



VIRGINIA CRIMINAL
SENTENCING COMMISSION



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RICHMOND, VIRGINIA

**2006
ANNUAL REPORT**

DECEMBER 1, 2006

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SUPREME COURT OF VIRGINIA
VIRGINIA CRIMINAL SENTENCING COMMISSION

DECEMBER 1, 2006

To: THE HONORABLE LEROY ROUNTREE HASSELL, SR., CHIEF JUSTICE OF VIRGINIA
THE HONORABLE TIMOTHY M. KAINES, 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 *2006 ANNUAL REPORT OF THE CRIMINAL SENTENCING COMMISSION*.

THIS REPORT DETAILS THE WORK OF THE COMMISSION OVER THE PAST YEAR AND OUTLINES THE AMBITIOUS SCHEDULE OF ACTIVITIES THAT LIES AHEAD. THE REPORT PROVIDES A COMPREHENSIVE EXAMINATION OF JUDICIAL COMPLIANCE WITH THE FELONY SENTENCING GUIDELINES FOR FISCAL YEAR 2006. THE COMMISSION'S RECOMMENDATIONS TO THE 2007 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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INTRODUCTION

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 twelfth in the series.

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 2006. The Guidelines Compliance chapter presents the results of a comprehensive analysis of compliance with the sentencing guidelines during fiscal year (FY) 2006. The next chapter provides the results of the Commission's recent study of offenses related to child pornography and online solicitation of minors, which was conducted at the request of Virginia's Attorney General. The report's final chapter presents the Commission's recommendations for revisions to the felony sentencing guidelines system and, where applicable, suggested revisions to the *Code of Virginia*.

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 will have 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 will make only one appointment, with the other appointment filled by the Chairman of the Senate Courts of Justice Committee or a designee from that committee. The 2005 amendment did not affect existing members whose appointed terms had not expired; instead, the amended provision will become effective when the terms of two legislative appointees expire on December 31, 2006. The final member of the Commission is Virginia's Attorney General, who serves by virtue of his office.

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

COMMISSION MEETINGS

The membership of the Commission met four times during 2006. These meetings were held in the Richmond on March 20, June 12, September 11 and November 13. Minutes for each of these meetings are available on the Commission's website (www.vcsc.virginia.gov).

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 must be signed by the judge and become a part of the official record of each case. The clerk of the circuit court is responsible for sending the completed and signed worksheets to the Commission.

The 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 and properly. As a result of the review process, any errors or omissions are detected and resolved.

Once the guidelines worksheets are reviewed and determined to be complete, they are automated and analyzed. The principal analysis performed with the automated guidelines database relates to judicial compliance with sentencing guidelines recommendations. This analysis is conducted and presented to the Commission on a quarterly 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 "hot line" phone system. Training and education are on-going 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 provides sentencing guidelines seminars to 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 promotes the accuracy of sentencing guidelines.

In 2006, the Commission offered 18 training seminars across the Commonwealth. This year, Commission staff focused on training attorneys and probation officers new to Virginia's sentencing guidelines. The six-hour continuing legal education seminar introduced participants to the sentencing guidelines and provided instruction on correct scoring of the guidelines worksheets. The seminar also introduced new users to the probation violation guidelines and the two offender risk assessment instruments that are incorporated into Virginia's guidelines system. 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 guideline users. Staff continues to seek out facilities that are designed for training, forgoing the typical courtroom environment for the Commission's training programs. The sites for these seminars included a combination of colleges and universities, libraries, state and local facilities, a jury assembly room, a museum and criminal justice academies. Many sites, such as the Roanoke Higher Education Center, were selected in an effort to provide comfortable and convenient locations at little or no cost to the Commission.

The Commission will continue to place a priority on providing sentencing guidelines training on request to any group of criminal justice professionals. The Commission 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 developed and presented in a locality convenient to the majority of individuals on the list.

In addition to providing training and education programs, the Commission maintains a website and a "hot line" phone system (804.225.4398). By visiting the website, a user can learn about upcoming training sessions, access Commission reports, look up Virginia Crime Codes (VCCs) and utilize on-line versions of the sentencing guidelines forms. The "hot line" phone is staffed from 7:45 a.m. to 5:15 p.m., Monday through Friday, to respond quickly to any questions or concerns regarding the sentencing guidelines. The hot line continues to be an important resource for guidelines users around the Commonwealth. As in previous years, the staff of the Commission has responded to thousands of calls through this service during 2006.

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 any increase or decrease in adult offender populations and any necessary adjustments to sentencing guideline 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 2006 General Assembly session, the Commission prepared 336 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. In most instances, the projected impact and accompanying analysis of a bill is presented to the General Assembly within 48 hours after the Commission was notified of the proposed legislation. When requested, the Commission provides pertinent oral testimony to accompany the impact analysis.

PRISON AND JAIL POPULATION FORECASTING

Since 1987, the Secretary of Public Safety has utilized an approach known as “consensus forecasting” to produce and validate the prisoner forecasts. This open, participative forecasting process brings together policy makers, administrators and technical experts from numerous state agencies across all branches of state government and includes representatives from local 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 scrutinizes each forecast carefully according to the highest statistical standards. Selected forecasts are recommended by the Technical Advisory Committee for consideration at the next level. The Policy Advisory Committee reviews the recommended forecasts and sets the official forecast for each prisoner population. This Committee also can approve adjustments to the recommended forecasts to account for emerging trends or recent policy changes. Members of the Policy Advisory Committee represent Virginia’s executive, legislative, and judicial branches, prosecutors, and local and state law enforcement agencies. This year, the Secretary expanded the membership by

extending invitations to the chairmen of key General Assembly committees. To facilitate and streamline the exchange of information between the two committees this year, the Secretary established the Policy-Technical Liaison Work Group. Chaired by the Deputy Secretary of Public Safety, Work Group members included deputy directors and senior managers of criminal justice and budget agencies as well as staff of the General Assembly’s House Appropriations and Senate Finance Committees. The Work Group provided guidance and oversight for the Technical Advisory Committee, discussed detailed aspects of the forecasts, and directed technical staff to provide additional data as needed. Through the consensus process, a separate forecast is produced for adult and juvenile offender populations confined in state and local correctional facilities.

While the Commission is not responsible for generating the prison or jail population forecast, it is included in the consensus forecasting process. In years past, Commission staff members have served on the Technical Advisory Committee while the Commission’s Deputy Director has served on the Policy Advisory Committee. This year, the Commission’s Deputy Director was appointed by the Secretary of Public Safety to chair the Technical Advisory Committee. The Secretary presented the most recent prisoner forecasts to the General Assembly in a report submitted in October 2006.

SENTENCING GUIDELINES SOFTWARE

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

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

The Commission has been working closely with a software development company, Cross Current Corporation, to enhance and expand the functionality of the current system. The Commission is striving to fully automate the preparation of the sentencing guidelines forms and provide this service on-line to users. The development of sentencing guidelines software is proceeding in phases. Phase 2 is nearing completion. Phase 2 will provide users with additional features beyond what is currently available through the Commission's website. For example, it will total the scores automatically and fill in the appropriate guidelines sentence range for the case on the cover sheet of the form. It will also allow users to run multiple charging scenarios, save prepared guidelines forms to a local computer, send completed forms to the Commission electronically, and search the guidelines database for previously completed

forms for a particular offender. The software will be available through the website to all prosecutors, probation officers, public defenders and defense attorneys who register with the Commission and receive a log-in identification and password. As funds permit, the Commission hopes to pilot test this phase of the software and make it available statewide during the coming year.

SENTENCING GUIDELINES STRUCTURE ANALYSIS

The methodological approach used by the Commission for developing Virginia's historically-based sentencing guidelines was developed in 1987. Through detailed analysis, sentencing models have been developed that reflect that the judicial decision-making process. The judge's decision of whether or not to sentence an offender to prison was modeled first. The next sentencing decision was dependent upon the outcome of the first decision. For cases in which the judge did not order a prison term, the choice between giving the offender a jail term or probation without incarceration was modeled. Finally, for cases resulting in a prison term, a model of the length of sentence was constructed.

Currently, the guidelines for most offense groups are composed of three sections. Section A is completed to determine if the offender will be recommended for incarceration greater than six months or not; Section A represents the "prison in/out" decision. If the offender is not recommended for incarceration over six months, Section B is completed to generate a recommendation for either probation without active incarceration or incarceration up to six months in jail. If, however, the offender is recommended for lengthier incarceration under Section A, Section C is completed to yield a recommended sentence length.

The current guidelines structure was adopted in 1995, when legislation was passed to abolish parole and institute truth-in-sentencing in Virginia. The definition of what constitutes a prison sentence, however, as opposed to a jail sentence, has changed in recent years. Since 1998, a prison sentence has been defined as incarceration for one year or more. The current sentencing guidelines structure has therefore been out of sync with the definition of a prison sentence since that time. The Commission is analyzing recent sentencing data to examine the impact of this inconsistency. At the same time, the Commission is examining the possibility of simplifying the guidelines while maintaining or improving the statistical power of the sentencing models. For example, it may be possible to reduce the number of worksheets required from three to two. Section A would recommend the offender for either an active term of incarceration or probation without incarceration. For an offender recommended for incarceration, a second worksheet would be completed to determine the recommended sentence length and would encompass both jail and prison sentences.

This year, Commission staff used Pre/Post-Sentence Investigation (PSI) data from fiscal years 1999 through 2003 to conduct a special analysis of the guidelines and the current worksheet structure (Section A, Section B, and Section C). Only truth-in-sentencing cases (offense date on or after January 1, 1995) were analyzed. The first offense group analyzed was the Drug Schedule I/II group, which makes up approximately 32% of all guidelines cases. Over 35,000 cases from this group were available for analysis. Statistical analyses were performed on these data to identify legal and extralegal factors which had a significant impact on sentencing outcomes. To explore the feasibility of reducing the number of worksheets, a proposed sentencing model incorporating the relevant legal factors was developed. Cases were scored on the new worksheet and their scores

were compared with their observed outcomes. This analysis showed that simplification of the Drug Schedule I/II worksheets could be achieved only at the expense of a loss in the statistical power of the sentencing model. It appears that the current structure employing three worksheets should be retained.

Analysis of these data will now focus on exploring the possibility of revising the worksheets to reflect the current definition of a prison inmate. Under this scheme, Section A would be designed to determine if the offender will be recommended for a sentence of one year or more of incarceration. If not, Section B would be completed to recommend either probation without active incarceration or incarceration up to twelve months in jail. If, however, the offender is recommended for a prison term under Section A, Section C would be completed to yield a recommended sentence length of one year or more. This analysis will continue in 2007 and the Commission will receive periodic progress reports.

STUDY OF CHILD PORNOGRAPHY AND ONLINE SOLICITATION OF MINORS CRIMES IN VIRGINIA

In April 2006, the Commission received a letter from Virginia's Attorney General asking the Commission to consider establishing sentencing guidelines for child pornography and online child exploitation offenses. Attorney General McDonnell expressed his desire for consistent and appropriate punishment for offenders committing these crimes and his concern that sentences in these cases have become increasingly disparate. The Commission considered the request at its June meeting and approved a special study of these offenses to determine if guidelines were feasible.

The Commission gathered available data on offenses associated with child pornography and online solicitation of minors from both the federal and state judicial system. The Commission collected additional detail for many of the cases from files of Virginia's Commonwealth's Attorneys. The Commission was specifically interested in details related to the commission of the offense, as well as the offender and victim. These included offense elements such as whether or not the offender arranged to meet a minor with whom he was communicating online, whether or not the charges were the result of online police operation, the number of minors with whom the offender had been communicating and their ages, and if the offender was a convicted sex offender.

Commission staff also contacted the Blue Ridge Thunder Task Force in the Bedford County Sheriff's Office to gain a better understanding of the investigation of online solicitation of minors. Developed in 1998 to investigate child exploitation on the internet, the Task Force operates in cooperation with Bedford County Commonwealth's Attorney.

The Commission conducted an in-depth analysis of the data in order to determine the feasibility of developing guidelines for child pornography and online solicitation offenses. Findings from this important research are provided in the third chapter of this report, while the Commission's proposal for adding these offenses to the sentencing guidelines system are presented in the Recommendations chapter.

ASSISTANCE TO THE VIRGINIA STATE CRIME COMMISSION

The 2006 General Assembly adopted a joint resolution directing the Virginia State Crime Commission to examine the state's juvenile justice system. Each year, a certain number of juveniles are certified to be tried as adults in Virginia's circuit courts. However, information on juveniles transferred to circuit court is not readily available due to limitations in existing databases. Given the challenging nature of this aspect of the study, the Crime Commission requested assistance from the Sentencing Commission. With extensive knowledge of the state's criminal justice databases and considerable research expertise, Sentencing Commission staff were able to compile information to provide the Crime Commission with an overview of juveniles convicted of felonies in circuit courts across the Commonwealth. This information was presented to the Crime Commission in October 2006. The Crime Commission may request further assistance as it pursues its two-year study. If requested, the Sentencing Commission will continue its efforts to assist the Crime Commission in 2007.



GUIDELINES COMPLIANCE

INTRODUCTION

On January 1, 2007, Virginia's truth-in-sentencing system will reach its twelfth anniversary. For any felony committed on or after January 1, 1995, the practice of discretionary parole release from prison was abolished, and the existing system of awarding inmates sentence credits for good behavior was eliminated. Under Virginia's truth-in-sentencing laws, convicted felons must serve at least 85% of the pronounced sentence, and they may earn no more than 15% off their sentences in credits, regardless of whether they are serving in a state facility or a local jail. The Commission was established to develop and administer felony sentencing guidelines for Virginia's judiciary that were compatible with truth-in-sentencing provisions. Under the current no-parole system, guidelines recommendations for nonviolent offenders with no prior record of violence are tied to the amount of time they served during a period prior to the abolition of parole. In contrast, offenders convicted of violent crimes and those with prior convictions for violent felonies are subject to guidelines recommendations up to six times longer than the historical time served in prison by similar offenders. In the more than 244,000 felony cases sentenced under truth-in-sentencing laws, judges have agreed with guidelines recommendations in more than three out of every four cases.

The Commission's last annual report presented an analysis of cases sentenced during fiscal year (FY) 2005. This report will focus on cases sentenced from the most recent year of available data, FY2006 (July 1, 2005, through June 30, 2006). Compliance is examined in a variety of ways in this report, and variations in data over the years are highlighted throughout.

COMPLIANCE DEFINED

In the Commonwealth, judicial compliance with the truth-in-sentencing guidelines is voluntary. A judge may depart from the guidelines recommendation and sentence an offender 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 is considered in general agreement with the guidelines recommendation if the sentence 1) meets modest criteria for rounding, 2) involves time served incarceration 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 sentenced an offender to a two-year sentence based on a guidelines recommendation that goes up to 1 year 11 months. In general, the Commission allows for rounding of a sentence that is within 5% of the guidelines recommendation.

