. When departing from the guidelines, circuit court judges were much more likely to sentence a juvenile offender to a term that is less than the recommended guidelines range than above it. In nearly one-third (32.1%) of the cases, the judge ordered a sentence below the guidelines recommendation. This is nearly three times the rate at which judges opted to exceed the guidelines recommendation (11.8%). In guidelines cases involving adult offenders, departures were evenly split between above and below the guidelines recommendation.

For the 2009 analysis, special attention was paid to juveniles convicted in circuit court but committed to the Department of Juvenile Justice. Through supplemental data collection, the Criminal Sentencing Commission was able to determine the length of the determinate commitment for each juvenile given such a term. If the term of commitment to DJJ

**Figure 42**  
**Juveniles Convicted of Felonies in Circuit Court, FY2001 - FY2008**  
**Judicial Compliance with Sentencing Guidelines**



\* The compliance information shown is based on juvenile circuit court cases for which guidelines forms were received.

(for example, a determinate commitment of three years) fell within the range recommended by the guidelines, the case was categorized as being in compliance with the guidelines. It is more difficult to categorize cases in which the judge committed the juvenile offender to DJJ for an indeterminate period of time. In those cases, DJJ will ultimately determine how long the offender will remain confined. However, the length of stay for offenders who receive an indeterminate commitment to DJJ cannot exceed three years. While DJJ utilizes length-of-stay guidelines to guide such decisions, an offender may stay longer than the suggested range due to institutional violations or infractions or the failure to complete a mandatory treatment program. DJJ provided the Criminal Sentencing Commission with the length-of-stay ranges for each offender, which were then used to approximate compliance in these cases. For roughly 38% of the cases resulting in an indeterminate sentence to DJJ, the recommended guidelines range exceeded the 36-month maximum length-of-stay for indeterminate commitments. In these cases, the indeterminate commitment to DJJ was clearly a departure below the guidelines recommendation. It is more difficult to compare an indeterminate commitment to the guidelines recommendation in the other 62% of cases with this type of sanction.

Analysis of FY2001 through FY2008 cases revealed that guidelines compliance rates vary by the age of the juvenile at the time the offense was committed (Figure 43). Compliance was lowest for juveniles who were 14 at the time of the offense (46%). Compliance increased as age increased, reaching 59% for 17-year olds. Conversely, mitigation rates were highest for 14-year olds and lowest for 17-year olds. Aggravation rates were roughly level across all ages.

**Figure 43**  
**Juveniles Convicted of Felonies in Circuit Court, FY2001 – FY2008**  
**Judicial Compliance with Sentencing Guidelines by Age at Offense**

Age at Offense	Compliance	Mitigation	Aggravation
14	46.4%	40.6%	13.0%
15	50.3	38.1	11.6
16	53.4	34.3	12.3
17	58.9	29.5	11.6

Since there is such a high rate of mitigation sentences in juvenile cases, the Criminal Sentencing Commission further examined the reasons that judges cite when sentencing below the guidelines recommendation. The *Code of Virginia* (§ 19.2-298.01) requires judges to provide a written reason whenever they give a sentence outside of the recommended guidelines range. The most frequently cited reasons for mitigation in juvenile cases are shown in Figure 44.

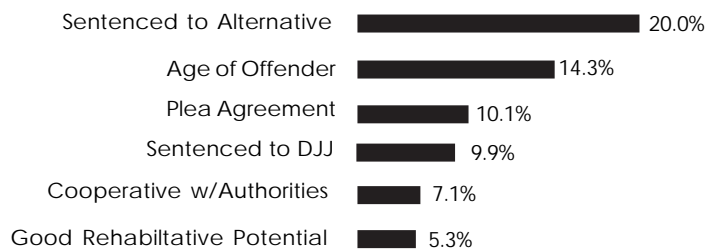
In one in five mitigation cases (20%), the judge indicated that the offender was sentenced to an alternative form of punishment other than that recommended by the guidelines. For example, giving the offender a jail or probation sentence in lieu of a recommended prison sentence is considered an alternative punishment. Ordering an offender to complete drug treatment instead of the recommended term of incarceration is also considered an alternative sanction. The second most common reason cited for a mitigation sentence was the young age of the offender (14.3% of mitigation cases). This was followed by the acceptance of a plea agreement (10.1%). In 9.9% of the

mitigations, the judge noted the decision to commit the offender to DJJ in lieu of adult punishment. Judges can cite multiple reasons for departing from the guidelines. Only the most frequently cited reasons are shown here. For guidelines cases overall, including adult offenders, the most common reasons cited for mitigation are typically: the acceptance of a plea agreement, the defendant’s cooperation with authorities, the defendant’s potential for rehabilitation, minimal offense circumstances, a sentence recommendation from the Commonwealth’s attorney or probation officer, and the fact that the defendant was already to serve incarceration time in another case.

### Conclusion

The study of juveniles convicted of felonies in circuit court, completed by the Criminal Sentencing Commission in 2009, was unquestionably the most comprehensive to date. The complexity of the data collection required for this analysis serves to highlight the limitations of individual data systems with regard to this particular population of offenders. Trial and conviction of juvenile offenders in circuit court is one aspect of the overall juvenile justice process. During the course of its multi-year study, the Virginia State Crime Commission has reviewed a wide array of juvenile justice issues, including the areas addressed in the Criminal Sentencing Commission’s study. It is expected that the State Crime Commission will submit its report to the 2010 General Assembly.

**Figure 44**  
 Juveniles Convicted in Circuit Court, FY2001 – FY2008  
 Reasons for Sentencing Guidelines Mitigations\*



\* Judges can cite multiple reasons for departing from the guidelines. Only the most frequently cited reasons are shown here.



# 5

## 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 "hotline" phone system, staffed Monday through Friday, to assist users with any questions or concerns regarding the preparation of the guidelines. While the hotline 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 these sessions often provide information that is 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 need adjustment to better reflect current judicial thinking. The opinions of the judiciary, as expressed in the reasons they write for departing from the guidelines, are very important in directing the Commission's attention to areas of the guidelines that may require amendment.

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

This year, the Commission focused particular attention on crimes not yet covered by the sentencing guidelines. Currently, the guidelines cover approximately 95% of felony cases in Virginia's circuit courts. Over the years, the General Assembly has created new crimes and raised other offenses from misdemeanors to felonies. The Commission keeps track of all of the changes to the *Code of Virginia* in order to identify new felonies that may be added to the guidelines system in the future. The Commission recently reviewed all of the crimes not covered by the guidelines. Unlike many other states, Virginia's guidelines are based on historical practices among its judges. The ability to

create guidelines depends, in large part, on the number of historical cases that can be used to identify past judicial sentencing patterns. Of the felonies not currently covered by the guidelines, many do not occur frequently enough for there to be a sufficient number of cases upon which to develop historically-based guidelines ranges. Through this process, however, the Commission identified four offenses that, after thorough analysis of the historical data, are recommended additions to the guidelines system. Each of these is described in detail on the pages that follow.

## Recommendation 1A

Amend the Felony Traffic sentencing guidelines to add hit and run with property damage of \$1,000 or more as defined in § 46.2-894.

### Issue

Currently, Virginia's sentencing guidelines do not cover hit and run with property damage of \$1,000 or more (in violation of § 46.2-894) when this crime is the primary, or most serious, offense in a case. This offense is associated with more cases than any other offense not covered by the guidelines. Guidelines presently cover another hit and run offense, namely hit and run with victim injury (also defined in § 46.2-894). After thorough analysis, the Commission has developed a proposal to incorporate hit and run with property damage of \$1,000 or more into the guidelines.

### Discussion

Hit and run, regardless of the value of property damage, was elevated from a Class 6 to a Class 5 felony, effective July 1, 2001. The next year, hit and run with property damage of less than \$1,000 was designated a separate offense and made a Class 1 misdemeanor, effective July 1, 2002.

Commission staff analyzed FY2003 through FY2007 data from the Pre/Post-Sentence Investigation (PSI) database to identify cases of hit and run with property damage of \$1,000 or more under § 46.2-894. According to the PSI database, there were 473 cases in which this crime was the most serious offense in the case. As shown in Figure 45, nearly one-third of these offenders received probation without an active term of incarceration, while another one-third were given an incarceration term of up to six months in jail, for which the median sentence was two months. For the remaining one-third of offenders who were sentenced to more than six months of incarceration, the median sentence was one year.

**Figure 45**  
**Hit and Run with Property Damage of \$1,000 or More (§ 46.2-894)**  
 FY2003-FY2007  
 N=473 cases

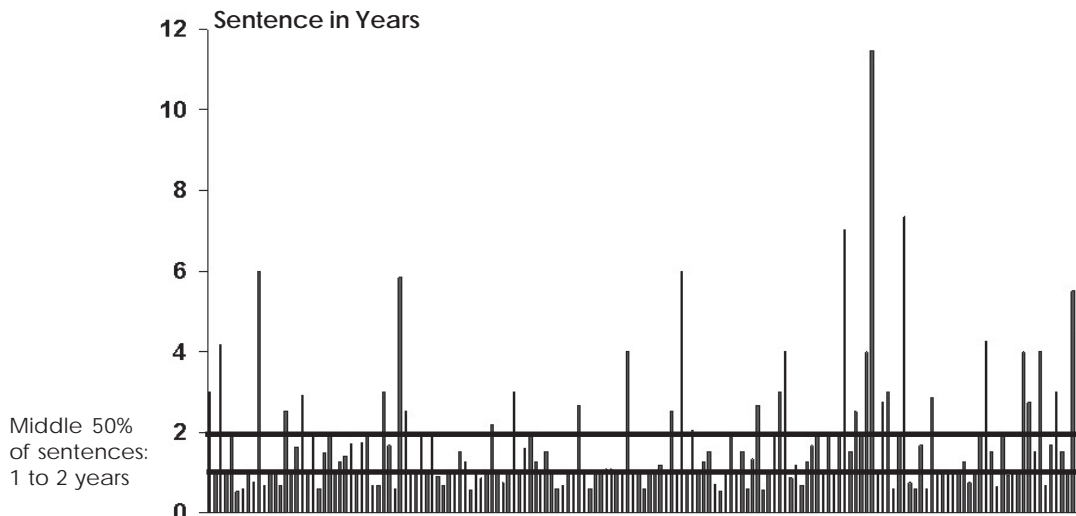
Disposition	Percent	Median Sentence
No Incarceration	32.0%	
Incarceration up to 6 months	33.7%	2 Months
Incarceration more than 6 months	34.3%	1 Year

The Commission's analysis of historical sentencing practices revealed considerable variation in sentencing for this offense. For offenders given a term in excess of six months, the sentences ranged from seven months to nearly 12 years (Figure 46). To develop the sentencing guidelines ranges for prison recommendations, the Commission focuses on the middle 50% of sentences. This removes the 25% of sentences at the high end and the 25% of sentences at the low end, which represent the more atypical sentences. For hit and run with property damage of \$1,000 or more, the middle 50% of sentences fell between one and two years.

Several steps were employed in the development of sentencing guidelines for this offense. The Commission examined judicial sentencing practices for this crime for the period FY2003 through FY2007. The proposed guidelines are based on analysis of actual sentencing patterns, including the historical rate of incarceration in prison and jail. Current guidelines worksheets serve as the starting point for scoring historical cases. Using historical sentencing data, various scoring scenarios were rigorously tested. Individual factors on the worksheets were assessed and several new factors were evaluated to ensure the proposed guidelines closely reflect judicial sentencing practices in these cases.

After a thorough analysis of the data, the Commission recommends adding hit and run with property damage of \$1,000 or more (in violation of § 46.2-894) to the Felony Traffic sentencing guidelines. The Felony Traffic guidelines encompass a variety of offenses, such as hit and run with victim injury, eluding police, third or subsequent convictions for driving while intoxicated (DWI), and habitual traffic offender violations.

**Figure 46**  
**Hit and Run with Property Damage of \$1,000 or More (§ 46.2-894)**  
**FY2003-FY2007, Offenders Sentenced to Incarceration of More Than 6 Months**  
**161 cases**



The proposal for integrating hit and run with property damage of \$1,000 or more into the Felony Traffic worksheets is presented in Figures 47, 48 and 49. On Section A of the proposed guidelines (Figure 47), offenders convicted of this offense receive the same points for the Primary Offense factor as offenders convicted of hit and run with victim injury (the hit and run offense already covered by the guidelines). To model actual sentencing practices for this crime most accurately, the Commission found it necessary to revise one of the other factors on Section A: Prior Criminal Traffic Convictions/Adjudications. Currently, this factor is only scored for offenders convicted of eluding police. Eight points are scored if the offender has any prior felony traffic convictions as an adult or adjudications as a juvenile. Under the proposal, this factor is split. Offenders convicted of eluding police will be scored as they currently are; however, the factor specifies different points for offenders convicted of hit and run with property damage of \$1,000 or more. Offenders convicted of this offense receive points based on prior felony and criminal misdemeanor traffic offenses (traffic infractions are not scored on this factor). For example, if the offender has four or more criminal traffic misdemeanors in his prior record, he receives one point. Any prior felony traffic offenses, such as a third conviction for DWI, will add two points to the offender's Section A score. This modification of an existing factor was necessary in order to more clearly distinguish between offenders who historically received more than six months of incarceration and those who did not.

Figure 47  
Proposed Traffic Section A  
Worksheet

Traffic/Felony Section A		Offender Name: _____
<b>◆ Primary Offense</b>		
A. DWI - Third conviction within 5 years (1 count) .....	1	Score
B. DWI - Third conviction within 10 years (1 count) .....	1	
C. DWI - Fourth or subsequent conviction within 10 years (1 count) .....	9	
D. Habitual Offender: endangerment, second or subsequent, or DWI and declared habitual offender for DWI, involuntary manslaughter (1 count) .....	9	
E. Drive on revoked license after DWI, involuntary manslaughter, or DWI victim permanently impaired (maiming) - endangerment (1 count) .....	9	
F. Drive on revoked license after DWI, involuntary manslaughter or DWI victim permanently impaired (maiming) and DWI etc. violation (1 count) .....	9	
G. Drive on revoked license after DWI, involuntary manslaughter or DWI victim permanently impaired (maiming) - second or subsequent (1 count) .....	9	
H. Hit and run, driver fails to stop and aid victim of <b>hit and run, property damage \$1,000 or more</b> 1 count .....	1	
2 counts .....	4	
I. Disregard police command to stop, endangerment (1 count) .....	5	0
<b>◆ Primary Offense Additional Counts</b> Total the maximum penalties for counts of the primary not scored above		
Years: 5 - 7 .....	1	0
8 - 18 .....	2	
19 - 28 .....	3	
29 - 38 .....	4	
39 or more .....	5	
<b>◆ Additional Offenses</b> Total the maximum penalties for additional offenses, including counts		
Years: Less than 1 .....	0	0
1 - 7 .....	1	
8 - 18 .....	2	
19 - 28 .....	3	
29 - 38 .....	4	
39 or more .....	5	
<b>◆ Victim Injury</b>		
Threatened, emotional or physical .....	1	0
Serious physical .....	2	
<b>◆ Prior Convictions/Adjudications</b> Total the maximum penalties for the 5 most recent and serious prior record events		
Years: Less than 2 .....	0	0
2 - 38 .....	1	
39 or more .....	2	
<b>◆ Prior Incarcerations/Commitments</b> If YES, add 4 →		
0		
<b>◆ Legally Restrained at Time of Offense</b>		
None .....	0	0
Other than post-incarceration supervision .....	2	
Post-incarceration supervision .....	5	
<b>SCORE THE FOLLOWING FACTOR ONLY IF PRIMARY OFFENSE IS DISREGARD POLICE COMMAND TO STOP OR HIT AND RUN, PROPERTY DAMAGE \$1,000 OR MORE</b>		
<b>◆ Prior Criminal Traffic Convictions/Adjudications</b>		
Primary offense disregard police command to stop .....	Points	0
Any prior felony traffic convictions/adjudications If YES, add 8		
Primary offense hit and run, property damage \$1,000 or more .....	0-3 prior criminal misdemeanor traffic conv./adj. .... 0	0
Any prior felony traffic convictions/adjudications .....	4+ prior criminal misdemeanor traffic conv./adj. .... 1 Any prior felony traffic convictions/adjudications .... 2	
<b>Total Score</b> →		
If total is 8 or less, go to Section B. If total is 9 or more, go to Section C.		

New Offense Added

Revised Factor

An offender who scores eight points or less on Section A is then scored on Section B of the guidelines, which will determine if he will be recommended for probation without an active term of incarceration or a jail term of up to six months. On Section B of the Felony Traffic worksheets (Figure 48), offenders convicted of hit and run with property damage of \$1,000 or more receive eight points for the Primary Offense factor. By comparison, cases of hit and run with victim injury score slightly higher on the Primary Offense factor (10 points) and are automatically recommended for a jail term of up to six months. The proposal includes a new factor on Section B that would be scored only for offenders convicted of hit and run. Under the new factor, an offender convicted of hit and run receives additional points based on his record of criminal traffic offenses, including adult convictions and juvenile adjudications. The points range from zero (for no prior criminal traffic offenses) to three (for offenders with a prior felony traffic offense and five or more criminal traffic misdemeanors).

Figure 48  
Proposed Traffic Section B  
Worksheet

**Traffic/Felony** ❖ **Section B** Offender Name: \_\_\_\_\_

◆ **Primary Offense** \_\_\_\_\_

A. DWI – Third conviction within 5 years (1 count).....	10	Score ▼ <input style="width: 40px; height: 20px;" type="text"/>
B. DWI – Third conviction within 10 years (1 count).....	10	
C. Hit and run, driver fails to stop and aid victim (1 count).....	10	
D. Hit and run, property damage \$1,000 or more (1 count).....	8	
E. Disregard police command to stop, endangerment (1 count).....	9	

◆ **Primary Offense Additional Counts** Total the maximum penalties for counts of the primary not scored above

Years: 5 - 9 .....	2	▼ <input style="width: 40px; height: 20px;" type="text"/>
10 - 19 .....	3	
20 - 29 .....	4	
30 - 39 .....	5	
40 or more .....	6	

◆ **Additional Offenses** Total the maximum penalties for additional offenses, including counts

Years: Less than 1 .....	0	▼ <input style="width: 40px; height: 20px;" type="text"/>
1 - 9 .....	2	
10 - 19 .....	3	
20 - 29 .....	4	
30 - 39 .....	5	
40 or more .....	6	

◆ **Victim Injury** \_\_\_\_\_

Threatened, emotional, or physical .....	2	▼ <input style="width: 40px; height: 20px;" type="text"/>
Serious physical .....	3	

◆ **Legally Restrained at Time of Offense** \_\_\_\_\_ If YES, add 1 →

SCORE THE FOLLOWING FACTOR ONLY IF PRIMARY OFFENSE IS HIT AND RUN [§ 46.2-894]

◆ **Prior Criminal Traffic Convictions/Adjudications**

0 Felonies: 1 - 4 Misdemeanors .....	1	▼ <input style="width: 40px; height: 20px;" type="text"/>
5+ Misdemeanors .....	2	
1+ Felonies: 0 Misdemeanors .....	1	
1 - 4 Misdemeanors .....	2	
5+ Misdemeanors .....	3	

**Total Score** \_\_\_\_\_

See Traffic Section B Recommendation Table to convert score to guidelines sentence.

Traffic/Section B

New Offense Added

New Factor

Finally, an offender who scores nine points or more on Section A is scored on Section C, which will produce a sentence length recommendation for a longer term of incarceration. Primary Offense points on Section C are assigned based on the classification of an offender's prior record. An offender is assigned to the Other category if he does not have a prior conviction for a violent felony defined in § 17.1-805. An offender is assigned to Category II if he has a prior conviction for a violent felony (per § 17.1-805) that has a statutory maximum penalty of less than 40 years. Offenders are classified as Category I if they have a prior conviction for a violent felony (per § 17.1-805) with a statutory maximum of 40 years or more.

On Section C of the proposed Felony Traffic guidelines, an offender convicted of hit and run with property damage of \$1,000 or more receives five points for the Primary Offense factor if his prior record is classified as Other, 10 points if he is a Category II offender, and 20 points if he is a Category I offender (Figure 49). Under the proposal, the factor that is scored when the offender is Legally Restrained at the Time of Offense is revised to increase the points for offenders convicted of hit and run. A new factor, similar to the one added to Section B, will be scored only in hit and run cases. This factor adds up to 12 points to a hit and run offender's score based on his prior convictions/adjudications for criminal traffic offenses.

Figure 49  
Proposed Traffic  
Section C  
Worksheet

**Traffic/Felony Section C**

Offender Name: \_\_\_\_\_

Prior Record Classification:  Category I  Category II  Other

Offense	Category I	Category II	Other	Score
<b>Primary Offense</b>				
A. DWI - Third conviction within 5 years (1 count)	20	10	5	
B. DWI - Third conviction within 10 years (1 count)	20	10	5	
C. DWI - Fourth or subsequent conviction within 10 years				
1 count	40	20	10	
2 counts	48	24	12	
3 counts	68	34	17	
D. Habitual Offender: endangerment, second or subsequent, or DWI and declared habitual offender for DWI, involuntary manslaughter				
1 count	40	20	10	
2 counts	48	24	12	
3 counts	68	34	17	
E. Drive on revoked license after DWI, involuntary manslaughter, or DWI victim permanently impaired (maiming) - endangerment				
1 count	40	20	10	
2 counts	48	24	12	
3 counts	68	34	17	
F. Drive on revoked license after DWI, involuntary manslaughter, or DWI victim permanently impaired (maiming) and DWI etc. violation				
1 count	40	20	10	
2 counts	48	24	12	
3 counts	68	34	17	
G. Drive on revoked license after DWI, involuntary manslaughter, or DWI victim permanently impaired (maiming) - second or subsequent				
1 count	40	20	10	
2 counts	48	24	12	
3 counts	68	34	17	
H. Hit and run, driver fails to stop and aid victim or hit and run, property damage \$1,000 or more (1 count)	20	10	5	0
I. Disregard police command to stop, endangerment (1 count)	40	20	10	
<b>Primary Offense Additional Counts</b> Assign points to each count of the primary not scored above and total the points				
Maximum Penalty: 5, 10 (years)				0
<b>Additional Offenses</b> Assign points to each additional offense (including counts) and total the points				
Maximum Penalty: 5, 10 (years)				0
Less than 5				0
5, 10				1
20				2
30				3
40 or more				5
<b>DWI Convictions for Current Event</b>				
Primary Offense: Habitual offender or Drive on a revoked license with DWI as additional offense				11
DWI fourth offense				2
DWI third offense, Hit and run or Disregard command to stop (with DWI as additional offense)				0
<b>Victim Injury</b>				
Threatened or emotional				2
Physical				4
Serious physical				5
<b>Prior Convictions/Adjudications</b> Assign points to the 5 most recent and serious prior record events and total the points				
Maximum Penalty: Less than 20 (years)				0
20, 30, 40 or more				1
<b>Prior Felony Convictions/Adjudications Against Person</b>				
Number: 1				4
2				2
3				5
<b>Prior Felony Convictions/Adjudications with the Same VCC Prefix as Primary Offense</b>				
Number: 1				2
2				4
3				6
<b>Legally Restrained at Time of Offense</b>				
Primary offense OTHER THAN hit and run				0
If YES, add 2				2
Primary offense hit and run (§ 46.2-894)				0
If YES, add 4				4
<b>SCORE THE FOLLOWING FACTOR ONLY IF PRIMARY OFFENSE IS HIT AND RUN (§ 46.2-894)</b>				
<b>Prior Criminal Traffic Convictions/Adjudications</b>				
0 Felonies: 1 - 4 Misdemeanors				4
5+ Misdemeanors				8
1+ Felonies: 0 Misdemeanors				4
1 - 4 Misdemeanors				8
5+ Misdemeanors				12
<b>Total Score</b>				
				0

See Traffic Section C Recommendation Table for guidelines sentence range.

**Annotations:**

- New Offense Added:** Points to row H (Hit and run, driver fails to stop and aid victim or hit and run, property damage \$1,000 or more).
- Revised Factor:** Points to the "Legally Restrained at Time of Offense" section.
- New Factor:** Points to the "Prior Criminal Traffic Convictions/Adjudications" section.

The proposal is based on the actual practices of Virginia's circuit court judges for the period studied. When developing sentencing guidelines, the Commission's goal is to match, or come very close to, the historical prison incarceration rate. The proposed guidelines are designed to recommend the same proportion of offenders for a sentence greater than six months as historically received a sentence greater than six months. Due to the wide variation in past sentencing practices for this offense, not all of the offenders who historically received such a sentence will be recommended for that type of sentence under the proposed guidelines. The guidelines are designed to bring about more consistency in sentencing decisions. The Commission will monitor judicial concurrence and departure patterns after the guidelines for hit and run with property damage of \$1,000 or more are in place and recommend changes to the guidelines as needed. As Figure 50 demonstrates, the proposed guidelines are expected to recommend 32.8% of offenders convicted of this offense for a sentence of more than six months. Actual practice has resulted in 34.3% of offenders being sentenced to such a term of incarceration. Thus, the recommended and actual historical rates of incarceration are very close.

Since the Commission's proposal is designed to integrate current judicial sanctioning practices into the guidelines, no impact on correctional bed space is anticipated.

Figure 50  
 Hit and Run with Property Damage of \$1,000 or More (§ 46.2-894)  
 FY2003-FY2007  
 473 cases

Sentencing Guidelines	Recommendations under Sentencing Guidelines		Actual Practices Prior to Sentencing Guidelines	
	Recommendation	Percent	NO PRISON Percent	PRISON Percent
Section A Score				
Up to 8	No Prison	67.2%	73.7%	26.3%
9 or More	Prison	32.8%	49.4%	50.6%
		100.0%	65.7%	OVERALL 34.3%



## Recommendation 1B

Amend the sentencing guidelines for hit and run with victim injury (under § 46.2-894) to increase the length of prison incarceration recommended for offenders who have prior criminal traffic offenses.

### Issue

Hit and run resulting in victim injury (as defined in § 46.2-894) is covered by the sentencing guidelines and compliance with the guidelines for this offense is fairly high. However, when judges depart from the recommendation, they are more likely to give the offender a sentence above the guidelines range than below it, particularly in cases in which the offender has been recommended for more than six months of incarceration. This suggests that the guidelines could be refined to more closely reflect judicial thinking in these cases.

### Discussion

Virginia's sentencing guidelines are grounded in actual sentencing practices among circuit court judges. The Commission closely monitors guidelines compliance by offense to determine if, based on judicial concurrence and departure patterns, any adjustments are needed to bring the guidelines more in line with current practice. In FY2008 and FY2009, compliance with the guidelines for hit and run with victim injury (under § 46.2-894) was close to 73%. Compliance was lower, however, in cases in which the offender was recommended for a term of more than six months. In these cases, compliance dropped to 58%. Nearly all of the departures were aggravations, or sentences above the guidelines. The most common reasons cited by judges for departing from the guidelines in these cases were: the aggravating circumstances of the case, the degree of victim injury, and the offender's prior record for similar offenses. Although the most common reason for aggravation cited by judges does not point to a specific factor or factors to evaluate for possible revision, the other frequently cited departure reasons point to circumstances in which judges find a sentence above the guidelines to be the most appropriate for the case.