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

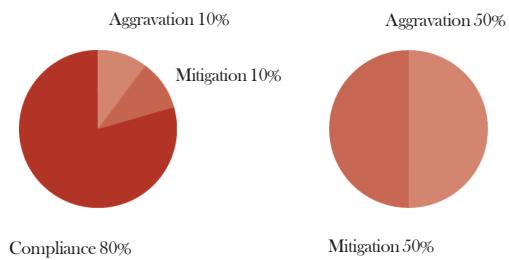
Compliance through the use of diversion options in habitual traffic cases resulted from amendments to §46.2-357(B2 and B3) of the *Code of Virginia*, effective July 1, 1997. The amendment allows judges to suspend the mandatory minimum 12-month incarceration term required in felony habitual traffic cases conditioned upon their sentencing the offenders 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 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. Between FY1995 and FY1998, the overall compliance rate hovered around 75%, increased steadily between FY1999 and FY2001, and then decreased slightly in FY2002. Over the past three fiscal years, the compliance rate has fluctuated around 80% where it remained for FY 2006 (Figure 1).

In addition to compliance, the Commission also studies departures from the guidelines. The rate at which judges sentence offenders to sanctions more severe than the guidelines recommendation, known as the "aggravation" rate, was 10% for FY2006. The "mitigation" rate, or the rate at which judges sentence offenders to sanctions considered less severe than the guidelines recommendation, was also 10% for the fiscal year. Thus, of the FY2006 departures, 50% were cases of aggravation while 50% were cases of mitigation.

FIGURE 1
OVERALL GUIDELINES COMPLIANCE AND DIRECTION OF DEPARTURES, FY 2006



DISPOSITIONAL COMPLIANCE

Since the inception of truth-in-sentencing in 1995, the correspondence between dispositions recommended by the guidelines and the actual dispositions imposed in Virginia's circuit courts has been quite high.

Figure 2 illustrates judicial concurrence in FY2006 with the type of disposition recommended by the guidelines. For instance, of all felony offenders recommended for more than six months of incarceration during FY2006, judges sentenced 86% to terms in excess of six months (Figure 2). 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
RECOMMENDED DISPOSITIONS AND ACTUAL DISPOSITIONS, FY2006

Recommended Disposition	Actual Disposition		
	Incarceration Probation	Incarceration 1 day-6 mos.	Incarceration >6 mos.
Probation	73.6%	22.4%	4.0%
Incarceration 1 day - 6 months	10.5%	76.9%	12.6%
Incarceration > 6 months	5.4%	8.8%	85.9%

Judges have also typically agreed with guidelines recommendations for shorter terms of incarceration. In FY2006, 77% 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, while in other cases offenders recommended for short-term incarceration received a sentence of more than six months, but these percentages were relatively small. Finally, 74% of offenders whose guidelines recommendation called for no incarceration were given probation without active 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 Detention Center and Diversion Center programs have been defined as incarceration sanctions for the purposes of the sentencing guidelines. The Commission recognizes that the programs are more restrictive than probation supervision in the community. The Commission, therefore, defines them as incarceration terms under the sentencing guidelines. The Detention and Diversion Center programs are counted as six months of confinement. In the previous discussion of recommended and actual dispositions, imposition of one of these programs is categorized as incarceration of six months or less.

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 FY2006 cases was approximately 80%, indicating that judges, in most cases, agree with the length of incarceration recommended by the guidelines in jail and prison cases (Figure 3). For FY2006 cases not in durational compliance, aggravations and mitigations were equally split.

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 recommend more than six months of incarceration and judges sentence within the recommended range, analysis reveals that 15% of offenders were sentenced to prison terms equivalent to the midpoint recommendation (Figure 4). In two-thirds (66%) of the cases judges gave a sentence below the recommended midpoint. Only 19% of the cases receiving incarceration over

FIGURE 3
DURATIONAL COMPLIANCE AND DIRECTION OF DEPARTURES, FY 2006*

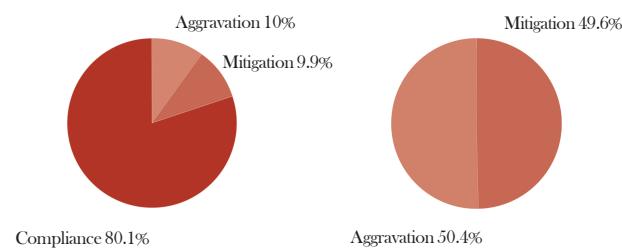
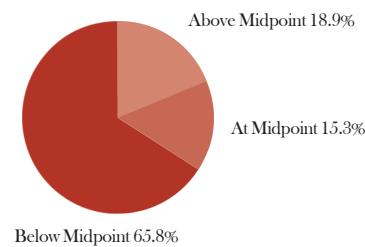


FIGURE 4
**DISTRIBUTION OF SENTENCES
WITHIN GUIDELINES RANGE, FY2006**



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

six months that were in durational compliance with the guidelines were sentenced above the midpoint recommendation. This pattern of sentencing within the range has been consistent since the truth-in-sentencing guidelines took effect in 1995, indicating that judges, overall, have favored the lower portion of the recommended range.

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

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 FY2006, 10% of guideline cases sentenced received sanctions that fell below the guidelines recommendation. An analysis of the 24,016 sentencing guidelines cases reveals that 2% of the time, judges sentence below the guidelines recommendation and a departure reason is not provided. In another 2%, judges cited a plea agreement as the reason for a mitigating departure (Figure 6).

FIGURE 5
**MEDIAN LENGTH OF DURATIONAL DEPARTURES,
FY2006**

Mitigation Cases  10 months
Aggravation Cases  9 months

With regard to other mitigated sentences, an offender's potential for rehabilitation was indicated, in 1% of the guideline cases. The use of an alternative sanction, such as Detention or Diversion Center, was cited as a mitigating reason in another 1% of guideline cases. Judges also referred to the offender's cooperation with authorities, such as aiding in the apprehension or prosecution of others, as well as minimal circumstances surrounding the case. Although other reasons for mitigation were reported to the Commission in FY2006, only the most frequently cited reasons are discussed here.

Judges sentenced 9.9% of the FY2005 cases to terms more severe than the sentencing guidelines recommendation, resulting in "aggravation" sentences. In examining the 24,016 sentencing guideline cases, the Commission found that 2% of the time an upward departure rationale is not provided. (Figure 7) In 2% of guideline cases, a plea agreement which called for a tougher sanction

than that recommended by guidelines was listed as the reason for an upward departure. Other commonly cited reasons relate to the flagrancy of the offense (1%) or the poor rehabilitation potential of the offender (1%). Judges also noted that the offender had a previous conviction for the same type of offense (1%) and that the guidelines recommendation was too low given the circumstances of the case (1%). These felony cases often involve complex sets of events or extreme circumstances for which judges feel a harsher than recommended sentence should be imposed. Other reasons were cited by judges to explain aggravation sentences but with much less frequency than the reasons discussed here.

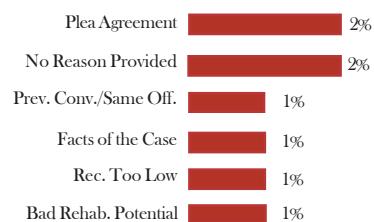
Appendices 1 and 2 contain detailed summaries of the reasons for departure from guidelines recommendations for each of the 14 guidelines offense groups.

FIGURE 6
**MOST FREQUENTLY CITED REASONS FOR MITIGATIONS*,
FY2006**



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

FIGURE 7
**MOST FREQUENTLY CITED REASONS FOR AGGRAVATIONS*,
FY2006**



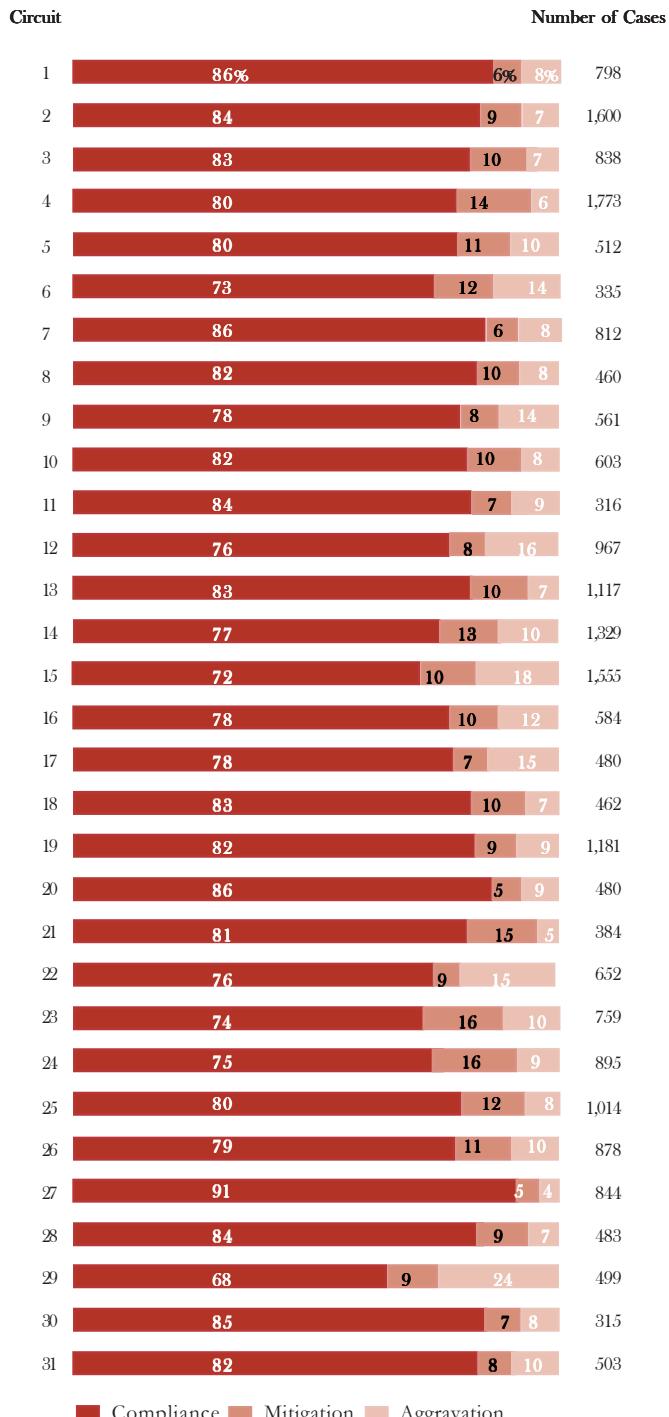
* Represents most frequently cited reasons only. Multiple reasons may be cited in each case.

COMPLIANCE BY CIRCUIT

Since the outset of truth-in-sentencing, compliance rates and departure patterns have varied across Virginia's 31 judicial circuits. FY2006 continues to show differences among judicial circuits in the degree to which judges within each circuit agree with guidelines recommendations (Figure 8). The map and accompanying table on the following pages identify the location of each judicial circuit in the Commonwealth.

In FY2006, more than one-half (55%) of the state's 31 circuits exhibited compliance rates at or above 80%. All but one of the remaining circuits reported compliance rates between 70% and 79%. Only one circuit had a compliance rate below 70%. There are likely many reasons for the variations in compliance across circuits. Certain jurisdictions may see atypical cases not reflected in statewide averages. In addition, the availability of alternative or community-based programs currently differs from locality to locality. The degree to which judges agree with guidelines recommendations does not seem to be primarily related to geography. The circuits with the lowest compliance rates are scattered across the state, and both high and low compliance circuits can be found in close geographic proximity.

FIGURE 8
COMPLIANCE BY CIRCUIT - FY 2006



■ Compliance ■ Mitigation ■ Aggravation

VIRGINIA LOCALITIES AND JUDICIAL CIRCUITS

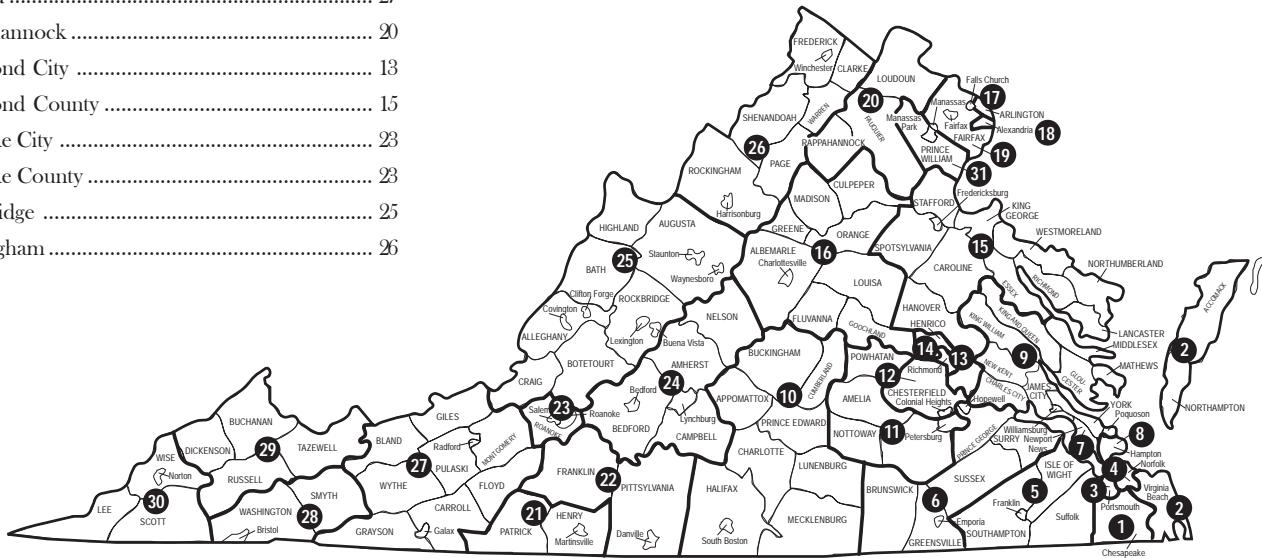
Accomack	2
Albemarle	16
Alexandria	18
Alleghany	25
Amelia	11
Amherst	24
Appomattox	10
Arlington	17
Augusta	25
Bath	25
Bedford City	24
Bedford County	24
Bland	27
Botetourt	25
Bristol	28
Brunswick	6
Buchanan	29
Buckingham	10
Buena Vista	25
Campbell	24
Caroline	15
Carroll	27
Charles City	9
Charlotte	10
Charlottesville	16
Chesapeake	1
Chesterfield	12
Clarke	26
Clifton Forge	25
Colonial Heights	12
Covington	25
Craig	25
Culpeper	16
Cumberland	10
Danville	22
Dickenson	29
Dinwiddie	11
Emporia	6
Essex	15

Fairfax City	19
Fairfax County	19
Falls Church	17
Fauquier	20
Floyd	27
Fluvanna	16
Franklin City	5
Franklin County	22
Frederick	26
Fredericksburg	15
Galax	27
Giles	27
Gloucester	9
Goochland	16
Grayson	27
Greene	16
Greensville	6
Halifax	10
Hampton	8
Hanover	15
Harrisonburg	26
Henrico	14
Henry	21
Highland	25
Hopewell	6
Isle of Wight	5
James City	9
King and Queen	9
King George	15
King William	9
Lancaster	15
Lee	30
Lexington	25
Loudoun	20
Louisa	16
Lunenburg	10
Lynchburg	24

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

VIRGINIA JUDICIAL CIRCUITS



In FY2006, the highest rates of judicial agreement with the sentencing guidelines, at 86% or higher, were found in the Radford area (Circuit 27), Newport News (Circuit 7), and Loudoun County area (Circuit 20). The lowest compliance rates were reported in Circuit 29 (Buchanan, Dickenson, Russell and Tazewell counties), Circuit 15 (Fredericksburg, Stafford, Hanover, King George, Caroline, Essex, etc.), and Circuit 6 (Sussex County area).

In FY2006, some of the highest mitigation rates were found in the Roanoke area (Circuit 23) and the Lynchburg area (Circuit 24). Each of these circuits had a mitigation rate around 16% during the fiscal year. With regard to high mitigation rates, it would be too simplistic to assume that this reflects areas with lenient sentencing habits. Intermediate punishment programs are not

uniformly available throughout the Commonwealth, and those jurisdictions with better access to these sentencing options may be using them as intended by the General Assembly. These sentences generally would appear as mitigations from the guidelines. Inspecting aggravation rates reveals that Circuit 29 (Buchanan County area) had the highest aggravation rate at 24%, followed by Circuit 15 (Fredericksburg, Stafford, Hanover, King George, Caroline, Essex, etc.) at 18% and Circuits 12 (Chesterfield) and 17 (Arlington) at 16%. Thus, lower compliance rates in these circuits are due primarily to high aggravation rates.

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

COMPLIANCE BY SENTENCING GUIDELINES OFFENSE GROUP

In FY2006, as in previous years, variation exists in judicial agreement with the guidelines, as well as in judicial tendencies toward departure, when comparing the 14 offense groups (Figure 9). For FY2006, compliance rates ranged from a high of 84% in both the fraud and drug/other offense groups to a low of 55% in kidnapping 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 73% whereas many of the property and drug offense categories had compliance rates above 82%.

Judicial concurrence with guideline recommendations decreased in 11 of 14 offense groups and increased slightly for murder, rape and robbery. Generally, the decreases in compliance were slight, with rates remaining close to the six-year average for each group.

Since 1995, departure patterns have differed across offense groups, and FY2006 was no exception. Robbery showed the highest mitigation rate during the time period, with nearly one-quarter of cases resulting in mitigation sentences. This mitigation pattern has been consistent with robbery offenses since the abolition of parole in 1995. The most frequently cited mitigation reasons provided by judges in robbery cases include the defendant's cooperation with law enforcement, the involvement of a plea agreement, the use of alternative sanctions other than jail or prison, and the age of the offender.

In FY2006, offenses with the highest aggravation rates included kidnapping (25%) and murder/homicide (22%). With respect to kidnapping, the high aggravation rate is a function of the small number of kidnapping cases rather than a true departure pattern. In murder/homicide cases, the influence of jury trials and the extreme case circumstances have historically contributed to higher aggravation rates.

FIGURE 9
GUIDELINES COMPLIANCE BY OFFENSE - FY 2006

	Compliance	Mitigation	Aggravation	Number of Cases
Drug/Other	84.4%	3.9%	11.7%	891
Fraud	84.4	9.8	5.8	2,900
Larceny	83.5	7.9	8.6	5,028
Traffic	82.5	5.6	11.8	1,931
Drug/Schedule I/II	82.4	8.5	9.1	7,802
Burg./Other Structure	74.1	14.6	11.3	646
Miscellaneous	73.8	10.4	15.8	615
Assault	72.9	15.7	11.4	1,421
Rape	69.6	18.0	12.4	217
Sexual Assault	67.2	15.1	17.7	430
Burglary/Dwelling	66.6	20.4	13.0	906
Robbery	64.6	24.1	11.3	785
Murder/Homicide	61.6	16.5	22.0	255
Kidnapping	55.1	20.3	24.6	118

COMPLIANCE UNDER MIDPOINT ENHANCEMENTS

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

extreme enhancement. A prior record labeled “Category II” contains at least one violent prior felony conviction carrying a statutory maximum penalty of less than 40 years, whereas a “Category I” prior record includes at least one violent felony conviction with a statutory maximum penalty of 40 years or more.

Because midpoint enhancements are designed to target only violent offenders for longer sentences, enhancements do not affect the sentence recommendation for the majority of guidelines cases. Among the FY2006 cases, 84% of the cases did not involve midpoint enhancements of any kind (Figure 10). Only 16% 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.

Of the FY2006 cases in which midpoint enhancements applied, the most common midpoint enhancement was that for a Category II prior record. Approximately 47% of the midpoint enhancements were of this type, applicable to offenders with a nonviolent instant offense but a violent prior record defined as Category II (Figure 11). In FY2006, 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

FIGURE 10
**APPLICATION OF MIDPOINT ENHANCEMENTS,
FY 2006**

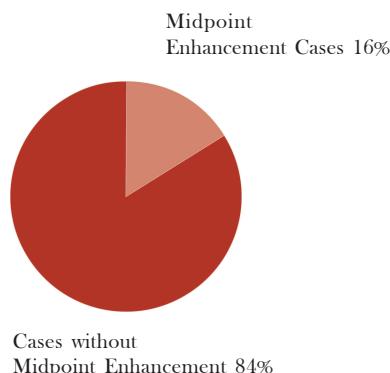
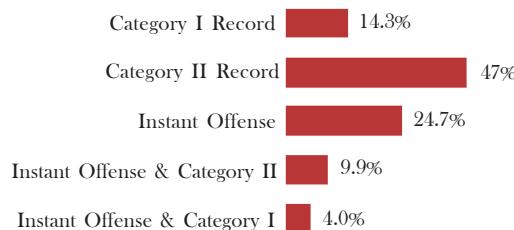


FIGURE 11
**TYPE OF MIDPOINT ENHANCEMENTS RECEIVED,
FY 2006**

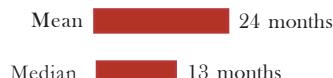


prior record of violence represented 25% of the midpoint enhancements in FY2006. The most substantial midpoint enhancements target offenders with a combination of instant and prior violent offenses. About 10% qualified for enhancements for both a current violent offense and a Category II prior record. Only a small percentage of cases (4%) were targeted for the most extreme midpoint enhancements triggered by a combination of a current violent offense and a Category I prior record.

Since the inception of the truth-in-sentencing guidelines, judges have departed from the sentencing guidelines more often in midpoint enhancement cases than in cases without enhancements. In FY2006, compliance was 68% when enhancements applied, 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 nearly three out of every four departures.

Among FY2006 midpoint enhancement cases resulting in incarceration, judges departed from the low end of the guidelines range by an average of two years (Figure 12). The median mitigation departure (the middle value, where half are lower and half are higher) was 13 months.

FIGURE 12
LENGTH OF MITIGATION DEPARTURES
IN MIDPOINT ENHANCEMENT CASES, FY2006



Compliance, while generally lower in midpoint enhancement cases than in other cases, varies across the different types and combinations of midpoint enhancements (Figure 13). In FY2006, as in previous years, enhancements for a Category II prior record generated the highest rate of compliance of all midpoint enhancements (72%). Compliance in cases receiving enhancements for a Category I prior record was significantly lower (62%). Compliance for enhancement cases involving a current violent offense was 67%. Those cases involving a combination of a current violent offense and a Category II prior record yielded a compliance rate of 65%, 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 55%.

Analysis of departure reasons in cases involving midpoint enhancements focuses on downward departures from the guidelines. Examination of midpoint enhancement cases shows that 1% are mitigations, but do not have a departure reason provided on the guidelines form submitted to the Commission. For those that do have a departure reason cited, the most frequent reasons cited for mitigation were based on the involvement of a plea agreement (1%), the defendant's cooperation with law enforcement (1%), or minimal circumstances (1%).

FIGURE 13
COMPLIANCE BY TYPE OF MIDPOINT ENHANCEMENT*, FY2006

	Compliance	Mitigation	Aggravation	Number of Cases
None	83.1%	6.3%	10.6%	18,999
Category I Record	61.8	34.1	4.0	718
Category II Record	72.2	21.6	6.2	2,360
Instant Offense	66.8	21.4	11.8	1,239
Instant Offense & Category I	55.0	33.7	11.4	202
Instant Offense & Category II	65.3	27.5	7.2	498

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

JURIES AND THE SENTENCING GUIDELINES

There are three general methods by which Virginia's criminal cases are adjudicated: guilty pleas, bench trials, and jury trials. Felony cases in the Commonwealth's circuit courts overwhelmingly are resolved as the result of guilty pleas from defendants or plea agreements between defendants and the Commonwealth. During the last fiscal year, 85% of guidelines cases were sentenced following guilty pleas (Figure 14). Adjudication by a judge in a bench trial accounted for 10% of all felony guidelines cases sentenced. Less than 2% of felony guidelines cases involved jury trials. During previous fiscal years of under truth-in-sentencing provisions, the overall rate of jury trials has been approximately half of the jury trial rate that existed under the last year of the parole system.

Virginia is one of only five states that allow juries to determine sentence length in non-capital offenses. Since the implementation of the truth-in-sentencing system, Virginia's juries typically have handed down sentences more severe than the recommendations of the sentencing guidelines. In FY2006, 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.

Since FY1986, there has been a generally declining trend in the percentage of jury trials among felony convictions in circuit courts (Figure 15). 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, the lowest rate since the data series began.

FIGURE 14
PERCENTAGE OF CASES RECEIVED BY
METHOD OF ADJUDICATION, FY 2006

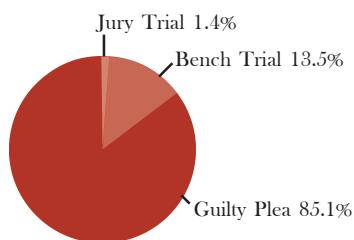
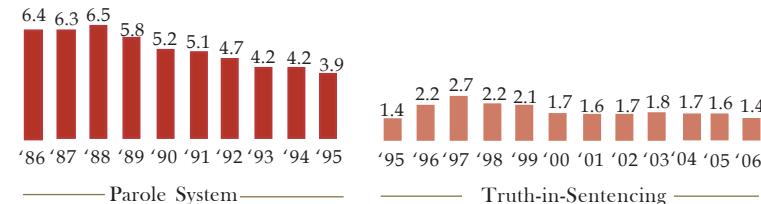


FIGURE 15
PERCENT OF FELONY CONVICTIONS ADJUDICATED BY JURIES FY1986-- FY2006
PAROLE SYSTEM v. TRUTH-IN-SENTENCING (NO PAROLE) SYSTEM



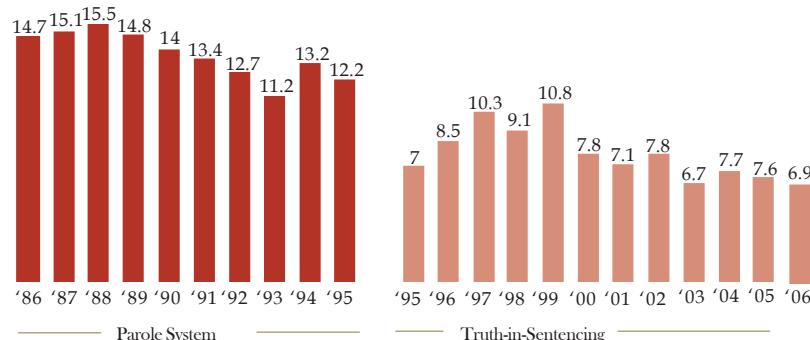
Among the early cases subjected to the new truth-in-sentencing provisions, implemented during the last six months of FY1995, jury adjudications sank to just over 1%. During the first complete fiscal year of truth-in-sentencing (FY1996), just over 2% of the cases were resolved by jury trials, half the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

Inspecting jury data by offense type reveals very divergent trends for person, property and drug crimes. Under the parole system, jury cases comprised 11%-16% of felony conviction cases for person crimes. This rate was typically three to four times the rate of jury trials for property and drug crimes (Figure 16). However, with the implementation of truth-in-sentencing, the percent of convictions handed down by juries dropped dramatically for all crime types. Under truth-in-sentencing, jury convictions involving person crimes have varied from 7% to nearly 11% of felony convictions. The percent of felony convictions resulting from jury trials for property and drug crimes declined to less than 1% under truth-in-sentencing.

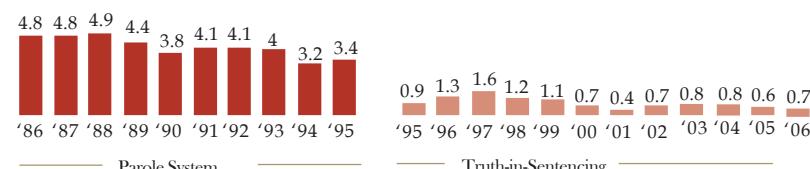
FIGURE 16

**PERCENT OF FELONY CONVICTIONS ADJUDICATED BY JURIES FY1986--FY2006
PAROLE SYSTEM v. TRUTH-IN-SENTENCING (NO PAROLE) SYSTEM**

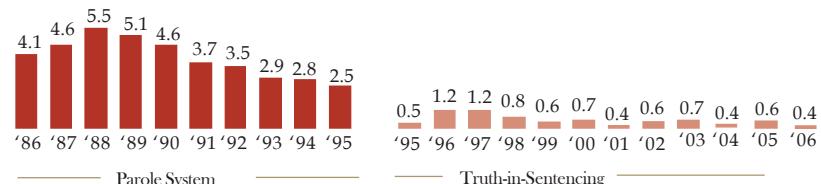
PERSON CRIMES



PROPERTY CRIMES



DRUG CRIMES



In FY2006, the Commission received 326 cases tried by juries. While the compliance rate for cases adjudicated by a judge or resolved by a guilty plea was at 82% during the fiscal year, sentences handed down by juries concurred with the guidelines only 50% of the time (Figure 17). In fact, jury sentences fell above the guidelines recommendation in 39% of the cases. This pattern of jury sentencing vis-à-vis the guidelines has been consistent since the truth-in-sentencing guidelines became effective in 1995.