Upon thorough analysis of these cases, the Commission found that judicial compliance with the guidelines can be improved by modifying a factor on Section C of the Felony Traffic guidelines and adding a new factor to the worksheet. The proposed changes are shown in Figure 51. Under the proposal, the factor scored when the offender is Legally Restrained at the Time of Offense is revised to increase the points for offenders convicted of hit and run. A new factor, based on the offender's prior record of criminal traffic offenses, will be scored only in hit and run cases. This factor adds a maximum of 12 points to the offender's score, which will increase the sentence recommendation by a corresponding number of months. The scoring of these two factors will be the same for both hit and run with victim injury and hit and run with property damage of \$1,000 or more (see Recommendation 1A).

Since the Commission's proposal is designed to integrate current judicial sanctioning practices into the guidelines, no impact on correctional bed space is anticipated.

**Figure 51**  
Proposed Changes on Traffic Section C Worksheet

Revised Factor	<p>◆ Legally Restrained at Time of Offense</p> <p>Primary offense OTHER THAN hit and run <input type="text"/> If YES, add 2</p> <p>Primary offense hit and run (§ 46.2-894) <input type="text"/> If YES, add 4</p>										
<p>SCORE THE FOLLOWING FACTOR ONLY IF PRIMARY OFFENSE IS HIT AND RUN (§ 46.2-894)</p>											
New Factor	<p>◆ Prior Criminal Traffic Convictions/Adjudications</p> <table border="0"> <tr> <td>0 Felonies: 1 - 4 Misdemeanors .....</td> <td>4</td> </tr> <tr> <td>5+ Misdemeanors .....</td> <td>8</td> </tr> <tr> <td>1+ Felonies: 0 Misdemeanors .....</td> <td>4</td> </tr> <tr> <td>1 - 4 Misdemeanors .....</td> <td>8</td> </tr> <tr> <td>5+ Misdemeanors .....</td> <td>12</td> </tr> </table>	0 Felonies: 1 - 4 Misdemeanors .....	4	5+ Misdemeanors .....	8	1+ Felonies: 0 Misdemeanors .....	4	1 - 4 Misdemeanors .....	8	5+ Misdemeanors .....	12
0 Felonies: 1 - 4 Misdemeanors .....	4										
5+ Misdemeanors .....	8										
1+ Felonies: 0 Misdemeanors .....	4										
1 - 4 Misdemeanors .....	8										
5+ Misdemeanors .....	12										

## Recommendation 2

Amend the Miscellaneous sentencing guidelines to add arson of an occupied dwelling or church as defined in § 18.2-77(A,i).

### Issue

Currently, arson of an occupied dwelling or church is not covered by the sentencing guidelines. The guidelines do cover other arson offenses, however, including arson of an unoccupied dwelling or church (§ 18.2-77(B)), burning of personal property (§ 18.2-81), and communication of a bomb threat by someone 15 years of age or older (§ 18.2-83). Based upon thorough analysis of available data, the Commission has developed a proposal to incorporate arson of an occupied dwelling/church into the guidelines.

### Discussion

Analysis of Pre/Post-Sentence Investigation (PSI) data for FY2003 through FY2008, and preliminary data for FY2009, identified 137 cases in which arson of an occupied dwelling or church under § 18.2-77(A,i) was the most serious offense. Arson of an occupied dwelling or church is a felony punishable by imprisonment of five years to life, although a judge is free to suspend part, or all, of the sentence imposed for this offense. As shown in Figure 52, the majority (76.6%) of offenders convicted of this crime received a sentence of more than six months. The median sentence in these cases was three years. Very few (4.4%) of these offenders were given a jail term of six months or less. The remaining 19% of offenders received probation without an active term of incarceration.

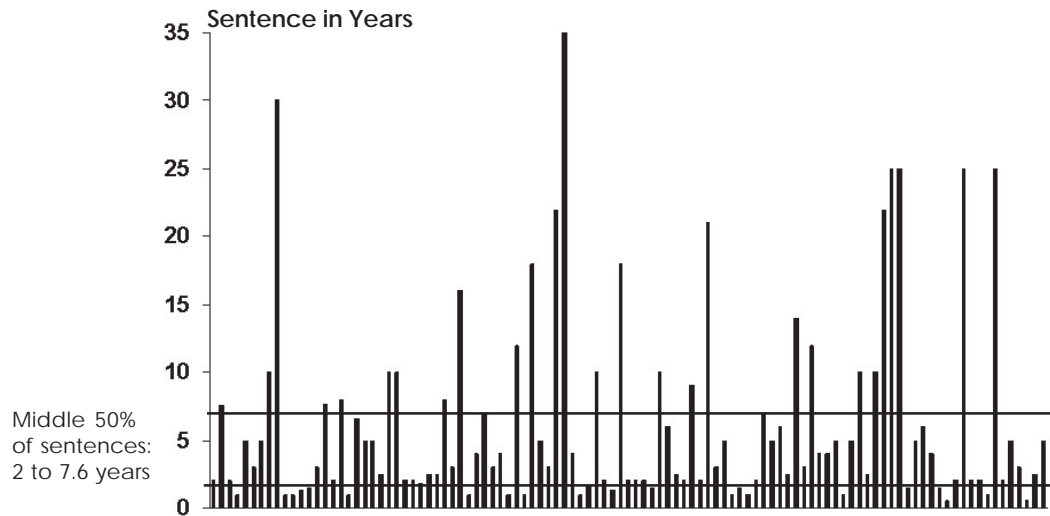
**Figure 52**  
**Arson of an Occupied Dwelling or Church (§ 18.2-77 (A,i))**  
 FY2003-FY2009\*  
 137 cases

Disposition	Percent	Median Sentence
No Incarceration	19.0%	
Incarceration up to 6 months	4.4%	6 Months
Incarceration more than 6 months	76.6%	3 Years

\* FY2009 data are preliminary.

Examination of the historical data revealed significant variation in sentencing practices. For offenders receiving more than six months of incarceration, the sentences spanned from seven months to 35 years. Virginia's sentencing guidelines are grounded in historical practice among judges and ranges are developed from the middle 50% of actual sentences. This removes the 25% of the highest and the 25% of the lowest sentences. The middle 50% of sentences for arson of an occupied dwelling or church fell between 2 to 7.6 years (Figure 53).

**Figure 53**  
**Arson of an Occupied Dwelling or Church (§ 18.2-77 (A,i))**  
 FY2003-FY2009\*, Offenders Sentenced to Incarceration of More Than 6 Months  
 105 cases



\* FY2009 data are preliminary.

Several steps were employed in the development of sentencing guidelines for this offense. The Commission examined actual judicial sentencing practices for this crime for the period FY2003 through FY2008, and preliminary FY2009. The proposed guidelines are based on analysis of historical sentencing patterns, including the historical rate of incarceration in prison and jail. When attempting to develop guidelines for non-guidelines offenses, current guidelines worksheets serve as the starting point for scoring historical cases. Using actual sentencing data, various scoring scenarios were rigorously tested. Individual factors were assessed and new factors were evaluated to ensure the proposed guidelines closely reflect judicial sentencing practices in these cases.

After a thorough analysis of the data, the Commission recommends adding arson of an occupied dwelling or church (as defined in § 18.2-77(A,i)) to the Miscellaneous sentencing guidelines. Figures 54, 55, and 56 display the proposed revisions for incorporating this offense. On Section A of the proposed guidelines (Figure 54), offenders convicted of this offense receive six points, which is the same score assigned for arson of an unoccupied dwelling or church. The remaining factors are to be scored as they currently appear on the worksheet.

**Figure 54**  
**Proposed Primary Offense Factor on Miscellaneous Section A Worksheet**

◆ Primary Offense		
A.	Burn unoccupied dwelling/church (1 count) .....	6
B.	Burn occupied dwelling/church (1 count) .....	6
C.	Burning of personal property, standing grain, etc., value \$200 or more	
	1 count .....	2
	2 counts .....	6
D.	Threatening to bomb, burn or explode (1 count) .....	1
E.	Threat by letter, communication or electronic message (1 count) .....	3
F.	Child neglect/abuse, serious injury	
	1 count .....	3
	2 counts .....	7
G.	Gross, reckless care of child (1 count) .....	1
H.	Cruelty and injury to child (1 count) .....	2
I.	Failure to appear in court for felony offense	
	1 count .....	1
	2 counts .....	4
J.	Perjury, falsely swear an oath (1 count) .....	1
K.	Possession or sale of Schedule III drug or marijuana by prisoner (1 count) .....	3
L.	Escape from correctional facility (1 count) .....	7
M.	Maliciously shoot, throw missile at train, car, etc. (1 count) .....	1
N.	Damage/destroy any property or monument \$1,000 or more (1 count) .....	2

New  
Offense  
Added

An offender who scores eight points or less on Section A of the Miscellaneous worksheet is then scored on Section B, which will determine if he will be recommended for probation without an active term of incarceration or a jail term of up to six months. On Section B of the proposed Miscellaneous guidelines (Figure 55), offenders convicted of this particular arson offense receive seven points for the Primary Offense factor. This is one point higher than that given for arson of an unoccupied dwelling or church. No other changes to Section B are recommended.

Offenders who receive nine points or more on Section A are scored on Section C to obtain the sentence length recommendation. Primary Offense points on Section C are assigned based on the classification of an offender's prior record. If an offender does not have a prior conviction for a violent felony defined in § 17.1-805, he is assigned to the Other category. An offender is assigned to Category II if he has a prior conviction for a violent felony (per § 17.1-805) that has a statutory maximum penalty of less than 40 years. Category I offenders have a prior conviction for a violent felony (per § 17.1-805) with a statutory maximum of 40 years or more.

Under the proposed guidelines for arson of an occupied dwelling or church, attempted and conspired acts are scored separately from completed crimes on Section C. Cases involving two or more counts of this offense are also scored differently. Figure 56 shows Section C of the Miscellaneous guidelines worksheets, including the proposed Primary Offense scores for arson of an occupied dwelling or church.

The next factor on Section C, Primary Offense Additional Counts, must also be revised. When the primary offense is arson of an occupied dwelling or church, this factor is scored if the offender has been convicted of more than two counts of the offense. The

Figure 55  
Proposed Primary Offense Factor on Miscellaneous Section B Worksheet

◆ Primary Offense	
A.	Burn unoccupied dwelling/church (1 count) ..... 6
B.	Burn occupied dwelling/church (1 count) ..... 7
C.	Burning of personal property, standing grain, etc., value \$200 or more (1 count) ..... 6
D.	Threatening to bomb, burn or explode (1 count) ..... 6
E.	Threat by letter, communication or electronic message (1 count) ..... 7
F.	Child neglect/abuse, serious injury (1 count) ..... 3
G.	Gross, reckless care of child (1 count) ..... 2
H.	Cruelty and injury to child (1 count) ..... 2
I.	Failure to appear in court for felony offense (1 count) ..... 10
J.	Perjury, falsely swear an oath (1 count) ..... 7
K.	Possession or sale of Schedule III drug or marijuana by prisoner (1 count) ..... 7
L.	Escape from correctional facility (1 count) ..... 10
M.	Maliciously shoot, throw missile at train, car, etc. (1 count) ..... 7
N.	Damage/destroy any property or monument \$1,000 or more (1 count) ..... 8

New  
Offense  
Added

score is assigned according to the statutory maximum penalty of the offense. Currently, the Miscellaneous guidelines cover several offenses, but none have a statutory maximum greater than 10 years. However, arson of an occupied dwelling or church carries a maximum of life. Therefore, this factor must be expanded to include a score of five points for an offense carrying a life maximum (Figure 56).

Under the proposal, the next factor on the worksheet, Additional Offenses, is also revised. This factor is split so that offenders convicted of arson of an occupied

Figure 56  
Proposed Miscellaneous Section C Worksheet

### Miscellaneous ❖ Section C

Offender Name: \_\_\_\_\_

— Prior Record Classification —  
 Category I  Category II  Other

◆ **Primary Offense** \_\_\_\_\_

A. Burn unoccupied dwelling/church (1 count).....	68	34	17
B. Burn occupied dwelling/church			
Attempted or conspired: (1 count).....	68	34	17
(2 counts).....	72	36	18
Completed: (1 count).....	108	54	27
(2 counts).....	200	100	50
C. Burning of personal property, standing grain, etc., value \$200 or more (1 count).....	32	16	8
D. Threatening to burn, bomb or explode (1 count).....	32	16	8
E. Threat by letter, communication or electronic message (1 count).....	40	20	10
F. Child neglect/abuse, serious injury (1 count).....	32	16	9
G. Gross, reckless care of child (1 count).....	28	14	7
H. Cruelty and injury to child (1 count).....	28	14	7
I. Failure to appear in court for felony offense (1 count).....	32	16	8
J. Perjury, falsely swear an oath (1 count).....	12	6	3
K. Possession or sale of Schedule III drug or marijuana by prisoner (1 count).....	32	16	8
L. Escape from correctional facility (1 count).....	40	20	10
M. Maliciously shoot, throw missile at train, car, etc. (1 count).....	32	16	8
N. Damage/destroy any property or monument \$1,000 or more (1 count).....	32	16	8

**Score**  
▼  
[ ] [ ] [ ]

◆ **Primary Offense Additional Counts** Assign points to each count of the primary not scored above and total the points

Maximum Penalty: 5, 10, 20, 30, 40..... 1 [ ] [ ] [ ]  
 (years) Life..... 5 [ ] [ ] [ ]

◆ **Additional Offenses** Assign points to each additional offense (including counts) and total the points

Primary offense OTHER THAN burn occupied dwelling/church		Primary offense burn occupied dwelling/church	
Years	Points	Years	Points
Less than 5.....	0	Less than 5.....	0
5, 10.....	1	5, 10.....	3
20.....	2	20.....	6
30.....	3	30.....	9
40 or more.....	5	40 or more.....	12

[ ] [ ] [ ]

◆ **Firearm Used or Brandished** \_\_\_\_\_ If YES, add 2 → [ 0 ] [ 0 ] [ ]

◆ **Victim Injury** \_\_\_\_\_

Primary offense other than child neglect/abuse		Primary offense child neglect /abuse etc.	
	Points		Points
Threatened or emotional.....	2	Threatened or emotional.....	6
Physical.....	4	Physical.....	7
Serious physical.....	5	Serious physical.....	10

[ 0 ] [ 0 ] [ ]

◆ **Prior Convictions/Adjudications** Assign points to the 5 most recent and serious prior record events and total the points

Maximum Penalty: Less than 20..... 0 [ 0 ] [ 0 ] [ ]  
 (years) 20, 30, 40 or more..... 1 [ 0 ] [ 0 ] [ ]

◆ **Prior Felony Convictions/Adjudications Against Person**

Primary offense OTHER THAN burn occupied dwelling/church		Primary offense burn occupied dwelling/church	
Number	Points	Number	Points
1.....	1	1.....	3
2.....	2	2.....	4
3.....	3	3.....	6
4.....	4	4 or more.....	8
5 or more.....	5		

[ 0 ] [ 0 ] [ ]

◆ **Prior Felony Convictions/Adjudications with the Same VCC Prefix as Primary Offense**

Number: 1..... 2 [ 0 ] [ ] [ ]  
 2..... 4 [ 0 ] [ ] [ ]  
 3..... 6 [ 0 ] [ ] [ ]  
 4..... 8 [ 0 ] [ ] [ ]  
 5 or more..... 10 [ 0 ] [ ] [ ]

◆ **Legally Restrained at Time of Offense** \_\_\_\_\_ If YES, add 2 → [ 0 ] [ 0 ] [ ]

**SCORE THE FOLLOWING FACTOR ONLY IF PRIMARY OFFENSE IS BURN OCCUPIED DWELLING/CHURCH (§ 18.2-77(A))**

◆ **Additional offense with VCC prefix "MUR"** \_\_\_\_\_ If YES, add 133 → [ 0 ] [ ] [ ]

[ 0 ] [ ] [ ]

**Total Score** [ ] [ ] [ ] [ ] [ ]

See Miscellaneous Section C Recommendation Table for guidelines sentence range.

Miscellaneous/Section C Eff. 7-1-10

New Offense Added

Revised Factor

Revised Factor

New Factor

dwelling or church will receive higher points for additional offenses than offenders convicted of other offenses. This change is based on analysis of the available data. The factor scoring Prior Felony Convictions/Adjudications against the Person is modified in a similar fashion, in that offenders convicted of the specified arson will receive higher points on this factor than other offenders. The final modification to Section C is the addition of a new factor to be scored only in cases of offenders convicted of arson of an occupied dwelling or church. This new factor will add 133 points if the offender is convicted of an additional offense of second-degree murder, felony murder, manslaughter, or attempted/conspired capital or first-degree murder. Analysis revealed that offenders convicted of a combination of arson and murder/manslaughter charges received significantly longer sentences than other arson offenders. This new factor will significantly increase the guidelines recommendation for such offenders in order to bring the recommendation more in line with judicial sentencing practices.

The proposal is based on the actual practices of Virginia's circuit court judges for the period studied. When developing sentencing guidelines, the Commission's goal is to come as close to the historical prison incarceration rate as possible. The proposed guidelines are designed to recommend the same proportion of offenders for a sentence greater than six months as historically received a sentence of more than six months. It is important to note that not all of the offenders who historically received such a sentence will be recommended for that type of sentence under the proposed guidelines, due to inconsistencies in past sentencing practices for this offense. The guidelines are designed to bring about more consistency in sentencing decisions. As Figure 57 shows, the proposed guidelines are expected to recommend 78.8% of offenders whose most serious crime is arson of an occupied dwelling or church to a term of incarceration in excess of six months. This is very close to actual practice, where 76.6% of offenders were given that type of disposition.

As the Commission's proposal is designed to integrate current judicial sanctioning practices into the guidelines, no impact on correctional bed space is anticipated.

**Figure 57**  
**Arson of an Occupied Dwelling or Church (§ 18.2-77 (A,i))**  
 FY2003-FY2009\*  
 137 cases

Sentencing Guidelines	Recommendations under Sentencing Guidelines		Actual Practices Prior to Sentencing Guidelines	
	Recommendation	Percent	NO PRISON Percent	PRISON Percent
Section A Score				
Up to 8	No Prison	21.2%	41.4%	58.6%
9 or More	Prison	78.8%	18.5%	81.5%
		100.0%	23.4%	OVERALL 76.6%

\* FY2009 data are preliminary.



### Recommendation 3

Amend the Miscellaneous sentencing guidelines to add two gang-related offenses defined in § 18.2-46.2 of the *Code of Virginia*: 1) participation in an offense for the benefit of, or at the direction of, a gang, and 2) participation in an offense for the benefit of, or at the direction of, a gang that has at least one member who is a juvenile.

#### Issue

Currently, the sentencing guidelines do not cover gang offenses. In addition, the Commission has received requests from users to add gang crimes to the guidelines system. After thorough analysis, the Commission has developed a proposal to incorporate the specified gang crimes into the Miscellaneous offense guidelines.

#### Discussion

Participation in an offense for the benefit of, or at the direction of, a gang is a Class 5 felony punishable by imprisonment of one to 10 years. Participation in an offense for the benefit of, or at the direction of, a gang that has at least one member who is a juvenile is a Class 4 felony punishable by two to 10 years of imprisonment. Typically, a gang violation appears as an additional offense to a more serious crime, such as robbery or malicious wounding. In order for the gang violation to be the primary offense in a case, either 1) the more serious crime has been dismissed or nolle prossed (for example, as part of a plea agreement), or 2) the gang member has been convicted of an offense that carries a statutory penalty of less than 10 years, such as unlawful wounding. Currently, if one of these gang offenses accompanies a guidelines offense that has a 10-year statutory maximum, the gang offense is scored as an additional offense. If these offenses are added to the guidelines, the gang crime will become the primary offense if it has a higher primary offense score on Section C than the accompanying offense with a 10-year maximum.

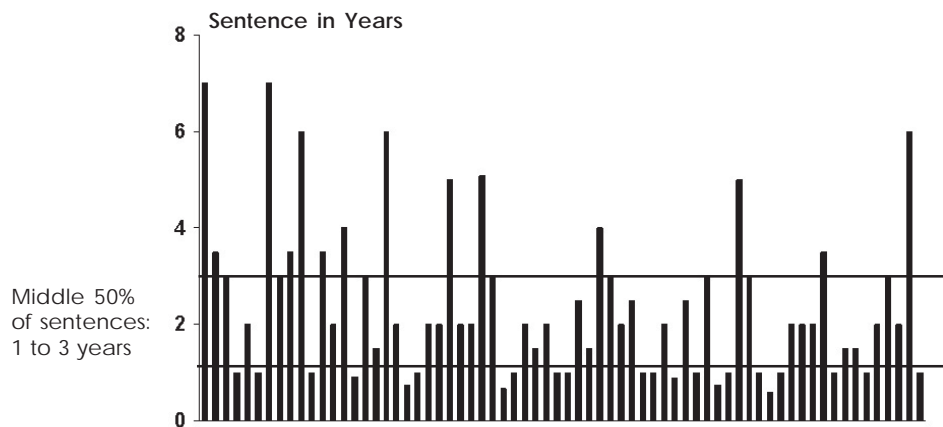
Analyzing Pre/Post-Sentence Investigation (PSI) data for FY2004 through FY2008, and preliminary FY2009 data, the Commission identified 124 cases in which one of the two gang offenses defined in § 18.2-46.2 was the most serious offense. As shown in Figure 58, more than half (54.8%) of the offenders studied were sentenced to a term of incarceration exceeding six months. The median sentence in these cases was two years. Slightly less than one-third (31.5%) of these offenders received probation without an active term of incarceration, while the remaining 13.7% were given a jail term of six months or less. The median sentence length for offenders receiving a jail term was five months.

**Figure 58**  
**Participation in Offense for Benefit/at Direction of a Gang**  
 (§ 18.2-46.2), FY2004-FY2008  
 124 cases

Disposition	Percent	Median Sentence
No Incarceration	31.5%	
Incarceration up to 6 months	13.7%	5 Months
Incarceration more than 6 months	54.8%	2 Years

For offenders receiving more than six months of incarceration, the sentences ranged from seven months to seven years (Figure 59). Virginia's sentencing guidelines are grounded in historical practice among judges and ranges are developed from the middle 50% of actual sentences. This removes the extreme 25% of sentences at either end and focuses upon the more typical cases. The middle 50% of sentences for these gang offenses encompasses one to three years.

**Figure 59**  
 Participation in Offense for Benefit/at Direction of a Gang (§ 18.2-46.2),  
 FY2004-FY2008, Offenders Sentenced to Incarceration of More Than 6 Months  
 68 cases



Several steps were employed in the development of sentencing guidelines for these offenses. The Commission examined actual judicial sentencing practices for these crimes for the period FY2004 through FY2009 (preliminary). Past sentencing patterns, including the historical rate of incarceration in prison and jail, are used to develop guidelines. Current worksheets serve as the starting point for incorporating offenses into the guidelines. Using actual sentencing data, various scoring scenarios were rigorously tested. To ensure the proposed guidelines closely reflect judicial sentencing practices in these cases, individual factors were assessed and new factors were evaluated.

After a thorough analysis of the data, the Commission recommends adding the two gang offenses defined in § 18.2-46.2 to the Miscellaneous sentencing guidelines. Proposed revisions for integrating these offenses are shown in Figures 60, 61 and 62. On Section A of the proposed guidelines (Figure 60), offenders convicted of participating in a gang offense receive five points. If the gang has a juvenile member, however, the offender receives six points. In order to best model actual practices in such cases, the addition of a new factor on Section A is recommended. This new factor, scored only when the most serious offense is a gang offense, adds two points if the offender has an additional or prior record offense defined as violent by § 17.1-805. This factor will increase the likelihood that a gang offender who has been convicted of a violent offense (as part of the current event or in the past) will be recommended for a prison term. The remaining factors on the worksheet would be scored as they currently appear on Section A.

**Figure 60**  
**Proposed Changes to Miscellaneous Section A Worksheet**

<b>◆ Primary Offense</b>		
A.	Burn unoccupied dwelling/church (1 count) .....	6
B.	Burning of personal property, standing grain, etc., value \$200 or more	
	1 count .....	2
	2 counts .....	6
C.	Threatening to bomb, burn or explode (1 count) .....	1
D.	Threat by letter, communication or electronic message (1 count) .....	3
E.	Child neglect/abuse, serious injury	
	1 count .....	3
	2 counts .....	7
F.	Gross, reckless care of child (1 count) .....	1
G.	Cruelty and injury to child (1 count) .....	2
H.	Failure to appear in court for felony offense	
	1 count .....	1
	2 counts .....	4
I.	Perjury, falsely swear an oath (1 count) .....	1
J.	Possession or sale of Schedule III drug or marijuana by prisoner (1 count) .....	3
K.	Escape from correctional facility (1 count) .....	7
L.	Maliciously shoot, throw missile at train, car, etc. (1 count) .....	1
M.	Damage/destroy any property or monument \$1,000 or more (1 count) .....	2
N.	Participation in offense by/for gang (1 count) .....	5
O.	Participation in offense by/for gang with juvenile member (1 count) .....	6
<b>SCORE THE FOLLOWING FACTOR ONLY IF PRIMARY OFFENSE IS GANG OFFENSE (§ 18.2-46.2)</b>		
<b>◆</b>	<b>Violent Additional Offense or Prior Record Offense (as defined in § 17.1-805) _____ If YES, add 2</b>	

— New  
Offenses  
Added

— New  
Factor

An offender who scores eight points or less on Section A is then scored on Section B of the guidelines, which will determine if he will be recommended for probation without an active term of incarceration or a jail term of up to six months. On Section B of the Miscellaneous worksheets (Figure 61), offenders convicted of a gang offense receive seven points for the Primary Offense factor. If the gang has a juvenile member, the offender receives eight points. Two new factors are added to the Section B worksheet and are scored only when a gang offense is the most serious offense in the case. The first new factor will add one point to the score if the offender has an additional offense of assault (felony or misdemeanor). The second new factor will add one point if the offender has a prior felony juvenile adjudication for a crime against the person. These new factors increase the likelihood that certain offenders scored on Section B of the guidelines will be recommended for a jail term of up to six months.