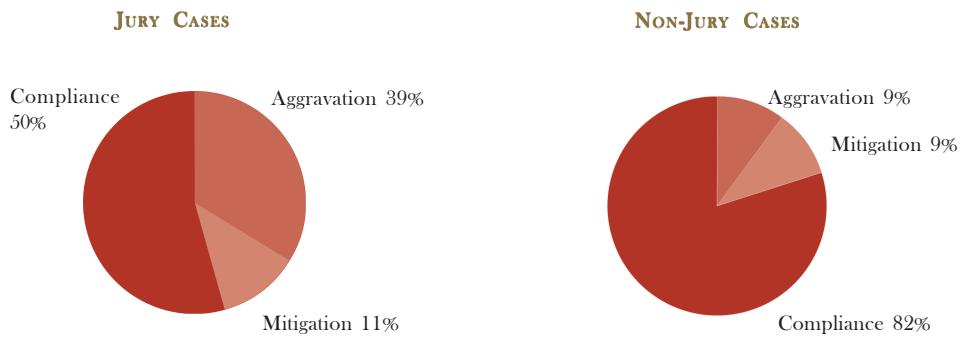
Judges, although permitted by law to lower a jury sentence, typically do not amend sanctions imposed by juries. Judges modified jury sentences in 20% of the FY2006 cases in which juries found the defendant guilty.

In those jury cases in which the final sentence fell short of the guidelines, it did so by a median value of twenty months (Figure 18). 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 nearly four and a half years.

**FIGURE 18
MEDIAN LENGTH OF DURATIONAL
DEPARTURES IN JURY CASES, FY2006**

Mitigation Cases	 20 months
Aggravation Cases	 53 months

**FIGURE 17
SENTENCING GUIDELINES COMPLIANCE IN JURY CASES AND NON-JURY, FY2006**



COMPLIANCE AND NONVIOLENT OFFENDER RISK ASSESSMENT

In 1994, as part of the reform legislation that instituted truth-in-sentencing, the General Assembly directed the Commission to study the feasibility of using an empirically-based risk assessment instrument to select 25% of the lowest risk, incarceration-bound, drug and property offenders for placement in alternative (non-prison) sanctions. By 1996, the Commission developed such an instrument and implementation of the instrument began in pilot sites in 1997. The National Center for State Courts (NCSC) conducted an evaluation of nonviolent risk assessment in the pilot sites for the period from 1998 to 2001. In 2001, the Commission conducted a validation study of the original risk assessment instrument to test and refine the instrument for possible use statewide. In July 2002, the nonviolent offender risk assessment instrument was implemented statewide for all felony larceny, fraud, and drug cases. This section will review the most recent fiscal year of statewide data, FY2006.

Between July 1, 2005, and June 30, 2006, more than two-thirds of all guidelines received by the Commission were for nonviolent offenses. However, only 39% of these nonviolent offenders were actually eligible to be assessed for an alternative sanction recommendation. 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 and those who have a current or prior violent felony conviction. In addition to those not eligible for risk assessment, there were 1,998 nonviolent offense cases for which a risk assessment instrument was not completed and submitted to the Commission. Without the form, the Commission cannot determine how many other offenders may have been eligible for risk assessment evaluation.

Among FY2006 eligible offenders for whom a risk assessment form was received (6,413 cases), 49% were recommended for an alternative sanction by the risk assessment instrument (Figure 19). Risk assessment cases can be categorized into four groups based upon whether the offender was recommended for an alternative sanction by the risk assessment instrument and whether the judge subsequently sentenced the offender to some form of alternative punishment.

Of the eligible offenders screened with the risk assessment instrument, 21% were recommended for and sentenced to an alternative punishment (Figure 20). Another 28% were sentenced to a

FIGURE 19
PERCENTAGE OF ELIGIBLE
NON-VIOLENT RISK ASSESSMENT CASES
RECOMMENDED FOR ALTERNATIVES, FY2006

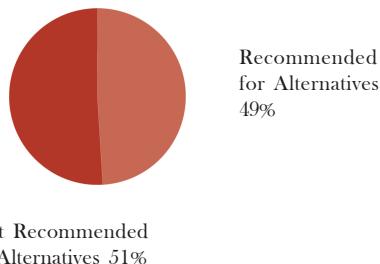


FIGURE 20
RECOMMENDED AND ACTUAL DISPOSITIONS TO ALTERNATIVE SANCTIONS, FY2006

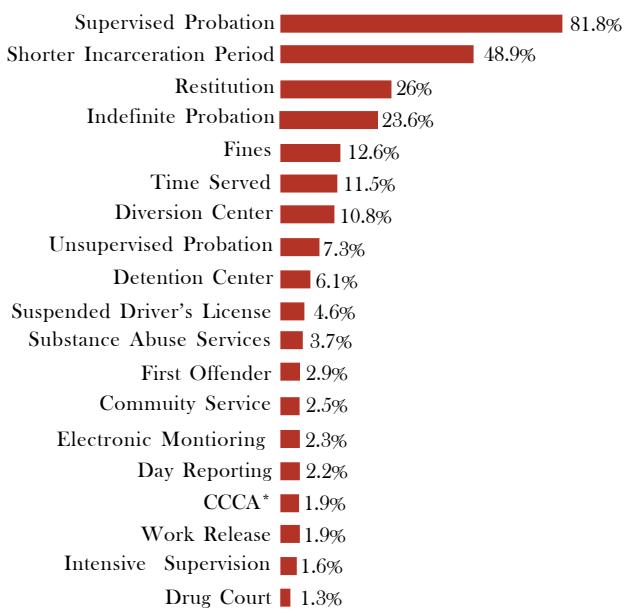
Recommended Disposition	Actual Disposition			
	Offender Received Alternative	Offender Not Received Alternative	Did Alternative	Total
Offender Recommended for Alternative	20.8%	28.4%	49.2%	
Offender Not Recommended for Alternative	11.6%	39.1%	50.7%	
Total	32.4%	67.5%		

traditional term of incarceration despite being recommended for an alternative sanction by the risk assessment instrument. In 12% of the screened cases, the offender was not recommended for, but was sentenced to, an alternative punishment. Nearly 40% of the offenders screened in FY2006 were not recommended for an alternative, and judges concurred in these cases by utilizing traditional incarceration:

In cases in which offenders were recommended for and received an alternative sanction, judges most often sentenced the offender to a period of supervised probation (82%) (Figure 21). In

addition, in nearly half of the cases in which an alternative was recommended, judges sentenced the offender to incarceration, but to a term shorter than that recommended by the traditional guidelines range. Other frequent sanctions reported include restitution (26%), indefinite probation (24%), fines (13%), and time served incarceration (12%). The Department of Corrections' Diversion Center program was cited in 11% of the cases; the Detention Center program was cited as an alternative sanction over 6% of the time. Less frequently cited alternatives include unsupervised probation, substance abuse services, suspended driver's license, home electronic monitoring (HEM), first offender status under § 18.2-251, and community service, etc.

FIGURE 21
MOST FREQUENT TYPES OF ALTERNATIVE SANCTIONS IMPOSED, FY2006



* Any program established through the Comprehensive Community Corrections Act

Of the risk assessment worksheets received, drug cases represent over half of all cases, with being Schedule I/II drug offenses. Of the 3,259 eligible drug cases in FY2006, 24% were recommended for and received an alternative sanction to prison (Figure 22). Another 9% were not recommended for an alternative by the risk assessment instrument; however, the judge deemed that an alternative would be appropriate and sentenced the individual as such.

Just under one-third (31%) of all risk assessment cases sentenced during the time period were larceny offenses. Of the 1,979 eligible larceny cases, 7% were recommended for and received an alternative sanction to prison (Figure 23). Another 14% were not recommended for an alternative sanction, but the judge sentenced the individual to an alternative program or probation. Well over half of the larceny offenders (58%) were not recommended for, and did not receive, an alternative sanction on the risk assessment instrument. In these cases, the judge agreed that a traditional incarceration sentence was the appropriate punishment. The nonviolent offender risk assessment instrument recommends fewer larceny offenders for alternative sanctions because both the National Center for State Courts evaluation and the Commission's validation study found that larceny offenders are most likely to recidivate among nonviolent offenders.

Fraud offenses accounted for about 18% of the nonviolent risk assessment cases in FY2006. Of the 1,175 eligible fraud cases, 34% were recommended for and received an alternative sanction (Figure 24). Another 15% were not recommended for an alternative on the risk assessment instrument, but the judge felt that an alternative was the most appropriate sanction. In total, 49% of eligible fraud offenders screened by the risk assessment instrument received an alternative sanction. This would seem to indicate that judges feel fraud offenders are the most amenable, among nonviolent offenders, for alternative sanctions.

FIGURE 22
RECOMMENDED AND ACTUAL DISPOSITIONS TO ALTERNATIVE SANCTIONS IN DRUG CASES, FY2006

DRUG CASES (N=3,113)

	Received Alternative	Did Not Receive Alternative
Recommended for Alternative	24.3%	34.2%
Not Recommended for Alternative	9.3%	32.1%

FIGURE 23
RECOMMENDED AND ACTUAL DISPOSITIONS TO ALTERNATIVE SANCTIONS IN LARCENY CASES, FY2006

LARCENY CASES (N=1,978)

	Received Alternative	Did Not Receive Alternative
Recommended for Alternative	7.3%	20.9%
Not Recommended for Alternative	13.6%	58.2%

FIGURE 24
RECOMMENDED AND ACTUAL DISPOSITIONS TO ALTERNATIVE SANCTIONS IN FRAUD CASES, FY2006

FRAUD CASES (N=1,327)

	Received Alternative	Did Not Receive Alternative
Recommended for Alternative	33.9%	25%
Not Recommended for Alternative	14.7%	26.4%

COMPLIANCE AND SEX OFFENDER RISK ASSESSMENT

In 1999, the Virginia General Assembly directed the Commission to develop a sex offender risk assessment instrument, based on the risk of re-offense, which could be integrated into the state's sentencing guidelines system. Such a risk assessment instrument could be used as a tool to identify those offenders who, as a group, represent the greatest risk for committing a new offense once released back into the community. The Commission conducted an extensive study of felony sex offenders convicted in Virginia's circuit courts and developed an empirical risk assessment tool based on the risk that an offender would be re-arrested for a new sex offense or other crime against the person. Effectively, risk assessment means developing profiles or composites based on overall group outcomes. Groups are defined by having a number of factors in common that are statistically relevant to predicting repeat offending. Those groups exhibiting a high degree of re-offending are labeled high risk. Although no risk

assessment model can ever predict a given outcome with perfect accuracy, the risk instrument, overall, produces higher scores for the groups of offenders who exhibited higher recidivism rates during the course of the Commission's study. In this way, the instrument developed by the Commission is indicative of offender risk.

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

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

The low end and the midpoint remain unchanged. Increasing the upper end of the recommended range provides judges the flexibility to sentence higher risk sex offenders to terms above the traditional guidelines range and still be in compliance with the guidelines. This approach allows the judge to incorporate sex offender risk assessment into the sentencing decision while providing the judge with flexibility to evaluate the circumstances of each case. Findings from the most recent year of available sex offender risk assessment data (FY2006) are presented below.

FIGURE 25
SEX OFFENDER RISK
LEVELS FOR OTHER
SEXUAL ASSAULT
OFFENSES - FY2006

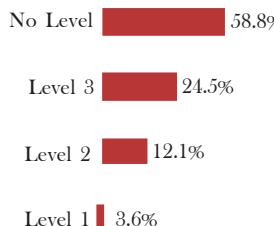


FIGURE 26
OTHER SEXUAL ASSAULT COMPLIANCE RATES BY RISK LEVEL OFFENSES - FY2006

	Mitigation	Compliance		Aggravation	Number of Cases
		Traditional Range	Adjusted Range		
Level 1	7%	86%	7%	0%	14
Level 2	23%	55%	19%	2%	47
Level 3	15%	60%	17%	8%	95
No Level	15%	62%	--	23%	232
Overall	16%	61%	7%	16%	388

During FY2006, there were 388 offenders convicted of an offense covered by the Other Sexual Assault guidelines. The majority (60%) were not assigned a level of risk by the sex offender risk assessment instrument (Figure 25). Approximately 25% of Other Sexual Assault guidelines cases resulted in a Level 3 risk classification, with an additional 12% assigned to Level 2. Only 4% of offenders reached the highest risk category of Level 1.

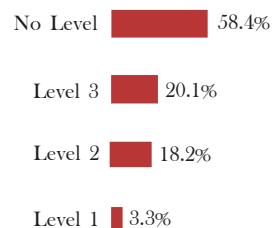
Under sex offender risk assessment, the upper end of the guidelines range is extended by 300%, 100% or 50% for offenders assigned to Level 1, 2 or 3, respectively. Judges have begun to utilize these extended ranges when sentencing sex offenders. For sexual assault offenders reaching Level 1 risk, 7% were given sentences within the extended guidelines range (Figure 26). Judges used the extended guidelines range in 19% of the Level 2 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 most likely to receive a sentence that was an upward departure from the guidelines (23%).

In FY2006, there were 214 offenders convicted of offenses covered by the Rape guidelines (which encompass rape, forcible sodomy, and object

penetration offenses). Among offenders convicted of these crimes, over one-half (58%) were not assigned a risk level by the Commission's risk assessment instrument. Approximately 20% of Rape cases resulted in a Level 3 adjustment—a 50% increase in the upper end of the traditional guidelines range recommendation (Figure 27). An additional 18% received a Level 2 adjustment (100% increase in the upper end of the guidelines recommendation). The most extreme adjustment (300% increase in the top guidelines recommendation) affected 3% of Rape guidelines cases.

For the 7 rape offenders reaching the Level 1 risk group, judges used the extended guidelines range in 43% of the cases (Figure 28). Further, 31% of offenders with a Level 2 risk classification, and 23% 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 27
SEX OFFENDER RISK
LEVELS FOR RAPE
OFFENSES - FY2006**



**FIGURE 28
RAPE COMPLIANCE RATES BY RISK LEVEL OFFENSES - FY2006**

Mitigation	Compliance			Aggravation	Number of Cases
	Traditional Range	Adjusted Range			
Level 1	14%	43%	43%	0%	7
Level 2	23%	41%	31%	5%	39
Level 3	9%	58%	23%	9%	43
No Level	18%	65%	--	17%	125
Overall	17%	58%	12%	13%	214

SENTENCING REVOCATION REPORTS (SRRs)

The most complete resource regarding revocations of community supervision in Virginia is the Commission's Community Corrections Revocations Data System, also known as the Sentencing Revocation Report (SRR) database. First implemented in 1997 with assistance from the Department of Corrections (DOC), the SRR is a simple form designed to capture the reasons for, and the outcomes of, community supervision violation hearings. The probation officer (or Commonwealth's attorney) completes the first part of the form, which includes identifying information and checkboxes indicating the reasons why a show cause or revocation hearing has been requested. The checkboxes are based on the list of eleven

conditions for community supervision established for every offender, but special supervision conditions imposed by the court can also be recorded. Following the violation hearing, the judge completes the remainder of the form with the revocation decision and any sanction ordered in the case. The completed form is submitted to the Commission, where the information is automated. A revised SRR form was developed and implemented in 2004 to serve as a companion to the new probation violation sentencing guidelines.