Figure 61  
Proposed Changes to Miscellaneous Section B Worksheet

◆ Primary Offense		
A.	Burn unoccupied dwelling/church (1 count) .....	6
B.	Burning of personal property, standing grain, etc., value \$200 or more (1 count) .....	6
C.	Threatening to bomb, burn or explode (1 count) .....	6
D.	Threat by letter, communication or electronic message (1 count) .....	7
E.	Child neglect/abuse, serious injury (1 count) .....	3
F.	Gross, reckless care of child (1 count) .....	2
G.	Cruelty and injury to child (1 count) .....	2
H.	Failure to appear in court for felony offense (1 count) .....	10
I.	Perjury, falsely swear an oath (1 count) .....	7
J.	Possession or sale of Schedule III drug or marijuana by prisoner (1 count) .....	7
K.	Escape from correctional facility (1 count) .....	10
L.	Maliciously shoot, throw missile at train, car, etc. (1 count) .....	7
M.	Damage/destroy any property or monument \$1,000 or more (1 count) .....	8
N.	Participation in offense by/for gang (1 count) .....	7
O.	Participation in offense by/for gang with juvenile member (1 count) .....	8
<hr/> SCORE THE FOLLOWING FACTORS ONLY IF PRIMARY OFFENSE IS GANG OFFENSE (§ 18.2-46.2) <hr/>		
◆	Additional Offense of Assault (Felony or Misdemeanor) _____	If YES, add 1
◆	Prior Felony Person Adjudication (as a Juvenile) _____	If YES, add 1

New Offenses Added

New Factors Added

Offenders who receive nine points or more on Section A of the Miscellaneous worksheets are scored on Section C, which determines the sentence length recommendation. An offender's prior record plays a large role in determining Primary Offense points on Section C. An offender's prior record is classified in one of three categories. Offenders assigned to the Other category do not have a prior conviction for a violent felony defined in § 17.1-805. An offender is classified as a Category II offender if he has a prior conviction for a violent felony (per § 17.1-805) that has a statutory maximum penalty of less than 40 years. Offenders who have a prior conviction for a violent felony (per § 17.1-805) with a statutory maximum of 40 years or more are considered Category I offenders.

An offender convicted of participating in a gang offense receives 21 points for the Primary Offense factor if his prior record is classified as Other, 42 points if he is a Category II offender, and 84 points if he is a Category I offender. If the offender is convicted of a gang offense and the gang has a juvenile member, higher points are assigned, as shown in Figure 62.

A new factor also appears on Section C. Offenders convicted of participating in a gang offense receive 12 points for an additional offense that is defined as violent per § 17.1-805. If the gang has a juvenile member, a violent additional offense adds 16 points to the offender's score. This new factor will increase the guidelines recommendation for these offenders.

**Figure 62**  
Proposed Changes to Miscellaneous Section C Worksheet

◆ Primary Offense		Category I	Category II	Other
A.	Burn unoccupied dwelling/church (1 count) .....	68	34	17
B.	Burning of personal property, standing grain, etc., value \$200 or more (1 count) .....	32	16	8
C.	Threatening to burn, bomb or explode (1 count) .....	32	16	8
D.	Threat by letter, communication or electronic message (1 count) .....	40	20	10
E.	Child neglect/abuse, serious injury (1 count) .....	32	16	9
F.	Gross, reckless care of child (1 count) .....	28	14	7
G.	Cruelty and injury to child (1 count) .....	28	14	7
H.	Failure to appear in court for felony offense (1 count) .....	32	16	8
I.	Perjury, falsely swear an oath (1 count) .....	12	6	3
J.	Possession or sale of Schedule III drug or marijuana by prisoner (1 count) .....	32	16	8
K.	Escape from correctional facility (1 count) .....	40	20	10
L.	Maliciously shoot, throw missile at train, car, etc. (1 count) .....	32	16	8
M.	Damage/destroy any property or monument \$1,000 or more (1 count) .....	32	16	8
N.	Participation in offense by/for gang (1 count) .....	84	42	21
O.	Participation in offense by/for gang with juvenile member (1 count) .....	104	52	26

**SCORE THE FOLLOWING FACTOR ONLY IF PRIMARY OFFENSE IS GANG OFFENSE (§ 18.2-46.2)**

◆ Violent Additional Offense (as defined in § 17.1-805)	
Primary offense Participation in offense by/for gang	Primary offense Participation in offense by/for gang
If YES, add 12	with juvenile member If YES, add 16

New Offenses Added

New Factor Added

The proposal is based on the actual practices of Virginia's circuit court judges for the period studied. When developing sentencing guidelines, the Commission's goal is to match, or come very close to, the historical prison incarceration rate. The proposed guidelines are designed to recommend the same proportion of offenders for a sentence greater than six months as historically received a sentence of more than six months. It is important to note that not all of the offenders who historically received such a sentence will be recommended for that type of sentence under the proposed guidelines. This is because of the inconsistencies in past sentencing practices for these offenses. The guidelines are designed to bring about more consistency in sentencing decisions for these offenses. As Figure 63 shows, the proposed guidelines are expected to recommend 57.3% of offenders convicted of these crimes for incarceration in excess of six months, whereas, 54.8% of offenders were actually sentenced to a term of incarceration greater than six months. Thus, the recommended and actual historical rates of incarceration are very close.

No impact on correctional bed space is anticipated, since the Commission's proposal is designed to integrate current judicial sanctioning practices into the guidelines.

Figure 63

Participation in Offense for Benefit/at Direction of a Gang (§ 18.2-46.2),  
 FY2004-FY2008  
 124 cases

Sentencing Guidelines	Recommendations under Sentencing Guidelines		Actual Practices Prior to Sentencing Guidelines	
	Section A Score	Recommendation Percent	NO PRISON Percent	PRISON Percent
Up to 8	No Prison	42.7%	60.4%	39.6%
9 or More	Prison	57.3%	33.8%	66.2%
		100.0%	45.2%	OVERALL 54.8%

### Recommendation 4

Amend the Drug-Other sentencing guidelines to add the sale, distribution, etc., of a Schedule III drug (not Anabolic Steroid) as defined in § 18.2-248(E1).

#### Issue

Currently, sale, distribution, etc., of a Schedule III drug under § 18.2-248(E1) is not covered by the sentencing guidelines. Since the crime was elevated from a Class 1 misdemeanor to a Class 5 felony in 2005, the Commission has received numerous requests to add this offense to the guidelines. From FY2007 to FY2008, the number of cases in which this crime was identified as the most serious offense increased by 62%.

#### Discussion

Many Schedule III drugs consist of diluted versions of certain Schedule II drugs, including many prescription pain medications. For instance, Lortab and Vicodin, which contain hydrocodone, as well as Tylenol with Codeine, are Schedule III drugs. Certain prescription appetite suppressants are also categorized as Schedule III drugs, as are certain depressants, such as Ketamine. Sale, distribution, etc., of a Schedule III drug has been a felony since 2005. While the Commission often compiles five years of historical data to develop guidelines, users have asked the Commission to add this offense to the guidelines system and the data provide a sufficient number of cases to do so.

The Commission utilized the FY2006 through FY2009 (preliminary) Pre/Post-Sentence Investigation (PSI) data to identify cases involving the sale, distribution, etc., of a Schedule III drug in violation of § 18.2-248(E1). During this period, there were 121 cases in which this offense was the most serious offense in the case. The number of cases grew significantly between FY2007 and FY2008. As shown in Figure 64, 36.4% of these offenders received probation without an active term of incarceration, 30.6% were given an incarceration term up to six months in jail (median sentence of six months), and 33% were sentenced to more than six months of incarceration (median sentence of one year).

**Figure 64**  
 Sale, Distribution, etc., of a Schedule III Drug-  
 (Not Anabolic Steroid (§ 18.2-248 (E1)))  
 FY2006 - FY2009\*  
 121 cases

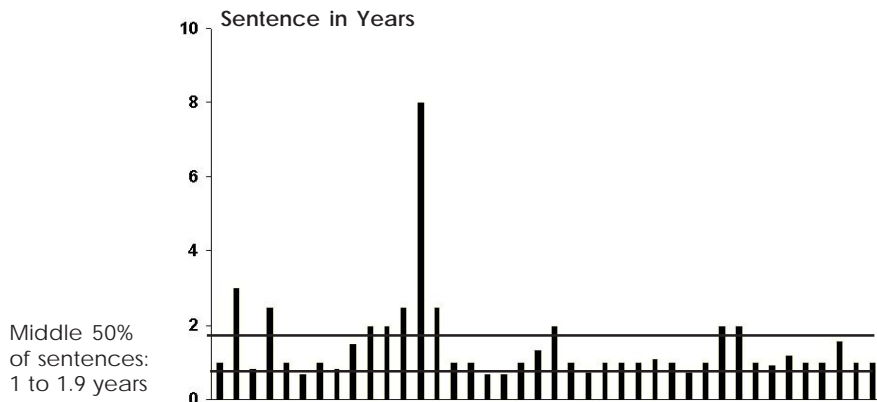
Disposition	Percent	Median Sentence
No Incarceration	36.4%	
Incarceration up to 6 months	30.6%	6 Months
Incarceration more than 6 months	33.0%	1 Year

\* FY2009 data are preliminary.

For the one-third of cases resulting in a sentence greater than six months, the sentences spanned from seven months to eight years (Figure 65). Virginia's sentencing guidelines are grounded in historical practices among judges and ranges are developed from the middle 50% of actual sentences, thus removing the extreme high and low sentences. For the sale, distribution, etc., of a Schedule III drug, the middle 50% of sentences fell between 1 and 1.9 years. During its analysis, the Commission observed significant variations in sentencing practices for this offense. The use of incarceration, particularly prison, varied markedly by locality, with some jurisdictions sending as many as 58% of the offenders convicted of this crime to prison, while other jurisdictions sent as few as 7% of the offenders to prison. Sentencing also differed by gender, with male offenders being much more likely to receive a prison sentence than females.

Several steps were employed in the development of sentencing guidelines for this offense. The Commission examined historical judicial sentencing practices for this crime for the period from FY2006 through FY2009 (preliminary). The proposed guidelines are based on analysis of past sentencing patterns, including the historical rate of incarceration in prison and jail. Current guidelines worksheets serve as the starting point for scoring historical cases. Various scoring scenarios were rigorously tested using actual sentencing data. Existing factors were assessed and new factors were evaluated to ensure the proposed guidelines closely reflect judicial sentencing practices in these cases.

**Figure 65**  
 Sale, Distribution, etc., a Schedule III Drug - Not Anabolic Steroid (§ 18.2-248 (E1))  
 Offenders Sentenced to Incarceration of More Than Six Months  
 FY2006 - FY2009\*  
 121 cases



\* FY2009 data are preliminary.



After a thorough analysis of the data, the Commission recommends adding sale, distribution, etc., of a Schedule III drug to the Drug/Other sentencing guidelines. The Drug/Other guidelines apply to offenses that are not covered by the Schedule I or II drug guidelines. For example, Drug/Other guidelines presently cover marijuana offenses, as well as the crime of selling a Schedule III or IV drug to a minor.

Figures 66, 67, and 68 present the proposed revisions for integrating the sale, distribution, etc., of a Schedule III drug into the Drug/Other worksheets. On Section A of the proposed guidelines (Figure 66), offenders convicted of this offense receive eight points for one count and 10 points for two counts. The remaining factors on the worksheet would be scored as they currently appear on Section A.

**Figure 66**  
**Proposed Primary Offense Factor on Drug/Other Section A Worksheet**

◆ Primary Offense		
A.	Other than listed below (1 count) .....	1
B.	Sell, etc. 1/2 ounce - 5 pounds of marijuana for profit; Sell, etc. marijuana to inmate for accommodation	
	1 count .....	3
	2 counts .....	8
C.	Sell, etc. more than 5 pounds of marijuana for profit; Sell, etc. third or subsequent felony (1 count) .....	12
D.	Sell, etc. marijuana to minor (1 count) .....	11
E.	Manufacture marijuana not for personal use (1 count) .....	8
F.	Transport 5 pounds or more of marijuana into Commonwealth (1 count) .....	12
G.	Sell, etc. Schedule III or IV drug to minor (1 count) .....	11
H.	Sell, etc. Schedule III drug - not Anabolic Steroid	
	1 count .....	8
	2 counts .....	10

**New  
Offense  
Added**

An offender who scores 10 points or less on Section A is then scored on Section B of the guidelines, which will determine if he will be recommended for probation without an active term of incarceration or a jail term of up to six months. On Section B of the Drug/Other worksheets (Figure 67), offenders convicted of selling, distributing, etc., a Schedule III drug receive seven points on the Primary Offense factor for one count of the offense and 12 points for two counts. An offender convicted of two or more counts will automatically be recommended for a jail term of three to six months.

The proposal includes two revised factors on Section B. First, the factor for Prior Incarcerations/Commitments is split. Offenders convicted of selling, distributing, etc., a Schedule III drug receive higher points on this factor than other offenders. Similarly, the factor for Legally Restrained at the Time of Offense is split and higher points are assigned for offenders convicted of selling, distributing, etc., a Schedule III drug. These changes are designed to better reflect judicial practices in these cases and will increase the likelihood that certain offenders convicted of this crime will be recommended for a jail term.

Figure 67  
Proposed Changes to Drug/Other Section B Worksheet

New Offense Added	◆ Primary Offense																
	A. Other than listed below (1 count) .....	1															
	B. Sell, etc. 1/2 ounce - 5 pounds of marijuana for profit; Sell, etc. marijuana to inmate for accommodation																
	1 count .....	6															
	2 counts .....	9															
New Offense Added	C. Manufacture marijuana not for personal use (1 count) .....	5															
	D. Sell, etc. Schedule III drug - not Anabolic Steroid																
	1 count .....	7															
	2 counts .....	12															
Revised Factor	◆ Prior Incarcerations/Commitments																
	Primary offense OTHER THAN sale, etc. of Schedule III drug - not anabolic steroid If YES, add 1	Primary offense sale, etc. of a Schedule III drug - not anabolic steroid If YES, add 4															
Revised Factor	◆ Legally Restrained at Time of Offense																
	<table border="1"> <tr> <td>Primary offense OTHER THAN sale, etc. of a Schedule III drug - not anabolic steroid</td> <td>Points</td> </tr> <tr> <td>None .....</td> <td>0</td> </tr> <tr> <td>Other than parole/post-release, supervised probation or CCCA .....</td> <td>2</td> </tr> <tr> <td>Parole, post-release, supervised probation or CCCA .....</td> <td>3</td> </tr> </table>	Primary offense OTHER THAN sale, etc. of a Schedule III drug - not anabolic steroid	Points	None .....	0	Other than parole/post-release, supervised probation or CCCA .....	2	Parole, post-release, supervised probation or CCCA .....	3	<table border="1"> <tr> <td>Primary offense sale, etc. of a Schedule III drug - not anabolic steroid</td> <td>Points</td> </tr> <tr> <td>None .....</td> <td>0</td> </tr> <tr> <td>Other than parole/post-release, supervised probation or CCCA .....</td> <td>3</td> </tr> <tr> <td>Parole, post-release, supervised probation or CCCA .....</td> <td>4</td> </tr> </table>	Primary offense sale, etc. of a Schedule III drug - not anabolic steroid	Points	None .....	0	Other than parole/post-release, supervised probation or CCCA .....	3	Parole, post-release, supervised probation or CCCA .....
Primary offense OTHER THAN sale, etc. of a Schedule III drug - not anabolic steroid	Points																
None .....	0																
Other than parole/post-release, supervised probation or CCCA .....	2																
Parole, post-release, supervised probation or CCCA .....	3																
Primary offense sale, etc. of a Schedule III drug - not anabolic steroid	Points																
None .....	0																
Other than parole/post-release, supervised probation or CCCA .....	3																
Parole, post-release, supervised probation or CCCA .....	4																

Offenders who receive 11 points or more on Section A of the Drug/Other worksheets are scored on Section C to obtain the sentence length recommendation. Primary Offense points on Section C are assigned based on the classification of an offender's prior record. An offender is assigned to the Other category if he does not have a prior conviction for a violent felony defined in § 17.1-805. If an offender has a prior conviction for a violent felony that has a statutory maximum penalty of less than 40 years, he is assigned to Category II. Offenders are classified as Category I if they have a prior conviction for a violent felony with a statutory maximum of 40 years or more.

On Section C of the proposed Drug/Other worksheets, an offender convicted of one count of selling, distributing, etc., a Schedule III drug receives five points for the Primary Offense factor if his prior record is classified as Other (Figure 68). Under the proposal, a Category II offender convicted of selling, distributing, etc., a Schedule III drug scores 10 points on the Primary Offense factor, while a Category I offender scores 20 points. Scores for two counts are slightly higher. Other than the Primary Offense factor, no other factors on Section C are revised.

The proposal is based on the actual practices of Virginia's circuit court judges for the period studied. When developing sentencing guidelines, the Commission's goal is to match, or come very close to, the historical prison incarceration rate. The proposed guidelines are designed to recommend the same proportion of offenders for a sentence greater than six months as historically received a sentence that exceeds six months. Due to inconsistencies in past sentencing practices for this offense, not all of the offenders who historically received such a sentence will be recommended for that type of sentence under the proposed guidelines. The guidelines are designed to bring about more consistency in sentencing decisions.

Figure 68  
Proposed Primary Offense Factor Drug/Other Section C Worksheet

◆ Primary Offense	Category I	Category II	Other
A. Other than listed below: (1 count) .....	32	16	8
B. Sell, etc. 1/2 oz - 5 pounds of marijuana for profit; Sell, etc. marijuana to inmate for accommodation			
Attempted, conspired or completed: 1 count .....	20	10	5
2 counts .....	28	14	7
3 counts .....	40	20	10
C. Sell, etc. more than 5 pounds of marijuana for profit; Sell etc. third or subsequent felony			
Attempted, conspired or completed: 1 count .....	76	38	19
D. Sell marijuana to minor			
Attempted, conspired or completed: 1 count .....	60	30	15
E. Manufacture marijuana not for personal use			
Attempted, conspired or completed: 1 count .....	24	12	6
F. Transport 5 pounds or more of marijuana into Commonwealth			
Attempted, conspired or completed: 1 count .....	76	38	19
G. Sell, etc. Schedule III or IV drug to minor			
Attempted, conspired or completed: 1 count .....	60	30	15
H. Sell, etc. Schedule III drug- not anabolic steroid			
Attempted, conspired or completed: 1 count .....	20	10	5
2 counts .....	32	16	8

New  
Offense  
Added

Figure 69 shows that the proposed guidelines are expected to recommend 28.1% of offenders convicted of selling, distributing, etc., a Schedule III drug for incarceration in excess of six months. The remaining 71.9% of offenders will be recommended for a lesser sanction. This includes offenders who, although they were recommended for more than six months of incarceration on the guidelines, score 38 points or less on the nonviolent offender risk assessment instrument. This instrument, completed for nonviolent offenders convicted of drug and property offenses, is designed to identify the offenders who are at the lowest risk to public safety. Offenders scoring 38 points or less are designated as low risk and are recommended for an alternative sanction in lieu of the term of incarceration. Past practice has resulted in 33.1% of offenders being sentenced to incarceration greater than six months. In some of the cases in which the judge historically has sentenced the offender to such a term, the offender will score 38 points or less on the risk assessment instrument and will be recommended for an alternative form of punishment, such as jail in lieu of prison. It is expected that judges, in some of these cases, will go along with the risk assessment recommendation and sentence the offender to some other type of sanction. This will reduce the rate at which judges sentence offenders to more than six months of incarceration and bring the rate closer to the 28.1% recommended by the guidelines. These assumptions are based on the rate of compliance with the nonviolent offender risk assessment instrument in cases involving the sale of a Schedule I or II drug. The Commission will closely monitor judicial response to these new guidelines (and the risk assessment instrument) and will recommend adjustments if necessary based on judicial practice after the guidelines take effect.

As the Commission's proposal is designed to integrate current judicial sanctioning practices into the guidelines, no increase in correctional bed space needs is anticipated.

**Figure 69**  
 Sale, Distribution, etc., of a Schedule III Drug - Not Anabolic Steroid (§ 18.2-248 (E1))  
 FY2006 - FY2009\*  
 121 cases

Sentencing Guidelines	Recommendations under Sentencing Guidelines		Actual Practices Prior to Sentencing Guidelines	
	Recommendation	Percent	NO PRISON Percent	PRISON Percent
Up to 10 on Section A Or Up to 38 on Risk Assessment	No Prison	71.9%	81.6%	18.4%
	11 or More	28.1%	29.4%	70.6%
		100.0%	66.9%	OVERALL 33.1%

\* FY2009 data are preliminary.

# Appendices

## Appendix 1

### Judicial Reasons for Departure from Sentencing Guidelines Property, Drug, and Miscellaneous Offenses

<b>Reasons for MITIGATION</b>	<b>Burg. of Dwelling (N=154)</b>	<b>Burg. Other Structure (N=67)</b>	<b>Sch. I/II Drugs (N=681)</b>	<b>Other Drugs (N=61)</b>	<b>Fraud (N=245)</b>	<b>Larceny (N=444)</b>	<b>Misc (N=42)</b>	<b>Traffic (N=148)</b>	<b>Weapon (N=63)</b>
Plea agreement	45	17	193	20	81	127	21	44	20
No reason given	28	16	172	14	44	117	6	48	12
Judicial discretion (time served, other sentence to serve, etc.)	9	5	71	5	35	45	2	12	5
Offender cooperated with authorities	6	10	78	6	16	32	0	4	4
Offender is sentenced to an alt. punishment to incarceration	17	7	45	4	21	40	0	4	1
Sentence recommended by Commonwealth Attorney	20	5	52	5	13	28	1	9	3
Minimal circumstances/facts of the case	14	8	25	2	20	31	6	15	6
Mitigating court circumstances(plead guilty, weak evid.etc.)	8	2	53	4	12	25	1	6	4
Offender has minimal/no prior record	7	5	34	1	8	15	3	14	10
Offender health (mental, physical, emotional, etc.)	3	3	27	1	6	23	4	3	2
Offender's progress in rehabilitation	3	1	25	1	12	19	1	1	1
Offender has good potential for rehabilitation	6	2	25	3	5	10	3	6	1
Financial obligations (court costs, restitution,support, etc.)	3	0	9	0	18	11	0	2	1
Offender issues (age of offender, homeless, family issues, etc.)	17	1	21	0	8	4	1	5	1
Current offense involves drugs/alcohol (small amount,etc.)	0	0	20	0	1	1	2	0	0
Offender needs rehabilitation	1	1	9	1	5	3	0	0	2
Multiple charges/events are being treated as one event	4	2	9	0	7	0	0	2	0
Victim request	2	2	0	0	6	8	0	2	0
Offender not the leader	1	0	5	0	1	6	0	0	1
Minimal property or monetary loss	0	0	0	0	1	11	0	0	0
Offender's substance abuse issues	0	0	9	0	1	1	0	0	0
Guidelines recommendation is too harsh	2	2	4	0	2	0	1	1	1
Sentencing guidelines recommendation not appropriate	2	0	2	0	2	2	0	1	1
Behavior positive since commission of the offense	1	1	5	0	1	0	0	0	0
Jury sentence	2	1	1	1	0	2	0	0	0
Judge had an issue scoring one of the guidelines factors	1	0	3	0	3	0	0	0	0
Victim cannot/will not testify	1	0	0	0	0	4	0	0	1
Type of victim (drug dealer, relative, friend, etc.)	0	0	0	0	3	1	1	0	0
Sentencing guidelines incorrect/missing	0	0	1	0	1	2	0	0	0
Sentenced to Department of Juvenile Justice	2	0	1	0	0	2	0	0	1
Minimal circumstances involved with supervision violation	0	0	2	0	0	0	0	0	1
Concealed weapon, but was not a firearm	0	0	0	0	0	0	0	0	3
Little or no injury/offender did not intend to harm	1	0	1	0	0	0	0	2	0
Illegible written reason	0	0	1	0	0	0	0	1	0
Sentence recommended by Probation Officer	0	0	1	0	0	1	0	0	0
Judge thought sentence was in compliance	0	0	1	0	0	1	0	0	0
Judge rounded guidelines minimum to nearest whole year	1	0	1	0	0	0	0	1	0
Split trial (guilty plea/bench trial and jury trial combined)	0	0	1	0	0	0	0	0	0
Judge had an issue scoring one of the risk assessment factors	0	0	1	0	0	0	0	0	0
Original offense is nonviolent	0	0	1	0	0	0	0	0	0
Offender failed alternative sanction program	0	0	0	1	0	0	0	0	0
Victim circumstances (facts of the case, etc.)	1	0	0	0	0	0	0	0	0
Victim's role in the offense	1	0	0	0	0	0	0	0	0

Note: Figures indicate the number of times a departure reason was cited.

Because multiple reasons may be cited in each case, figures will not total the number of cases in each offense group.

## Appendix 1

### Judicial Reasons for Departure from Sentencing Guidelines Property, Drug, and Miscellaneous Offenses

Reasons for AGGRAVATION	Burg. of Dwelling (N=167)	Burg. Other Structure (N=59)	Sch. I/II Drugs (N=684)	Other Drugs (N=138)	Fraud (N=160)	Larceny (N=444)	Misc (N=54)	Traffic (N=248)	Weapon (N=58)
Plea agreement	40	9	163	30	36	104	9	29	25
Offender has extensive prior record or same type prior	22	17	133	27	21	96	8	97	3
No reason given	24	12	160	33	43	80	8	50	13
Aggravating circumstances/flagrancy of offense	35	8	23	4	15	47	13	38	5
Offender has poor rehabilitation potential	11	2	35	5	7	20	6	29	2
Current offense involves drugs/alcohol (large amount, etc.)	1	0	64	19	1	0	3	20	0
Jury sentence	7	0	26	3	7	23	5	5	3
Offender is sentenced to an alt. punishment to incarceration	10	3	28	6	6	15	1	6	0
Number of violations/counts in the event	7	1	22	7	4	12	1	6	5
Extreme property or monetary loss	8	4	2	0	11	37	1	0	0
Guidelines recommendation is too low	5	4	18	5	1	16	4	8	0
Offense involved a high degree of planning/violation of trust	3	7	4	1	11	33	0	0	0
Judicial discretion (time served, shock incarceration, etc.)	6	2	24	5	5	8	2	2	1
Poor conduct since commission of offense	2	1	18	5	8	6	1	3	0
True offense behavior was more serious than offenses at conv.	1	0	13	6	0	13	1	5	4
Offender's substance abuse issues	1	1	21	2	0	7	0	11	0
Offender needs rehabilitation offered by jail/prison	0	0	22	1	1	10	1	7	0
Offender failed alternative sanction program	0	0	28	4	0	1	0	1	0
Aggravating court circumstances/proceedings	0	1	18	4	2	4	1	2	0
Offender failed to cooperate with authorities	2	0	10	2	1	9	1	0	0
Aggravating facts involving the breaking and entering	18	2	0	0	0	2	0	0	0
New offenses were committed while on probation	1	0	14	0	0	4	0	1	1
Sentence recommended by Commonwealth Attorney	2	0	9	1	1	4	1	3	0
Offender issues (age of offender, homeless, etc.)	2	2	7	0	1	1	0	3	1
Financial obligations (court costs, restitution, support, etc.)	0	1	2	1	7	4	0	0	0
Current offense involves accident/reckless driving	0	0	1	1	0	1	0	11	0
Prior record not adequately weighed by guidelines	1	1	5	0	2	5	0	0	0
Mandatory minimum involved in event	0	0	4	1	1	1	0	3	1
Victim circumstances (facts of the case, etc.)	8	1	0	0	1	1	0	0	0
Absconded from probation supervision	0	0	6	0	3	0	0	1	0
Used, etc., drugs/alcohol while on probation	0	0	6	0	0	2	0	0	2
Failed to follow instructions while on probation	0	0	3	2	1	3	0	1	0
Gang-related offense	3	2	0	0	0	5	0	0	0
Violent/disruptive behavior in custody	0	0	3	1	0	1	2	2	0
Seriousness of offense	2	0	0	0	1	3	0	3	0
Multiple offenses/counts in same event	1	0	1	0	1	4	0	0	0
Child present at time of offense	0	0	0	0	0	2	1	3	0
Judge thought sentence was in compliance	0	0	1	1	0	0	0	1	1
Sentencing guidelines incorrect/missing	0	0	2	0	0	1	0	0	0
Sentencing guidelines recommendation not appropriate	0	0	0	1	1	1	0	0	0
Sentencing guidelines recommendation issue (stat. min. etc.)	0	0	1	1	0	1	0	0	0
Offender was the leader	0	1	1	0	0	1	0	0	0
Split trial (part jury, part bench trial)	0	0	1	0	0	0	0	0	0

Note: Figures indicate the number of times a departure reason was cited.