In FY2006, there were 10,786 felony violations of probation, suspended sentence, and good behavior for which a Sentencing Revocation Report (SRR) was submitted to the Commission. Judicial circuits submitting the largest number of SRRs during the time period included Chesapeake, Fairfax, and Richmond City. (Figure 29). Judicial circuits submitting the lowest number of SRRs during the same time period included Arlington, the Petersburg area, and Lee County.

FIGURE 29
NUMBER OF SENTENCING REVOCATION REPORTS RECEIVED BY CIRCUIT—FY2006

Circuit		Number of Cases	Percentage
1	Chesapeake	710	6.6%
2	Virginia Beach	348	3.2
3	Portsmouth	521	4.8
4	Norfolk	396	3.7
5	Suffolk	411	3.8
6	Sussex	134	1.2
7	Newport News	450	4.2
8	Hampton	334	3.1
9	Williamsburg	340	3.2
10	South Boston	258	2.4
11	Petersburg	69	0.6
12	Chesterfield	350	3.2
13	Richmond City	637	5.9
14	Henrico	403	3.7
15	Fredericksburg	329	3.0
16	Charlottesville	261	2.4
17	Arlington	115	1.1
18	Alexandria	226	2.1
19	Fairfax	600	5.6
20	Loudoun	234	2.2
21	Martinsville	376	3.5
22	Danville	483	4.5
23	Roanoke	363	3.4
24	Lynchburg	328	3.0
25	Staunton	331	3.1
26	Harrisonburg	509	4.7
27	Radford	353	3.3
28	Bristol	224	2.1
29	Buchanan	237	2.2
30	Lee	40	0.4
31	Prince William	416	3.9
Total		10,786	100.0%

PROBATION VIOLATION GUIDELINES

In 2003, the General Assembly directed the Commission to develop, with due regard for public safety, discretionary sentencing guidelines for felony offenders who are determined by the court to be in violation of their probation supervision for reasons other than a new criminal conviction (Chapter 1042 of the Acts of Assembly 2003). Often these offenders are referred to as “technical violators.” In determining the guidelines, the Commission was to examine historical judicial sanctioning patterns in revocation hearings.

Early use of the probation violation guidelines, effective July 1, 2004, indicated that the guidelines needed further refinement to better reflect current judicial sanctioning patterns for punishing supervision violators. Therefore, the Sentencing Commission’s *2004 Annual Report* recommended several adjustments to the probation violation guidelines. Changes included assigning additional points on the Section A worksheet for offenders found in violation of certain conditions of probation. Also, defendants who admitted using

drugs other than marijuana or alcohol during their current supervision period would be assigned the same number of points on the Section C worksheet as those who had a positive drug test. Lastly, the Section C recommendation table was adjusted based on sentences judges imposed during the months following implementation of the probation violation guidelines.

These proposed changes were approved by the General Assembly and, subsequently, became effective for technical probation violators sentenced July 1, 2005, and after. This report will examine data on judicial sentencing practices using the revised probation violation guidelines. It is important to note that probation violation guidelines were required, but were found to be missing, in 6% of the cases received by the Commission during FY2006. Also, approximately 13% of the cases sentenced and received in FY2006 were completed incorrectly on old FY2005 probation violation guideline forms. As previously mentioned, there were significant changes to the FY2006 probation violation guidelines; therefore, the following analysis will focus only on the technical violator cases that were sentenced between July 1, 2005, and June 30, 2006, using the new FY2006 guidelines.

Between July 1, 2005 and June 30, 2006, the Commission received 5,553 technical probation violation guidelines completed on the new FY2006 worksheet. The worksheets include cases in which the court found the defendant in violation of the conditions of probation (except Condition 1, a new law violation), cases that the court decided to take under advisement until a later date, and cases in which the court found the defendant not to be in violation of supervision conditions. Of the 5,553 cases, 43% cited a felony property offense as the most serious offense for which the offender was on probation, followed by felony drug offenses at 38% (Figure 30). A smaller portion (11%) of the offenders being brought back before the court for an alleged technical violation (not a new law violation) involved those for which their most serious original offense was a person crime.

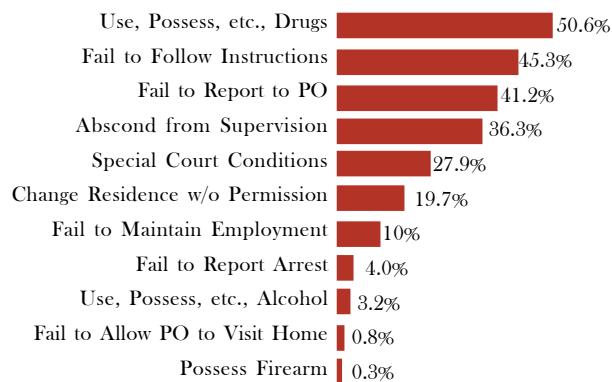
When examining the conditions of probation that these offenders were alleged to have violated (Figure 31), over half (51%) were cited for using, possessing, or distributing a controlled substance (Condition 8 of the *DOC Conditions of Probation*). Violations of Condition 8 may include a positive test (urinalysis, etc.) for a controlled substance or a signed admission conceding to the use of controlled substances during the current supervision period. Offenders were also likely to be cited for failing to follow their probation officer's instructions (45%), failing to report to the probation office in person or by telephone when instructed (41%), and absconding from supervision (36%). In more than one-quarter of the violation cases (28%), defendants were cited for failing to follow special conditions imposed by the court. These conditions most often included failing to pay court costs and restitution, failing to comply with court-ordered

FIGURE 30
**NUMBER OF PROBATION VIOLATION WORKSHEETS RECEIVED
BY TYPE OF MOST SERIOUS ORIGINAL OFFENSE—FY2006***

Original Offense Type	Number Received	Percent Received
Property	2,388	42.8%
Drug	2,110	38.3
Person	611	11.0
Traffic	333	5.7
Other	111	2.2
Total	5,553	100.0

*Includes FY2006 worksheets received regardless of disposition (not in violation, etc.)

FIGURE 31
**TECHNICAL VIOLATION CONDITIONS
CITED BY PROBATION OFFICER—FY2006***



*Includes FY2006 worksheets received regardless of disposition (not in violation, etc.). Technical violations do not include Condition 1—New Law Violations. See *DOC Conditions of Probation*.

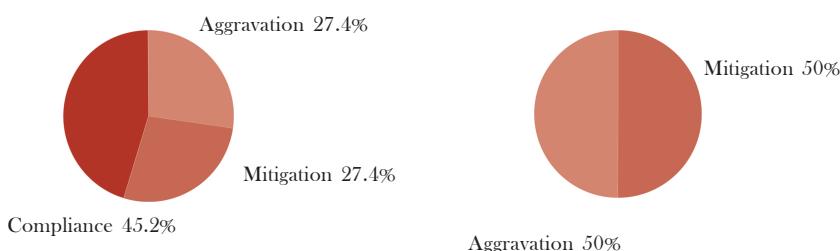
substance abuse treatment, or failing to successfully complete alternatives such as Detention Center, Diversion Center, or Day Reporting. It is important to note that defendants may be, and typically are, cited for more than one violation of their probation conditions in a Sentencing Revocation Report.

Of the 5,553 probation violation cases that the Commission received between July 1, 2005, and June 30, 2006, there were 5,343 in which the defendant was found in violation of a condition of probation other than a new law violation. The remaining cases were either taken under advisement until a later date or were found not in violation. The following analysis will focus on the 5,343 cases in which defendants were found in violation of any condition of probation, other than a new law violation, and for which the new FY2006 probation violation guidelines were completed.

COMPLIANCE WITH THE PROBATION VIOLATION GUIDELINES

The overall compliance rate summarizes the extent to which Virginia's judges concur with recommendations provided by the probation violation guidelines, both in type of disposition and in length of incarceration. Between July 1, 2005, and June 30, 2006, the overall compliance rate was 45%, a significant increase over the preliminary FY2005 compliance rate (38%) reported in the Commission's *2004 Annual Report* (Figure 32). Data show the rate at which judges sentence offenders to sanctions more severe than the guidelines recommendation, known as the "aggravation" rate, was 27% for the year. The "mitigation" rate, or the rate at which judges sentence offenders to sanctions considered less severe than the guidelines recommendation, was also 27%. Thus, departures in technical probation violation cases for FY2006 were evenly divided between mitigation and aggravation.

FIGURE 32
OVERALL GUIDELINES COMPLIANCE
AND DIRECTION OF DEPARTURES, FY 2006*

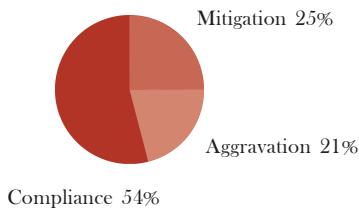


*Includes only FY2006 cases found to be in violation

Figure 33 illustrates judicial concurrence with the type of disposition recommended by the probation violation guidelines for the most recent fiscal year. There are three general categories of sanctions recommended by the probation violation guidelines—probation/no incarceration, a jail sentence up to twelve months, or a prison sentence of one year or more. Data for FY2006 reveal that judges agree with the type of sanction recommended by the probation violation guidelines in 54% of the cases. Judges sentenced defendants to less severe sanctions than those recommended by the guidelines approximately 25% of the time. Judges chose to sentence probation violators to more severe sanctions in 21% of the cases. Thus, when departing from the probation violation guidelines, judges are slightly more likely to sentence the defendant to probation with no incarceration or to a jail sentence of twelve months or less.

Consistent with the traditional sentencing guidelines, sentences to the Detention Center and Diversion Center programs are defined as incarceration sanctions for the probation violation guidelines. The Detention and Diversion Center programs are counted as six months of confinement. In the previous discussion of dispositional compliance, imposition of one of these programs is categorized as incarceration of six months.

FIGURE 33
DISPOSITIONAL GUIDELINES COMPLIANCE AND DIRECTION OF DEPARTURES, FY 2006*

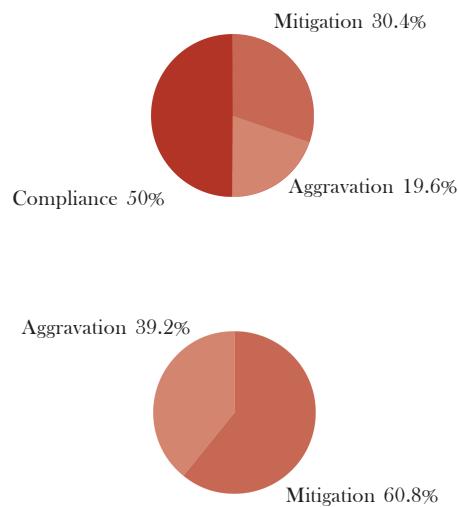


*Includes FY2006 cases found to be in violation

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 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.

Among the technical violation cases sentenced in FY2006, there were 3,218 cases that were recommended for, and actually received, an active period of incarceration of one day or more. Data show that durational compliance for the specified time period was approximately 50% (Figure 33). For FY2006 cases not in durational compliance, mitigations were more prevalent (61%) than aggravations (39%) (Figure 34).

FIGURE 34
OVERALL DURATIONAL COMPLIANCE AND DIRECTION OF DEPARTURES, FY 2006*
(N=3,218)



*Includes FY2006 cases found to be in violation

When judges sentenced offenders to incarceration, but to an amount less than the recommended time, offenders were given effective sentences (sentences less any suspended time) short of the guidelines range by a median value of nine months (Figure 35). For offenders receiving longer than recommended incarceration sentences, the effective sentence exceeded the guidelines range by a median value of nine months as well. Thus, durational departures from the guidelines are typically less than one year above or below the recommended range.

FIGURE 35
**LENGTH OF DEPARTURE IN RECOMMENDED
JAIL/PRISON CASES, FY2006**



Similar to the traditional felony sentencing guidelines, sentencing in accordance with the recommendations of the probation violation guidelines is voluntary. Each year, as the Commission deliberates upon recommendations for revisions to the guidelines, the opinions of the judiciary, as reflected in their written 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. With respect to the traditional sentencing guidelines, Virginia's judges are required by § 19.2-298.01 of the *Code of Virginia* to submit reasons for departure. However, currently there is no requirement by the *Code of Virginia* that the probation violation guidelines be submitted to the court in felony violation cases, and no requirement that judges provide written reasons for departure when sentencing outside of the guidelines recommendation.

According to FY2006 data, 45% of technical probation violation cases resulted in sanctions that fell within the guidelines recommendation. With judges departing from these guidelines at such high rates, written departure reasons are an integral part of understanding judicial sentencing patterns. Ultimately, adjustments to the probation violation guidelines, to more closely reflect judicial sanctioning practices across the Commonwealth, are largely dependant upon the judges' written reasons for departure. In FY2006, judges sentenced 27% of technical violation cases to terms below the probation violation guidelines recommendation. An analysis of the 1,464 mitigating cases revealed that 54% of the time a departure reason was not provided. The lack of feedback from judges, in the form of a written departure reason, makes it difficult for the Commission to propose changes to the guidelines to address specific judicial concerns.

For the few mitigating cases in which departure reasons were provided, judges were most likely to cite the defendant's progress in rehabilitation, the facts of the case, the defendant's physical/mental health, or the involvement of an alternative sentence to prison, such as the Detention or Diversion Center program. Although other reasons for mitigation were reported to the Commission during the time period, only the most frequently cited reasons are mentioned here.

In FY 2006, judges sentenced 27% of the technical violation cases to terms more severe than the guidelines recommendation. Examining these 1,465 aggravation cases, the Commission found that 62% of the time an upward departure rationale was not provided. Therefore, for nearly two-thirds of the aggravating cases, the Commission is unable to determine the judge's reasoning for sentencing the defendant to a more severe sanction than called for by the guidelines.

When a departure reason was provided in aggravation cases, judges were more likely to cite the defendant's poor potential for rehabilitation, the defendant's substance abuse problem, or that it was the defendant's second or subsequent probation revocation. Other reasons were cited by judges to explain aggravation sentences but with much less frequency than the reasons noted here.

This year, the Commission is recommending further refinement of the probation violation guidelines. The proposed revisions, presented in the Recommendations chapter of this report, are based on judicial sanctioning patterns during FY2006, written reasons for departure and other feedback provided by Virginia's circuit court judges. As with the felony sentencing guidelines first implemented in 1991, the development of useful sentencing tools for judges to deal with probation violators will be an iterative process, with improvements made each year. Continued feedback from judges is of critical importance to this process. The changes proposed by the Commission are made with the goal of enhancing the usefulness of these guidelines for Virginia's circuit court judges as they make difficult sentencing decisions.



CHILD PORNOGRAPHY AND ONLINE SOLICITATION OFFENSES IN VIRGINIA

INTRODUCTION

In April 2006, the Commission received a letter from Attorney General Robert McDonnell asking the Commission to consider establishing sentencing guidelines for child pornography and online child exploitation offenses. The Attorney General expressed his desire for consistent and appropriate punishment for offenders convicted of these crimes and his concern that sentences in these cases have become increasingly disparate. The Commission considered the Attorney General's request at its June 2006 meeting and approved a special study of these offenses to determine if guidelines were feasible.

OFFENSES STUDIED

For its study, the Commission carefully examined the crimes defined in §§ 18.2-374.1, 18.2-374.1:1, and § 18.2-374.3 of the *Code of Virginia*. Under § 18.2-374.1, it is a Class 5 felony to produce, publish, sell, possess with intent to distribute, or transfer sexually explicit material involving minors under the age of 18. Financing the production of sexually explicit material is a Class 4 felony under this provision. Under § 18.2-374.1:1, possessing child pornography is punishable as a Class 6 felony for the first offense. This crime was raised from a Class 1 misdemeanor to a Class 6 felony by 2003 General Assembly. A second conviction for

possessing child pornography is a Class 5 felony. Under § 18.2-374.3, using a communication system, such as the internet, to facilitate certain offenses involving children is prohibited. Using a communications system to procure or promote the use of a minor for sexually explicit material or for any act that would constitute indecent liberties under § 18.2-370 is a Class 6 felony. It is a Class 5 felony, however, to use a communication system to solicit a minor for prostitution, sodomy, sexually explicit material, child pornography, or any activity constituting indecent liberties with a child under the age of 15. These last two offenses have gained considerable attention in recent years with the widespread use of the Internet by both adults and children and heightened concern over online solicitation of minors by adults that may take place through chat rooms and web sites designed for children and teenagers. Technology has also had a significant impact on child pornography offenses, transforming how pornography is produced, distributed, and viewed. According to the Federal Bureau of Investigation (FBI), one study showed that 88% of child pornography discovered by law enforcement was stored on computer drives and disks as opposed to hard copies (www.roanoke.com/news/roanoke/wb/92338, November 20, 2006).

DETECTION OF ONLINE SOLICITATION OFFENSES

To gain insight into the nature of these cases, the Commission contacted law enforcement and criminal justice officials involved in the investigation and prosecution of offenders for illicit online activity involving minors. These cases are frequently complex and information gleaned from investigators guided the Commission's data collection efforts. For example, officials from Operation Blue Ridge Thunder with the Bedford County Sheriff's Office suggested that a defendant chatting with a minor or police officer posing as a minor over the Internet may be charged with a separate count for each day the chat includes a prohibited solicitation. If the defendant attempts to meet with a minor he solicited over the Internet, he may be charged with attempted indecent liberties under § 18.2-370. Based on the officer's chat log with the defendant, there may be probable cause to seize the defendant's computer to search for related chat logs and child pornography. If a warrant is subsequently issued, the Virginia State Police forensic unit will conduct the search of the defendant's computer; however, this investigation may take from 12 to 18 months. During this period, the defendant may be convicted of the attempted indecent liberties charge or other charges, serve his sentence and be released before child pornography charges are brought. Because of the way the investigation progresses (separate charges, lag time between the initial arrest and the forensic investigation, multiple jurisdictions involved), the data may appear to show that a defendant has a prior record when in reality all charges stemmed from the same scenario. Finally, Operation Blue Ridge Thunder officials suggested that offenders convicted of online solicitation of a minor tend to receive a lower sentence when the victim is actually a police officer posing as a minor on the Internet rather than an actual child. These and other observations provided useful insight for the Commission as it studied these crimes.

FEDERAL CASES

In order to conduct a thorough examination of child pornography and online solicitation cases in Virginia, the Commission obtained conviction data from both the state and federal judicial systems. Because a portion of criminal cases are processed through the federal judicial system, reviewing federal data provides a more complete picture of the pervasiveness of and trends in convictions for these crimes in the Commonwealth. Federal data are available through the United States Sentencing Commission.

From among offenders adjudicated in federal courts, the Commission identified Virginia cases involving sexual abuse, exploitation, prostitution, or pornography offenses. The Commission focused on cases of offenders sentenced during federal fiscal years 1999 through 2003. A total of 128 Virginia cases were identified. Most (103 cases or 81%) were related to pornography or prostitution. The remaining (25 cases or 19%) involved sexual abuse. Over 80% of the federal cases came from the Eastern district of Virginia. In general, little or no victim information was available from the federal data. Federal offenders were sentenced under numerous statutes and it

was often difficult to discern which offenses were committed against minors under the age of 18. This was particularly true in the sexual abuse cases. However, one-third of these cases (8 of 25) involved travel with intent to engage in illicit sexual conduct (defined as a sexual act with a person less than 18 years of age) under Title 18, Part I, Chapter 117, and Section 2423 of the *United States Code*. Prostitution and pornography offenses involving minors were easier to identify. For example, 27 cases involved possession of child pornography mailed or transported in interstate or foreign commerce, including via computer (*US Code* 18-2252A(a)(5)(B)). Another 17 cases involved other child pornography offenses sentenced under *US Code* 18-2252A. Material concerning the sexual exploitation of minors (*US Code* 18-2252) resulted in 28 cases and another 6 cases were based on the sexual exploitation of children under *US Code* 18-2251.

Victim information in the federal cases was limited to the victim adjustment factors scored on the federal sentencing guidelines. For example, federal penalties are enhanced if the victim was “vulnerable,” if the victim was physically restrained during the offense, or if the victim was subjected to a hate crime. However, very few victim-related adjustments were observed in these cases.

Nearly all of the federal offenders were sentenced to prison terms. Approximately 97% were sentenced to prison only and another 2% received prison plus some other type of sanction. Only 1% received probation without incarceration. Most federal prison sentences were between one and four years. The median sentence (i.e., the middle sentence, where half the sentences are higher and half are lower) was 2.5 years in pornography/prostitution cases and 3 years in sexual abuse cases. Factors affecting sentence length included criminal history, multiple counts of the offense, and a lack of acceptance of responsibility on the part of the offender.

Federal offenders were overwhelmingly white (88%) and male (98%). They ranged from 19 to 63 years in age, with a median age of 40 years. Approximately 63% of these offenders had better than a high school education and all but one were United States citizens. Almost 38% of them were married. Nearly 41% reported having anywhere from one to four dependents.

While informative, federal data cannot be used to assess the feasibility of adding new crimes to Virginia’s guidelines system. The methodology for developing Virginia’s historically-based sentencing guidelines was established in the late 1980s. Much of the framework for today’s sentencing guidelines, implemented in 1995 as an integral component of the state’s truth-in-sentencing reform, is spelled out in the *Code of Virginia* (§ 17.1-805). The development of Virginia’s guidelines has never included federal case data. Instead, Virginia’s guidelines reflect the historical sentencing practices exclusively of circuit court judges in the Commonwealth.

VIRGINIA CIRCUIT COURT CASES

To examine cases associated with child pornography, sexually explicit material involving minors, and online solicitation of minors, the Commission collected data from traditional sources such as the Pre/Post-Sentencing Investigation (PSI) database. PSI records covering fiscal years (FY) 2002 through 2006 were selected for the study. While PSI data was incomplete for FY2006, the Commission requested all available records for the fiscal year. PSI reports containing detail on the circumstances of the offense, the offender, his criminal history, and the victim are available for most offenders sentenced in Virginia's circuit courts. PSI offense narratives proved particularly useful in identifying eligible cases. The Commission next turned to the Local

FIGURE 36
SUPPLEMENTAL DATA COLLECTION INSTRUMENT
FOR CHILD PORNGRAPHY AND ONLINE SOLICITATION OFFENSES

General		
1. PSI Number _____	or	CA Case Number _____
2. Is the Event Currently Covered by Guidelines? <input type="checkbox"/> Yes <input type="checkbox"/> No		
3. A Conviction was the Result of Police Sting? <input type="checkbox"/> Yes <input type="checkbox"/> No		
4. Other Charges pending at time of sentencing? <input type="checkbox"/> Yes <input type="checkbox"/> No A. Same Jurisdiction B. State C. Federal		
5. Registered Sex offender (at time of offense) <input type="checkbox"/> Yes <input type="checkbox"/> No		
6. Victim Type: A. Undercover Officer B. Identified Victim C. No Identifiable Victim		
<i>Circle all answers that apply</i>		
Juvenile Victimization (Solicitation)		Child Exploitation (Pornography)
<p>A. Did defendant meet victim/police? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>B. Did defendant travel to meet victim?</p> <ol style="list-style-type: none"> 1. No 2. Within County/Metro Area 3. Another City/County in VA 4. Another State <p>C. Location of Solicitation:</p> <ol style="list-style-type: none"> 1. Internet 2. Outdoors 3. Offender's Home (Not Internet) 4. Victim's Home (Not Internet) 5. Shared Residence (Not Internet) 6. School 7. Store 8. Other <p>D. Age of Victim/Portrayed age _____</p> <p>E. Age Group: _____</p> <p>F. Gender of Victim: M F Both</p> <p>G. Number of Different Victims/Screen Names _____</p> <p>H. Relationship to victim/subject</p> <ol style="list-style-type: none"> 1. Known 2. Babysitter 3. Parent 4. Step-parent 5. Relative 6. Stranger 7. Internet 8. Image Only (None) <p>I. Type of Sexual Conduct Completed</p> <ol style="list-style-type: none"> 1. Penetration/Attempted Penetration 2. Touching 3. Exposure 4. Verbal 5. Written (Text Msg, IMs) 6. None <p>J. Drug/Alcohol Use (At Time of Offense)</p> <ol style="list-style-type: none"> 1. Defendant Used 2. Victim Used 3. Defendant Provided Victim <p>K. Type of Substance Used By Victim: _____</p> <p>L. Type of Substance Used By Def: _____</p>		
<p>A. When/how was child porn discovered?</p> <ol style="list-style-type: none"> 1. During Sting 2. Reported 3. Computer Repair 4. Sex Abuse Case 5. Developing Picture 6. Sent E-mail/Web 7. Other <p>B. Youngest Age of porn subject _____</p> <p>C. Age Group: _____</p> <p>D. Gender of Subject(s): M F Both</p> <p>E. Images Depicted (All that Apply):</p> <ol style="list-style-type: none"> 1. Genitals/Exposure 2. Penetration (Oral, Anal, Sexual) 3. Contact between adult and minor 4. Violence, bondage 5. Defendant Appeared in porn picture <p>F. Defendant Produced Child Porn? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>G. Defendant Distributed Child Porn? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>H. Relationship to victim/subject</p> <ol style="list-style-type: none"> 1. Known 2. Babysitter 3. Parent 4. Step-parent 5. Relative 6. Stranger 7. Internet 8. Image Only (None) <p>I. Possession of child porn conviction occurred(Current)</p> <ol style="list-style-type: none"> 1. After conviction for sex offense 2. Before conviction for sex offense 3. At the same time as a sex offense 4. Only known charge(s) 5. Not Charged/Con <p>J. Drug/Alcohol Use (At Time of Offense)</p> <ol style="list-style-type: none"> 1. Defendant Used 2. Victim Used 3. Defendant Provided Victim <p>K. Type of Substance Used By Victim: _____</p> <p>L. Type of Substance Used By Def: _____</p>		

Inmate Data System (LIDS) database to identify additional offenders, not found in the PSI data, who were sentenced for the specified crimes during the FY2002-FY2006 period. LIDS provides data on prisoners entering and exiting all local and regional jails in Virginia, but contains no offense detail, victim information, or criminal history.

The collection of detailed offense information posed major challenges. Traditional criminal justice databases were not designed to maintain detailed information for Internet-related crimes. To supplement the existing automated data, the Commission conducted a special data collection. Supplemental data was requested from Commonwealth's Attorneys' files. Criminal history information was obtained from the Virginia State Police. A supplemental data collection form was designed and used to record rich offense detail that may influence sentencing outcomes (Figure 36). Some of the questions addressed in the supplemental data collection were:

- Was the case the result of a police operation ("sting")?
- Did the offender actually meet or arrange to meet the victim?
- What was the victim's age?
- Were there multiple victims?
- How many pornographic images were found?
- Was the offender a registered sex offender?

The Commission identified a total of 161 cases for the specified crimes that could be used for analysis. Another 13 cases were excluded because records did not provide sufficient information to include the case. In addition, the Commission did not include cases in which a conviction for one of the specified crimes accompanied a more serious offense such as a rape, forcible sodomy or aggravated sexual battery. In nearly all cases, these more serious offenses are already covered by the sentencing guidelines.

Of the 161 cases studied, crimes involving the online solicitation of minors were most frequently observed (Figure 37). Offenders convicted of using a communication system, such as the Internet, to solicit minors for sodomy, prostitution or other sexual offenses (violation of § 18.2-374.3B) accounted for nearly one in four (24%) of the cases examined. In another 18% of the cases, offenders had been convicted of using a communication system to procure or promote the use of minors for sexually explicit material or for another act that would constitute indecent liberties (violation of § 18.2-374.3A). In 16% of the cases, offenders were convicted for producing sexually explicit materials involving minors (violation of § 18.2-374.1B2). Other violations of

§ 18.2-374.1 related to sexually explicit material and minors, together, accounted for 14% of the cases. More than one in four offenders (27%) were convicted of possessing child pornography, either first offense or a subsequent offense (violation of § 18.2-374.1:1). Two other crimes (producing or possessing obscene pictures for sale as defined in § 18.2-374 and unlawfully filming or photographing a minor in violation of § 18.2-386.1) were included at this stage of the analysis; these offenses, however, generated only 1% of the cases studied by the Commission.