Because multiple reasons may be cited in each case, figures will not total the number of cases in each offense group.

## Appendix 2

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

<b>Reasons for MITIGATION</b>	<b>Assault (N=224)</b>	<b>Homicide (N=32)</b>	<b>Kidnapping (N=16)</b>	<b>Robbery (N=256)</b>	<b>Rape (N=48)</b>	<b>Sexual Assault (N=71)</b>
Plea agreement	93	13	7	63	14	21
No reason given	33	5	3	32	6	15
Sentenced to Department of Juvenile Justice	7	2	0	40	3	3
Offender cooperated with authorities	5	5	0	43	0	0
Minimal circumstances/facts of the case	19	6	1	15	2	7
Judicial discretion (time served, other sentence to serve, etc.)	15	3	1	26	3	1
Sentence recommended by Commonwealth Attorney	16	1	1	22	5	1
Offender issues (age of offender, homeless, family issues, etc.)	4	1	0	31	5	5
Mitigating court circumstances/proceedings	12	5	2	13	4	9
Victim request	26	1	2	2	6	6
Offender has minimal/no prior record	14	1	0	14	5	6
Offender health (mental, physical, emotional, etc.)	13	1	1	15	1	5
Offender has good potential for rehabilitation	12	1	3	14	4	2
Offender not the leader	2	0	0	16	0	0
Victim cannot/will not testify	5	0	0	6	5	2
Little or no injury/offender did not intend to harm	14	0	0	2	0	1
Victim's role in the offense	7	0	3	4	0	2
Jury sentence	4	2	0	4	4	1
Offender is sentenced to an alt. punishment to incarceration	3	0	0	6	0	2
Offender's progress in rehabilitation	2	0	0	7	1	1
Offender needs rehabilitation	4	0	0	2	1	2
Type of victim (drug dealer, relative, friend, etc.)	3	0	0	0	3	3
Multiple charges/sequence of events are being treated as one	1	0	0	4	1	2
Judge had an issue scoring one of the guidelines factors	2	0	0	2	0	0
Concealed weapon was not a firearm	0	0	0	4	0	0
Behavior positive since commission of the offense	2	0	0	0	1	0
Split trial/sentence (combination jury and bench trial)	0	0	0	3	0	0
Financial obligations (court costs, restitution, support, etc.)	2	0	0	0	0	1
Sentencing guidelines recommendation not appropriate	0	0	0	2	0	1
Guidelines recommendation is too harsh	1	0	0	0	0	2
Current offense involves drugs/alcohol (small amount of drugs.)	1	0	0	0	1	0
Mitigating circumstances of sex offense	0	0	0	0	1	1
Offender's substance abuse issues	0	0	0	1	0	0
Sentencing guidelines incorrect/missing	0	0	0	1	0	0
Judge had an issue scoring one of the risk assessment factors	0	0	0	0	0	1
Victim circumstances (facts of the case, etc.)	0	0	0	1	0	0

Note: Figures indicate the number of times a departure reason was cited.

Because multiple reasons may be cited in each case, figures will not total the number of cases in each offense group.



## Appendix 2

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

<b>Reasons for AGGRAVATION</b>	<b>Assault (N=185)</b>	<b>Homicide (N=57)</b>	<b>Kidnapping (N=27)</b>	<b>Robbery (N=104)</b>	<b>Rape (N=21)</b>	<b>Sexual Assault (N=115)</b>
Aggravating circumstances/flagrancy of offense	32	16	6	15	2	22
Plea agreement	36	8	4	16	0	26
Jury sentence	26	13	4	19	6	10
No reason given	23	6	5	18	1	21
Degree of victim injury (physical, emotional, etc.)	46	7	0	7	5	8
Type of victim (child, etc.)	16	3	4	8	10	21
Offender has poor rehabilitation potential	23	5	3	14	3	13
Offender has extensive prior record or same type of prior	30	4	0	7	0	2
Degree of violence toward victim	16	4	0	2	2	0
Guidelines recommendation is too low	3	3	2	2	1	10
Offender used a weapon in commission of the offense	7	2	0	9	0	0
Judicial discretion (time served, shock incarceration, etc.)	2	1	2	2	1	8
Offense involved a high degree of planning/violation of trust	2	1	1	3	1	7
True offense behavior was more serious than offenses at conv.	4	3	0	3	0	4
Number of violations/counts in the event	5	1	0	2	0	5
Gang-related offense	5	2	0	0	0	0
Offender was the leader	1	2	0	4	0	0
Current offense involves drugs/alcohol (large amount of drugs)	2	4	0	0	0	0
Sentencing guidelines recommendation not appropriate	2	0	2	0	1	1
Mandatory minimum involved in event	3	0	1	2	0	0
Sentence recommended by Commonwealth Attorney	4	0	0	1	0	0
Offender issues (age of offender, homeless, etc.)	2	0	0	3	0	0
Seriousness of offense	0	1	0	3	0	1
Victim circumstances (facts of the case, etc.)	1	1	0	0	3	0
Violent/disruptive behavior in custody	1	2	0	1	0	0
Facts of sex offense involved	0	0	0	1	0	3
Poor conduct since commission of offense	1	0	0	2	0	0
Offender violated protective order or was stalking	3	0	0	0	0	0
Victim request	1	1	0	0	1	0
Offender failed to cooperate with authorities	0	1	0	1	0	0
Aggravating facts involving the breaking and entering	0	0	0	2	0	0
Offender's substance abuse issues	0	0	2	0	0	0
Judge thought sentence was in compliance	0	0	1	1	0	0
Sentencing guidelines recommend. issue (stat. min. exceeded.)	1	0	0	0	0	1
Offender health (mental, physical, emotional, etc.)	0	0	0	1	0	1
Current offense involves accident/reckless driving	0	1	0	0	0	0
Child present at time of offense	1	0	0	0	0	0
Aggravating court circumstances/proceedings	1	0	0	0	0	0
Split trial (part jury, part bench trial)	0	0	0	1	0	0
Sentencing guidelines incorrect/missing	0	0	0	1	0	0
Prior record not adequately weighed by guidelines	0	0	1	0	0	0
<b>Offender needs rehabilitation offered by jail/prison</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>

Note: Figures indicate the number of times a departure reason was cited.

Because multiple reasons may be cited in each case, figures will not total the number of cases in each offense group.

### Appendix 3

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

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##### BURGLARY OF DWELLING

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	54.5	18.2	27.3	33
2	75.4	13.0	11.6	69
3	76.9	0.0	23.1	13
4	60.5	20.9	18.6	43
5	63.6	15.2	21.2	33
6	73.3	13.3	13.3	30
7	54.2	20.8	25.0	24
8	80.0	12.0	8.0	25
9	60.0	4.0	36.0	25
10	77.8	11.1	11.1	36
11	45.5	27.3	27.3	11
12	54.2	12.5	33.3	24
13	79.2	16.7	4.2	24
14	72.0	16.0	12.0	25
15	73.2	7.1	19.6	56
16	63.9	19.4	16.7	36
17	90.9	0.0	9.1	11
18	50.0	25.0	25.0	16
19	69.4	13.9	16.7	36
20	58.8	17.6	23.5	17
21	66.7	27.8	5.6	36
22	54.3	11.4	34.3	35
23	56.4	25.6	17.9	39
24	56.1	33.3	10.5	57
25	67.4	23.9	8.7	46
26	72.2	16.7	11.1	54
27	94.7	0.0	5.3	38
28	86.1	0.0	13.9	36
29	68.8	12.5	18.8	16
30	52.0	16.0	32.0	25
31	69.6	8.7	21.7	23
Total	67.7	15.5	16.8	993

##### BURGLARY/OTHER

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	75.0	5.0	20.0	20
2	93.3	6.7	0.0	30
3	90.9	9.1	0.0	11
4	76.0	20.0	4.0	25
5	58.3	16.7	25.0	12
6	80.0	10.0	10.0	10
7	100.0	0.0	0.0	13
8	100.0	0.0	0.0	10
9	76.2	9.5	14.3	21
10	88.9	11.1	0.0	27
11	66.7	20.0	13.3	15
12	76.5	5.9	17.6	17
13	85.3	14.7	0.0	34
14	74.2	9.7	16.1	31
15	80.8	7.7	11.5	26
16	81.0	14.3	4.8	21
17	72.7	0.0	27.3	11
18	60.0	20.0	20.0	5
19	66.7	11.1	22.2	27
20	62.5	0.0	37.5	8
21	71.4	28.6	0.0	7
22	72.4	13.8	13.8	29
23	72.0	20.0	8.0	25
24	66.7	33.3	0.0	15
25	84.0	4.0	12.0	25
26	86.5	8.1	5.4	37
27	93.1	3.4	3.4	29
28	83.3	16.7	0.0	18
29	61.5	7.7	30.8	13
30	61.5	15.4	23.1	13
31	70.0	20.0	10.0	10
Total	78.8	11.3	9.9	595

##### DRUG/OTHER

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	80.5	7.3	12.2	41
2	91.4	1.4	7.1	70
3	72.4	3.4	24.1	29
4	85.4	7.3	7.3	41
5	80.0	5.0	15.0	20
6	82.4	2.9	14.7	34
7	75.7	5.4	18.9	37
8	95.5	0.0	4.5	22
9	79.2	4.2	16.7	24
10	77.4	12.9	9.7	31
11	90.0	0.0	10.0	10
12	73.8	4.8	21.4	42
13	85.3	5.9	8.8	34
14	89.2	5.4	5.4	37
15	76.8	2.4	20.7	82
16	87.0	4.3	8.7	23
17	90.0	5.0	5.0	20
18	84.6	15.4	0.0	13
19	83.5	5.5	11.0	91
20	96.6	3.4	0.0	29
21	90.0	10.0	0.0	10
22	76.9	2.6	20.5	39
23	85.2	4.9	9.8	61
24	82.8	5.2	12.1	58
25	81.1	11.3	7.5	53
26	88.2	2.9	8.8	68
27	90.9	6.5	2.6	77
28	86.0	2.3	11.6	43
29	81.6	2.6	15.8	38
30	86.4	0.0	13.6	22
31	83.3	8.3	8.3	36
Total	83.9	4.9	11.2	1235

### Appendix 3 Sentencing Guidelines Compliance by Judicial Circuit: Property, Drug, and Miscellaneous Offenses

#### SCHEDULE VI/DRUGS

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	81.1	7.6	11.3	275
2	85.3	9.4	5.2	382
3	74.7	5.8	19.5	399
4	77.1	14.1	8.8	533
5	84.5	5.6	9.9	161
6	77.0	8.1	14.9	148
7	91.6	6.5	1.9	321
8	87.0	7.8	5.2	231
9	83.7	6.2	10.1	129
10	77.7	16.3	6.0	166
11	75.9	4.8	19.3	83
12	82.6	5.0	12.4	201
13	79.7	13.8	6.5	847
14	80.2	13.6	6.2	258
15	77.6	5.6	16.9	450
16	80.6	8.9	10.6	180
17	79.2	5.2	15.6	96
18	88.9	9.5	1.6	63
19	87.0	9.2	3.8	315
20	88.7	6.0	5.3	151
21	77.1	18.1	4.8	83
22	79.0	6.3	14.7	143
23	79.9	10.3	9.8	214
24	76.3	14.0	9.7	279
25	83.3	8.3	8.3	228
26	85.8	7.4	6.8	324
27	93.7	3.8	2.4	287
28	89.4	4.9	5.6	142
29	76.8	4.3	18.9	164
30	82.7	6.1	11.2	98
31	86.3	7.0	6.6	227
Total	82.0	9.0	9.0	7578

#### FRAUD

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	90.3	7.8	1.9	103
2	87.0	10.4	2.6	154
3	90.9	6.8	2.3	44
4	79.5	10.8	9.6	83
5	91.0	6.0	3.0	67
6	88.4	11.6	0.0	43
7	86.4	6.8	6.8	44
8	76.5	11.8	11.8	34
9	81.2	7.2	11.6	69
10	85.5	7.9	6.6	76
11	80.9	10.6	8.5	47
12	81.2	12.0	6.8	117
13	78.9	15.8	5.3	57
14	83.6	7.8	8.6	116
15	79.3	8.0	12.7	213
16	81.8	8.2	10.0	110
17	89.1	1.8	9.1	55
18	95.3	2.3	2.3	43
19	84.8	7.1	8.1	198
20	92.0	8.0	0.0	87
21	86.7	10.0	3.3	30
22	84.1	11.1	4.8	63
23	83.0	16.1	0.9	112
24	80.5	19.5	0.0	82
25	85.3	10.1	4.7	129
26	84.4	10.2	5.4	147
27	93.0	4.9	2.1	143
28	93.3	5.0	1.7	60
29	85.7	5.7	8.6	105
30	81.6	10.2	8.2	49
31	93.5	3.9	2.6	77
Total	85.3	8.9	5.8	2758

#### LARCENY

Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	85.2	5.3	9.5	243
2	87.6	9.2	3.2	251
3	86.9	6.6	6.6	122
4	82.0	11.6	6.4	250
5	82.4	8.5	9.2	142
6	80.0	6.7	13.3	60
7	85.5	7.9	6.6	76
8	84.2	8.9	6.9	101
9	70.3	8.5	21.2	118
10	82.0	12.8	5.3	133
11	70.8	8.3	20.8	48
12	78.9	10.7	10.4	289
13	79.7	14.7	5.6	143
14	83.7	9.1	7.2	362
15	73.8	9.5	16.7	401
16	74.6	11.4	14.0	114
17	86.3	4.2	9.5	168
18	84.4	10.4	5.2	135
19	83.4	9.5	7.1	326
20	90.6	3.1	6.3	96
21	78.2	16.7	5.1	78
22	83.2	4.6	12.2	197
23	86.6	8.3	5.1	276
24	83.9	8.4	7.7	155
25	87.3	6.7	6.1	165
26	84.2	9.0	6.8	222
27	95.4	3.4	1.3	238
28	94.5	3.6	1.8	110
29	82.7	5.1	12.2	156
30	80.8	8.2	11.0	73
31	95.9	2.0	2.0	148
Total	83.5	8.2	8.2	5397

### Appendix 3

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

TRAFFIC				
Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	76.1	7.6	16.3	92
2	86.3	8.1	5.6	124
3	93.0	2.3	4.7	43
4	81.0	8.3	10.7	84
5	76.0	10.0	14.0	50
6	86.1	5.6	8.3	36
7	76.3	10.5	13.2	38
8	76.5	8.8	14.7	34
9	74.7	4.0	21.3	75
10	94.3	1.9	3.8	53
11	78.9	10.5	10.5	19
12	82.1	8.4	9.5	95
13	91.2	2.9	5.9	34
14	83.3	5.6	11.1	72
15	76.9	8.1	15.1	186
16	74.1	7.1	18.8	85
17	67.5	5.0	27.5	40
18	91.7	0.0	8.3	12
19	77.8	5.6	16.7	108
20	82.3	3.2	14.5	62
21	84.6	10.3	5.1	39
22	78.1	1.4	20.5	73
23	82.9	15.9	1.2	82
24	82.2	10.9	6.9	101
25	79.2	6.5	14.3	77
26	82.9	7.9	9.3	140
27	85.7	7.1	7.1	70
28	93.3	4.4	2.2	45
29	71.4	5.7	22.9	35
30	68.0	12.0	20.0	25
31	88.7	3.2	8.1	62
Total	81.1	7.1	11.9	2091

MISCELLANEOUS				
Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	66.7	16.7	16.7	6
2	70.0	0.0	30.0	10
3	60.0	0.0	40.0	5
4	68.4	15.8	15.8	19
5	75.0	0.0	25.0	8
6	57.1	28.6	14.3	21
7	57.1	14.3	28.6	7
8	66.7	33.3	0.0	3
9	100.0	0.0	0.0	5
10	72.7	9.1	18.2	11
11	50.0	25.0	25.0	8
12	71.4	7.1	21.4	14
13	60.0	30.0	10.0	10
14	90.0	10.0	0.0	10
15	70.0	12.5	17.5	40
16	88.9	11.1	0.0	9
17	50.0	25.0	25.0	4
18	0.0	0.0	100.0	1
19	60.0	0.0	40.0	10
20	71.4	14.3	14.3	7
21	0.0	50.0	50.0	2
22	82.4	5.9	11.8	17
23	80.0	13.3	6.7	15
24	75.0	12.5	12.5	8
25	84.6	7.7	7.7	13
26	78.6	0.0	21.4	14
27	100.0	0.0	0.0	16
28	75.0	18.8	6.3	16
29	57.1	14.3	28.6	14
30	40.0	40.0	20.0	5
31	77.8	11.1	11.1	9
Total	71.5	12.5	16.0	337

WEAPONS				
Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	81.0	4.8	14.3	21
2	71.4	19.0	9.5	21
3	89.5	10.5	0.0	19
4	89.8	2.0	8.2	49
5	60.0	20.0	20.0	15
6	80.0	6.7	13.3	15
7	100.0	0.0	0.0	9
8	85.7	0.0	14.3	7
9	37.5	0.0	62.5	8
10	80.0	20.0	0.0	20
11	75.0	25.0	0.0	4
12	66.7	16.7	16.7	24
13	66.0	14.0	20.0	50
14	81.8	13.6	4.5	22
15	81.8	12.1	6.1	33
16	81.3	12.5	6.3	16
17	50.0	0.0	50.0	4
18	100.0	0.0	0.0	3
19	62.5	25.0	12.5	8
20	80.0	20.0	0.0	5
21	63.6	27.3	9.1	11
22	84.8	3.0	12.1	33
23	83.3	11.1	5.6	18
24	79.2	8.3	12.5	24
25	80.8	7.7	11.5	26
26	71.4	19.0	9.5	21
27	81.8	13.6	4.5	22
28	83.3	0.0	16.7	12
29	90.0	10.0	0.0	10
30	70.0	30.0	0.0	10
31	86.7	13.3	0.0	15
Total	78.2	11.4	10.5	555

### Appendix 4 Sentencing Guidelines Compliance by Judicial Circuit: Offenses Against the Person

ASSAULT				
Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	79.1	7.5	13.4	67
2	77.4	10.7	11.9	84
3	66.7	13.3	20.0	45
4	74.5	17.0	8.5	94
5	66.7	8.3	25.0	48
6	63.5	25.0	11.5	52
7	77.8	3.7	18.5	54
8	66.7	33.3	0.0	18
9	77.4	9.7	12.9	31
10	68.3	20.6	11.1	63
11	87.0	13.0	0.0	23
12	75.0	11.1	13.9	36
13	80.4	9.8	9.8	51
14	76.3	11.9	11.9	59
15	75.7	13.6	10.7	103
16	72.4	19.0	8.6	58
17	68.2	9.1	22.7	22
18	69.6	17.4	13.0	23
19	60.0	12.9	27.1	70
20	85.2	7.4	7.4	27
21	82.8	17.2	0.0	29
22	86.0	8.0	6.0	50
23	74.6	15.3	10.2	59
24	76.1	11.3	12.7	71
25	68.2	18.2	13.6	66
26	72.5	23.8	3.8	80
27	75.5	13.2	11.3	53
28	81.3	15.6	3.1	32
29	66.7	13.9	19.4	36
30	70.6	23.5	5.9	17
31	76.6	17.0	6.4	47
Total	73.9	14.3	11.8	1568

KIDNAPPING				
Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	100.0	0.0	0.0	5
2	100.0	0.0	0.0	6
3	80.0	0.0	20.0	5
4	50.0	33.3	16.7	6
5	0.0	0.0	100	2
6	0.0	0.0	0.0	0.0
7	80.0	0.0	20.0	5
8	0.0	0.0	100	1
9	66.7	0.0	33.3	3
10	83.3	16.7	0.0	6
11	100.0	0.0	0.0	1
12	0.0	0.0	0.0	0.0
13	50.0	0.0	50.0	2
14	87.5	0.0	12.5	8
15	77.8	11.1	11.1	9
16	75.0	25.0	0.0	8
17	25.0	0.0	75.0	4
18	0.0	0.0	100	2
19	50.0	0.0	50.0	10
20	66.7	33.3	0.0	3
21	0.0	0.0	0.0	0.0
22	66.7	33.3	0.0	3
23	75.0	25.0	0.0	4
24	25.0	25.0	50.0	4
25	25.0	25.0	50.0	4
26	25.0	50.0	25.0	4
27	80.0	20.0	0.0	5
28	100.0	0.0	0.0	5
29	50.0	16.7	33.3	6
30	66.7	33.3	0.0	3
31	100.0	0.0	0.0	4
Total	66.4	12.5	21.1	128

HOMICIDE				
Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	83.3	0.0	16.7	6
2	78.6	21.4	0.0	14
3	100.0	0.0	0.0	6
4	75.0	15.0	10.0	20
5	80.0	0.0	20.0	10
6	0.0	100.0	0.0	3
7	50.0	0.0	50.0	6
8	66.7	16.7	16.7	6
9	37.5	0.0	62.5	8
10	50.0	0.0	50.0	10
11	75.0	8.3	16.7	12
12	66.7	11.1	22.2	9
13	72.4	13.8	13.8	29
14	70.0	20.0	10.0	10
15	71.4	0.0	28.6	7
16	50.0	25.0	25.0	4
17	0.0	100.0	0.0	1
18	100.0	0.0	0.0	3
19	40.0	30.0	30.0	10
20	0.0	0.0	100.0	5
21	33.3	0.0	66.7	3
22	57.1	0.0	42.9	7
23	61.5	30.8	7.7	13
24	85.7	0.0	14.3	7
25	75.0	12.5	12.5	8
26	60.0	40.0	0.0	5
27.0	80.0	0.0	20.0	5
28.0	100.0	0.0	0.0	3
29.0	50.0	0.0	50.0	4
30.0	50.0	25.0	25.0	4
31.0	46.2	7.7	46.2	13
Total	64.5	12.7	22.7	251

### Appendix 4 Sentencing Guidelines Compliance by Judicial Circuit: Offenses Against the Person

ROBBERY				
Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	63.3	20.0	16.7%	30
2	49.4	26.6	24.1	79
3	47.8	34.8	17.4	23
4	56.5	33.3	10.2	108
5	59.3	18.5	22.2	27
6	73.7	15.8	10.5	19
7	63.6	27.3	9.1	44
8	60.0	33.3	6.7	30
9	70.8	12.5	16.7	24
10	83.3	16.7	0.0	18
11	71.4	14.3	14.3	14
12	61.1	25.9	13.0	54
13	59.1	34.4	6.5	93
14	69.4	24.5	6.1	49
15	69.0	26.2	4.8	42
16	60.0	26.7	13.3	30
17	75.0	15.0	10.0	20
18	68.0	20.0	12.0	25
19	55.6	33.3	11.1	54
20	50.0	50.0	0.0	8
21	62.5	37.5	0.0	8
22	65.0	20.0	15.0	20
23	85.7	14.3	0.0	21
24	50.0	25.0	25.0	20
25	57.9	36.8	5.3	19
26	51.7	44.8	3.4	29
27	84.6	7.7	7.7	13
28	100.0	0.0	0.0	5
29	87.5	0.0	12.5	8
30	100.0	0.0	0.0	6
31	77.8	22.2	0.0	18
Total	62.4	26.7	10.9	958

RAPE				
Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	50.0	25.0	25.0	4
2	66.7	16.7	16.7	6
3	42.9	57.1	0.0	7
4	50.0	20.0	30.0	10
5	85.7	0.0	14.3	7
6	25.0	75.0	0.0	4
7	80.0	10.0	10.0	10
8	77.8	11.1	11.1	9
9	75.0	12.5	12.5	8
10	62.5	37.5	0.0	8
11	100.0	0.0	0.0	1
12	50.0	50.0	0.0	2
13	100.0	0.0	0.0	4
14	76.9	23.1	0.0	13
15	60.0	26.7	13.3	15
16	75.0	12.5	12.5	8
17	33.3	33.3	33.3	3
18	100.0	0.0	0.0	2
19	54.5	36.4	9.1	11
20	100.0	0.0	0.0	6
21	50.0	0.0	50.0	2
22	80.0	10.0	10.0	10
23	50.0	50.0	0.0	6
24	55.6	22.2	22.2	9
25	81.8	18.2	0.0	11
26	57.1	42.9	0.0	7
27	50.0	50.0	0.0	4
28	75.0	25.0	0.0	4
29	0.0	33.3	66.7	3
30	0.0	100.0	0.0	1
31	71.4	14.3	14.3	7
Total	65.8	23.8	10.4	202

OTHER SEXUAL ASSAULT				
Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	80.0	20.0	0.0	5
2	76.0	8.0	16.0	25
3	77.8	22.2	0.0	9
4	70.8	16.7	12.5	24
5	36.4	27.3	36.4	11
6	60.0	30.0	10.0	10
7	84.2	10.5	5.3	19
8	66.7	11.1	22.2	9
9	66.7	22.2	11.1	18
10	66.7	16.7	16.7	12
11	33.3	33.3	33.3	3
12	51.5	18.2	30.3	33
13	66.7	11.1	22.2	9
14	56.3	25.0	18.8	16
15	55.6	9.3	35.2	54
16	60.0	4.0	36.0	25
17	20.0	0.0	80.0	5
18	80.0	10.0	10.0	10
19	51.6	3.2	45.2	31
20	92.3	0.0	7.7	13
21	100.0	0.0	0.0	3
22	50.0	16.7	33.3	12
23	71.4	23.8	4.8	21
24	65.2	21.7	13.0	23
25	70.4	11.1	18.5	27
26	64.9	13.5	21.6	37
27	55.6	27.8	16.7	18
28	81.8	0.0	18.2	11
29	58.3	16.7	25.0	12
30	87.5	0.0	12.5	8
31	93.1	0.0	6.9	29
Total	65.7	13.1	21.2	542