FIGURE 37
**SEXUALLY EXPLICIT MATERIAL INVOLVING MINORS, CHILD PORNOGRAPHY AND ONLINE
SOLICITATION OF MINORS CASES STUDIED BY COMMISSION, FY2002 - FY2006**

Offense	Seriousness	Number	Percent
Use of communication system to solicit minors for sodomy, prostitution or other sexual offense (§ 18.2-374.3 B)	Class 5 felony	38	24%
Use of communication system to procure or promote the use of minor for sexually explicit material or indecent liberties (§ 18.2-374.3 A)	Class 6 felony	29	18%
Possession of child pornography - 1st offense (§ 18.2-374.1:1 A)	Class 6 felony	28	17%
Produce sexually explicit materials involving minor (§ 18.2-374.1B2)	Class 5 felony	25	16%
Possession of child pornography - 2nd offense (§ 18.2-374.1:1 D)	Class 5 felony	16	10%
Participate in filming sexually explicit material of minor (§ 18.2-374.1 B3)	Class 5 felony	9	6%
Sell, give, distribute or transmit sexually explicit material of minor (§ 18.2-374.1 B4)	Class 5 felony	8	5%
Entice minor to perform in sexually explicit material (§ 18.2-374.1 B1)	Class 5 felony	3	2%
Finance sexually explicit material involving minor (§ 18.2-374.1 C)	Class 4 felony	2	1%
Produce or possess obscene pictures for sale - 2nd offense (§ 18.2-374)	Class 6 felony	2	1%
Unlawful filming, videotaping, photographing, etc., minor (§ 18.2-386.1)	Class 6 felony	1	0%
Total		161	100%

The majority of offenders convicted for soliciting minors online, possessing child pornography, producing sexually explicit material involving minors, etc., were sentenced to serve an active term of incarceration in jail or prison (Figure 38). Overall, 43% of these offenders were given a prison sentence of one year or more. Another 29% of offenders were sentenced to serve a jail term up to 12 months. The remaining 28% were given probation without an active term of incarceration following conviction for one of the specified offenses.

The type of disposition received by offenders convicted of these crimes varies considerably depending on the specific charge at conviction. Figure 39 presents the disposition outcomes by

conviction offense listed in decreasing order by the corresponding prison incarceration rate. Those convicted of a second or subsequent possession of child pornography had the highest prison incarceration rate (63%). These offenders were also the least likely to receive probation without active incarceration (6%). Similarly, over half (55%) of offenders convicted for crimes associated with sexually explicit materials involving minors received a prison term. Convictions for other crimes were much less likely to result in a prison sentence. For example, 39% of offenders convicted for soliciting a minor for sodomy or other sexual offense over the Internet were sanctioned with a prison term. Approximately 31% of offenders convicted for using the Internet to procure or promote the use of minors for sexually explicit material or a related offense were given a prison sentence. Offenders convicted of possessing child pornography for the first time had the lowest prison incarceration rate; less than 30% of these offenders served a prison term. Conversely, offenders convicted for using the internet to procure or promote the use of minors for sexually explicit material and offenders possessing child pornography for the first time (both Class 6 felonies) were the most likely to receive probation without active incarceration in jail or prison. For these two crimes, 40% to 45% of offenders were given straight probation. Sentence data discussed here reflects the total effective sentence (imposed sentence less suspended time) for all charges in the sentencing event.

FIGURE 38
SEXUALLY EXPLICIT MATERIAL INVOLVING MINORS, CHILD PORNGRAPHY AND ONLINE SOLICITATION CASES BY DISPOSITION
NUMBER OF CASES = 161

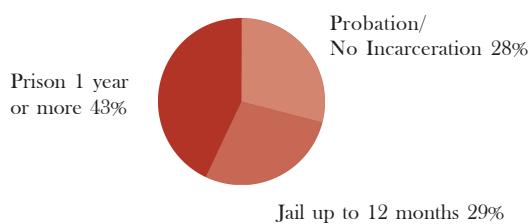


FIGURE 39
SEXUALLY EXPLICIT MATERIAL INVOLVING MINORS, CHILD PORNGRAPHY AND ONLINE SOLICITATION CASES BY OFFENSE AND DISPOSITION

	Probation/ No Incarceration	Jail up to 12 months	Prison 1 year or more
Possession of child pornography, 2nd offense (16 cases)	6%	31%	63%
Production, sale, distribution, finance of, participation in, etc., sexually explicit material involving minors (47 cases)	19%	26%	55%
Use of communication system to solicit minors for sodomy, prostitution or other sexual offense (38 cases)	24%	37%	39%
Use of communication system to procure or promote the use of minor for sexually explicit material or indecent liberties (29 cases)	45%	24%	31%
Possession of child pornography, 1st offense, and other Class 6 felonies (31 cases)	40%	30%	30%

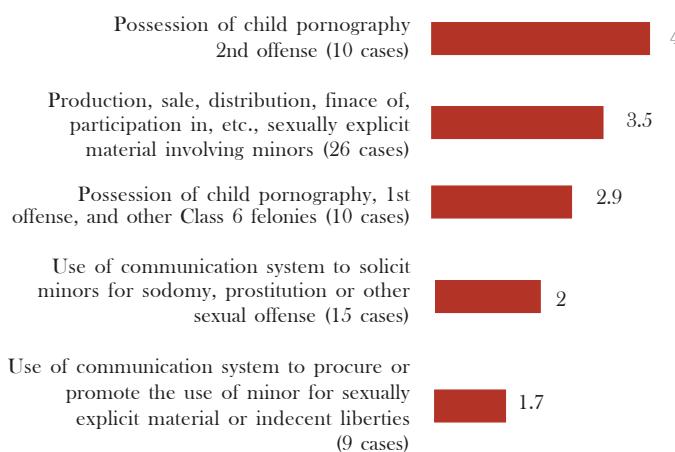
Note: Sentencing data reflects the total effective sentence (imposed less suspended time) for all charges in the sentencing event.

For offenders sent to prison for one of these crimes, the length of the prison sentence ordered by the court varies depending on the specific charge at conviction. For cases resulting in a prison term, Figure 40 displays the median prison sentence (in years). The median sentence is the middle sentence, where half the sentences are higher and half are lower. The longest median sentence is four years, for offenders convicted of second or subsequent possession of child pornography. Offenders convicted of crimes associated with sexually explicit materials involving minors received a median prison sentence of 3.5 years. Convictions for first-time possession of child pornography resulted in a median prison sentence of 2.9 years. By comparison, the median sentence lengths for offenders convicted of online offenses involving minors were markedly lower and did not exceed 2.0 years.

ONLINE SOLICITATION OFFENSES

Online solicitation offenses accounted for 67, or 42%, of the cases studied by the Commission. These crimes are defined in § 18.2-374.3. Using a communications system, such as the Internet, to procure or promote the use of a minor for sexually explicit material or for a specified sexual offense is a Class 6 felony under this provision. Using a communication system to solicit a minor for sodomy, prostitution, sexually explicit material, pornography or any activity constituting indecent liberties with a child under the age of 15 is a Class 5 felony. The Commission examined both of these offenses. Data reveal that the bulk of offenders convicted of these crimes are between the ages of 25 and 40, with nearly 43% of offenders

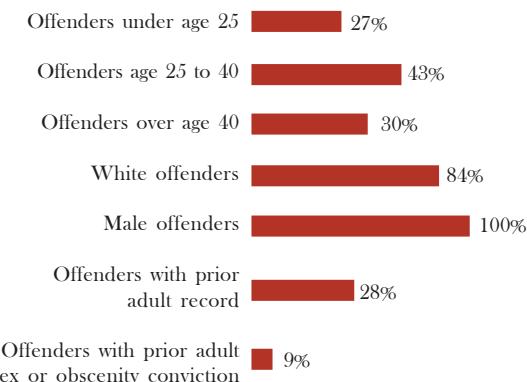
FIGURE 40
**SEXUALLY EXPLICIT MATERIAL INVOLVING MINORS, CHILD PORNOGRAPHY AND
 ONLINE SOLICITATION CASES RESULTING IN PRISON -
 MEDIAN PRISON SENTENCE IN YEARS**



Note: Data represents only those cases resulting in a prison term. Sentence data reflects the median effective sentence (imposed less suspended time) including all charges in the sentencing event.

falling into this age range (Figure 41). Data also indicate, however, that nearly a third (30%) are over the age of 40. Online solicitation offenders were overwhelmingly white (84%) and exclusively male. More than one in four (28%) of these offenders had a prior adult record of some kind. Relatively few offenders (9%) had a prior adult sex or obscenity conviction. Since online solicitation is a relatively recent phenomenon, the percentage of offenders with a prior sex offense or obscenity conviction may increase in the future. Additional resources have been dedicated in recent years to the apprehension of offenders who solicit minors over the internet. If offenders commit subsequent acts of online solicitation, they are more likely to be apprehended and prosecuted today than they were even a few years ago.

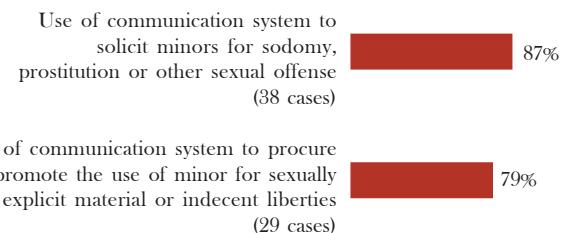
FIGURE 41
**CHARACTERISTICS OF OFFENDERS CONVICTED
 OF ONLINE SOLICITATION OFFENSES (§ 18.2-374.3)**
NUMBER OF CASES = 67



The vast majority of online solicitation cases arose from a police operation, or “sting,” in which a police officer impersonated a potential victim online (Figure 42). Police stings lead to 87% of the convictions for online solicitation of minors for sodomy, prostitution, etc. Nearly 79% of the convictions for procuring or promoting the use of minors in sexually explicit material via the internet were result of this type of police operation.

Data gathered by the Commission suggest that online offenders frequently attempt to meet the minors with whom they have communicated over the Internet. Often the minor they intend to meet is actually a law enforcement officer who has posed as a minor online. Typically, offenders who arrange a meeting travel within their own resident counties or metropolitan areas to meet their online

FIGURE 42
**ONLINE SOLICITATION OF MINORS (§ 18.2-374.3)-
 CASES RESULTING FROM A POLICE OPERATION**



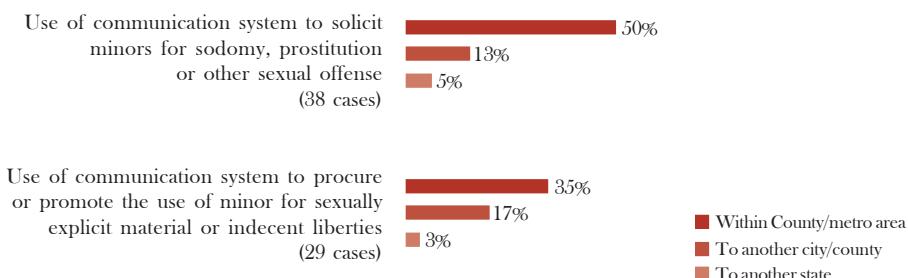
acquaintances (Figure 43). For example, 50% of the offenders studied who were convicted for online solicitation of a minor for sodomy or other sexual offense traveled within their home counties or metro regions for a meeting. Only in rare instances did the offender travel to another state to meet a minor.

Online solicitation offenders generally target female victims aged 13 or 14. Based on victim information obtained by the Commission, in cases of online solicitation for sodomy or other sex crimes, 71% of the actual or portrayed victims were aged 13 or 14. Nearly 97% of victims or portrayed victims were female. More 80% of the convictions for procuring or promoting the use of minors in sexually explicit material via the internet involved

minors who were aged 13 or 14 and, in cases of this type, 86% of the victims were female. These analyses include only those cases for which actual or portrayed age or gender were available. Since the vast majority of these cases resulted from online police operations, victim information largely reflects the profile portrayed by online police investigators.

The Commission's research revealed that, while online offenses rarely resulted in hands-on contact between the offender and a minor, nearly one in five cases (19%) involved exposure either by the offender or the minor. This was achieved through internet-ready cameras attached to computers (i.e., "web cams"), digital cameras or other digital devices.

FIGURE 43
ONLINE SOLICITATION OF MINORS (§ 18.2-374.3)
TRAVEL BY OFFENDERS TO MEET AN ACTUAL OR ASSUMED MINOR

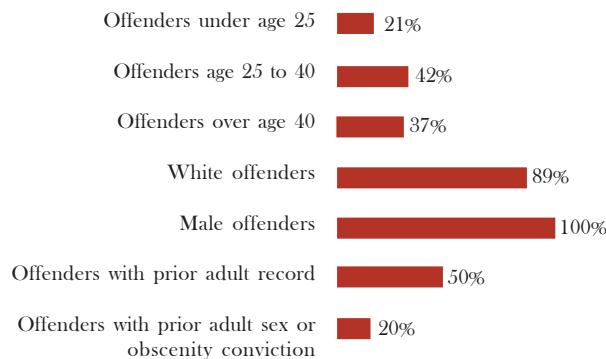


CHILD PORNOGRAPHY AND RELATED OFFENSES

Convictions for sexually explicit materials involving minors and child pornography offenses accounted for 94, or 58%, of the cases studied by the Commission. These offenses are defined in §§ 18.2-374.1 and 18.2-374.1:1, respectively. Under § 18.2-374.1, it is a Class 5 felony to produce, publish, sell, possess with intent to distribute, or transfer sexually explicit material involving minors under the age of 18, while financing the production of this type of material is a Class 4 felony. Under § 18.2-374.1:1, possessing child pornography is punishable as a Class 6 felony for the first offense and a Class 5 felony for any second or subsequent conviction. The Commission's study included all of the crimes delineated in these two statutes.

FIGURE 44

**CHARACTERISTICS OF OFFENDERS CONVICTED FOR SEXUALLY EXPLICIT MATERIALS INVOLVING MINORS OR CHILD PORNOGRAPHY OFFENSES
(§§ 18.2-374.1 & 18.2-374.1:1)**
NUMBER OF CASES - 94

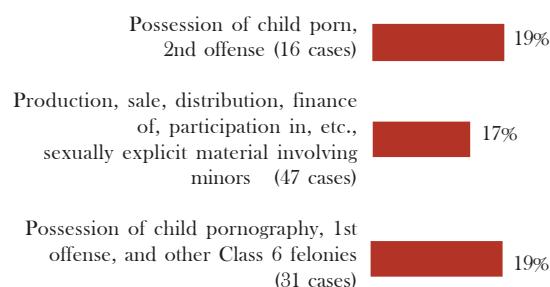


Overall, offenders convicted for sexually explicit materials with minors or pornography-related offenses appear to be slightly older than offenders convicted of online solicitation offenses involving minors. The Commission's data indicate that 37% of these offenders are over the age of 40 (Figure 44). They were also overwhelmingly white (89%) and all were males. Compared to those convicted for online offenses with minors, these offenders are more likely to have a prior adult record, including a prior conviction for a sex offense or obscenity crime. Over half (52%) of these offenders have a prior adult record of some kind and more than 20% have been previously convicted for a sex offense or obscenity charge as an adult.

Data suggest that relatively few cases involving sexually explicit materials with minors or child pornography resulted from a police operation. Information collected by the Commission indicates that roughly one in five of these offenders were apprehended as a result of a police operation (Figure 45). This rate is much lower than that observed for the online solicitation cases.

FIGURE 45

**SEXUALLY EXPLICIT MATERIAL INVOLVING MINORS AND CHILD PORNOGRAPHY
(§§ 18.2-374.1 & 18.2-374.1:1) -
CASES RESULTING FROM A POLICE OPERATION**



Crimes involving sexually explicit materials and child pornography were more likely to be reported to the authorities by someone outside of law enforcement who became aware of the images or materials (Figure 46). It is interesting to note that, for nearly one in five (19%) offenders convicted for a second or subsequent possession of child pornography, the pornography was discovered as part of an investigation for a sexual abuse charge.

Through its supplemental data collection, the Commission attempted to gather details about the types of sexually explicit materials and pornographic images associated with these cases. The objective was to determine if such factors affected judicial sentencing decisions for offenders convicted of these crimes. This effort was hindered by incomplete and missing information in case files. Details pertaining to the age and gender of children depicted in the sexual material could be found in just over half the cases. The data shown below represent those cases for which such details were reported.

More than half (56%) of the cases involving sexually explicit materials with minors or child pornography appeared to depict teenagers (Figure 47). More than one in five (21%) depicted school age children approximately 6 to 12 years of age. Some cases involved very young children. The Commission found that 12% of the cases included material depicting preschool-aged children (ages 4 to 5), while another 12% depicted infant and toddlers up to age 3. Two-thirds (67%) of the cases studied portrayed females only; however, one-fifth of these cases portrayed both male and female children.

FIGURE 46
**SEXUALLY EXPLICIT MATERIAL INVOLVING MINORS AND CHILD PORNOGRAPHY
(\$§ 18.2-374.1 & 18.2-374.1:1) - DISCOVERY OF OFFENSE**

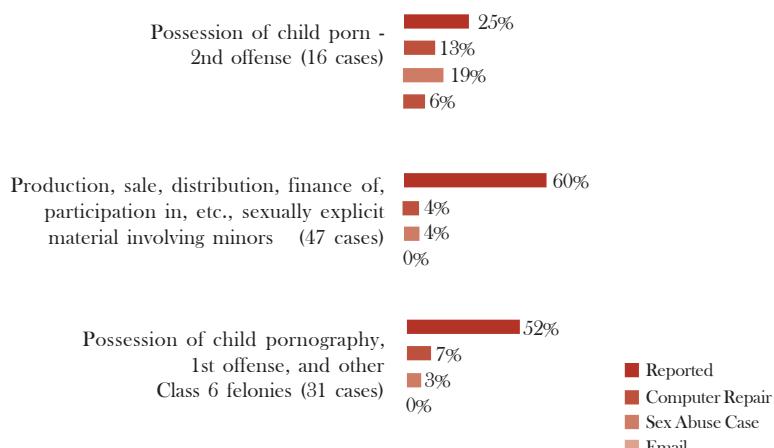
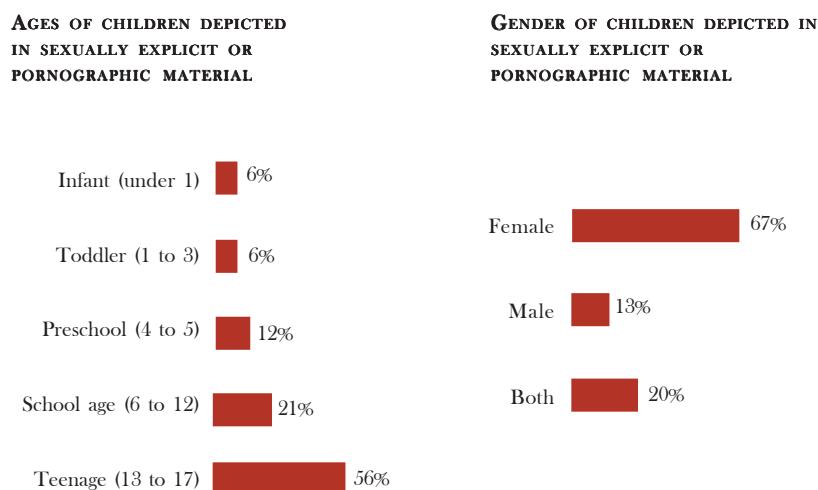


FIGURE 47
**SEXUALLY EXPLICIT MATERIAL INVOLVING MINORS AND CHILD PORNOGRAPHY
(\$§ 18.2-374.1 & § 18.2-374.1:1) -
AGE AND GENDER OF CHILDREN DEPICTED**



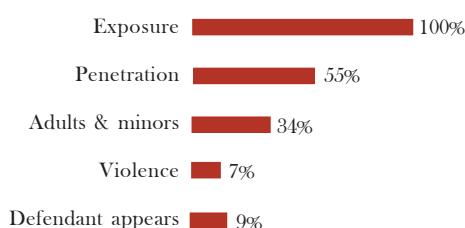
Note: Analysis includes only those cases for which age is reported (52 out of total 94 pornography cases studied).

Note: Analysis includes only those cases for which gender is reported (54 out of total 94 pornography cases studied).

Figure 48 describes the conduct depicted in the sexually explicit or pornographic images, when such information was reported. As expected, all cases depicted exposure. More than half (55%) portrayed some form of penetration. Adults and minors appeared together in approximately one-third (34%) of the cases. In 7% of the cases, images displayed some form of violence. The defendant, himself, appeared in sexually explicit or pornographic images in 9% of the cases. In each case, more than one type of conduct could be portrayed.

FIGURE 48

**SEXUALLY EXPLICIT MATERIAL INVOLVING MINORS
AND CHILD PORNOGRAPHY (§ 18.2-374.1 & § 18.2-374.1:1) -
TYPE OF CONDUCT DEPICTED**

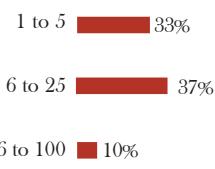


Note: Analysis includes only those cases for which information on sexual conduct is reported (58 out of total 94 pornography cases studied).

For child pornography cases (§ 18.2-374.1:1), the Commission attempted to collect information regarding the number of images or pornographic items possessed by the offender. This detail was not universally available due to incomplete or missing information in case files. The number of images could be identified for just over two-thirds of the cases, and those results are discussed here. When the number of images was known, one-third (33%) of the child pornography cases involved five images or less (Figure 49). The largest share of pornography cases (37%) involved 6 to 25 images. However, one in five child pornography offenders studied by the Commission had over 100 images in his possession.

FIGURE 49

**NUMBER OF IMAGES POSSESSED IN
CHILD PORNOGRAPHY CASES (§ 18.2-374.1:1)**



Note: Analysis includes only those cases for which age is reported (30 out of total 44 pornography cases studied).

PROPOSALS FOR INTEGRATING OFFENSES INTO VIRGINIA'S SENTENCING GUIDELINES

Conducted at the request of Virginia's Attorney General, this study was a significant component of the Commission's agenda during 2006. The Commission's objective was to examine offenses related to child pornography, sexually explicit materials involving minors, and online solicitation of minors and determine if the development of historically-based sentencing guidelines for these crimes was feasible. The Commission concluded that guidelines were feasible and would be a useful tool for judges when sentencing offenders convicted of these crimes. Therefore, the Commission adopted a proposal for integrating these crimes into the guidelines system. The proposal is described in detail in the "Recommendations" chapter of this report (Recommendation 1).

IMPLEMENTATION

The Commission's proposal to integrate these crimes into the sentencing guidelines is one of five recommendations presented in this report. Per § 17.1-806 of the *Code of Virginia*, any modifications to the sentencing guidelines adopted by the Commission and contained in its annual report shall, unless otherwise provided by law, become effective on the following July 1.



RECOMMENDATIONS

INTRODUCTION

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

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

In 2006, the Commission conducted a special study of offenses involving child pornography and online solicitation of minors, crimes which are not currently covered by Virginia's sentencing guidelines. The Commission embarked on this study at the request of Virginia's Attorney General, who asked the Commission to examine the feasibility of developing sentencing guidelines for these offenses. After careful deliberation, the Commission approved the proposal presented in this chapter.

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

RECOMMENDATION 1

Amend the sexual assault sentencing guidelines to add the following crimes defined in the *Code of Virginia*: 1) the production, publication, sale, possession with intent to distribute, finance, etc., of sexually explicit items involving children (§ 18.2-374.1), 2) the possession of child pornography (§ 18.2-374.1:1), and 3) the use of a communication system to facilitate certain offenses involving children (§ 18.2-374.3).

ISSUE

Currently, Virginia's sentencing guidelines do not cover crimes related to the production of sexually explicit material involving minors as defined in § 18.2-374.1, the possession of child pornography as defined in § 18.2-374.1:1, or the use of a communications system to facilitate certain offenses involving children as defined in § 18.2-374.3. At the request of Virginia's Attorney General, the Commission conducted a special study of these crimes to determine if guidelines were feasible. After thorough analysis, the Commission has developed a proposal to incorporate these crimes into the sentencing guidelines system.

DISCUSSION

In April 2006, the Commission received a letter from Attorney General Robert McDonnell asking the Commission to consider establishing sentencing guidelines for child pornography and online child exploitation offenses. The Attorney General expressed his desire for consistent and appropriate punishment for offenders committing these crimes and his concern that sentences in these cases have become increasingly disparate. The Commission considered the Attorney General's request at its June meeting and approved a special study of these offenses to determine if guidelines were feasible.

For its study, the Commission carefully examined the crimes defined in §§ 18.2-374.1, 18.2-374.1:1, and § 18.2-374.3 of the *Code of Virginia*. Under

§ 18.2-374.1, it is a Class 5 felony to produce, publish, sell, possess with intent to distribute, or transfer sexually explicit material involving minors under the age of 18. Financing the production of sexually explicit material is a Class 4 felony under this provision. Under § 18.2-374.1:1, possessing child pornography is punishable as a Class 6 felony for the first offense. This crime was raised from a Class 1 misdemeanor to a Class 6 felony by 2003 General Assembly. A second conviction for possessing child pornography is a Class 5 felony. Under § 18.2-374.3, using a communication system, such as the internet, to facilitate certain offenses involving children is prohibited. Using a communications system to procure or promote the use of a minor for sexually explicit material or for any act that would constitute indecent liberties under § 18.2-370 is a Class 6 felony. It is a Class 5 felony, however, to use a communication system to solicit a minor for prostitution, sodomy, sexually explicit material, child pornography, or any activity constituting indecent liberties with a child under the age of 15. The last two offenses have gained considerable attention in recent years with the widespread use of the Internet by both adults and children and heightened concern over online solicitation of minors by adults that may take place through chat rooms and web sites designed for children and teenagers. For additional detail on the Commission's study of these offenses, please see the chapter of this report entitled "Child Pornography and Online Solicitation Offenses in Virginia."

After a thorough analysis of the data, the Commission recommends adding the crimes listed above to the sentencing guidelines for sexual assault offenses. These guidelines encompass

offenses such as indecent liberties, carnal knowledge and aggravated sexual battery. Sex offenses carrying a maximum penalty of life in prison (i.e., rape, forcible sodomy, and object sexual penetration) are not covered by the sexual assault guidelines, but are covered on a separate set of guideline worksheets. Several steps were employed in the development of the Commission's proposal. The Commission examined actual judicial sentencing practices for these crimes for the period FY2002 through FY 2006. Using actual sentencing data, various scoring scenarios were rigorously tested. The goal was to seamlessly integrate the offenses with those currently covered, maximizing compliance and, if possible, balancing mitigation and aggravation departures from the guidelines. It is important to note that these proposals are based on the actual practices of Virginia's circuit court judges for the period studied.

The sexual assault guidelines consist of four worksheets. The first (Section A, Part I) is a risk assessment instrument designed to evaluate a sex offender's future likelihood of re-arrest for a new sex offense or other person crime, such as kidnapping. This instrument was developed by the Commission in response to a 1999 request from the General Assembly. The sex offender risk assessment instrument has been in statewide use since July 1, 2001. Production of sexually explicit materials involving minors, child pornography, and online solicitation offenses were not included in the original risk assessment study. In addition, online solicitation of minors is a relatively new crime and there is little research by criminologists on the recidivism patterns and relative risk posed by these offenders. For these reasons, the Commission recommends that these offenders be excluded from the risk assessment evaluation on Section A, Part I. The Commission will re-examine this risk assessment tool in the future and may incorporate these crimes at that time.

The second worksheet of the sexual assault guidelines (Section A, Part II) is scored to determine whether or not an offender will be recommended for a term of incarceration of more than six months. If the total score on this worksheet is less than nine points, the Section B worksheet is then scored to determine if the offender will be recommended for probation with no active incarceration or incarceration in jail up to six months. However, if the total score on the Section A (Part II) worksheet is nine points or more, the Section C worksheet will be scored to obtain an appropriate sentence length recommendation.

Figure 50 illustrates the recommended modification to the Section A (Part II) worksheet of the sexual assault guidelines. Offenders convicted for producing sexually explicit material involving minors or a related offense under § 18.2-374.1 receive five points for the Primary Offense factor. Offenders convicted of an online solicitation crime defined in § 18.2-374.3 or a first-time possession of child pornography receive six points for the Primary Offense factor. Offenders convicted of second or subsequent offense possession of child pornography receive nine points for the Primary Offense factor, which

by itself is sufficient to send the offender to the Section C worksheet. When there is more than one count of the offense, each will be scored on the Primary Offense Additional Counts factor. The remaining factors on the worksheet will also be scored (additional offenses in the case, age of the victim, prior convictions/juvenile adjudications, prior felony sexual assault convictions/juvenile adjudications, prior incarcerations, and the form of legal restraint at the time of the offense).

FIGURE 50
PROPOSED OTHER SEXUAL ASSAULT GUIDELINES
SECTION A (PART II) WORKSHEET

Other Sexual Assault Section A (Part II) Offender Name: _____	
◆ Primary Offense	
A. Other than listed below (1 count)	1
B. Non-forcible sodomy, parent/grandparent to child or grandchild age 13 to 17 (1 count)	7
C. Non-forcible sodomy, no parental relationship	
1 count	3
2 counts	4
3 counts	13
D. Indecent liberties with child	
1 - 2 counts	2
3 counts	3
E. Non-forcible carnal knowledge of child age 13, 14 (statutory rape)	
1 count	2
2 counts	8
3 counts	12
F. Aggravated sexual battery	
1 count	3
2 counts	6
3 counts	9
G. Incest with own child/grandchild (1 count)	3
H. Incest with own child/grandchild age 13 to 17 (1 count)	2
I. Produce sexually explicit materials involving minor, Entice, etc., minor to perform in sexually explicit material, Participate in filming, etc., of sexually explicit material involving minor, Sell, give, distribute, transmit sexually explicit material involving minor, Finance sexually explicit material involving minor, (1 count)	5
J. Electronic means for procuring minor for obscene material, etc., Electronic means to solicit minors for sodomy, etc., Possess obscene material - child pornography, 1 st offense (1 count)	6
K. Possess obscene material - child pornography, 2 nd or subsequent offense (1 count)	9
◆ Primary Offense Additional Counts Total the maximum penalties for counts of the primary not scored above	
Years: 5 - 26	1
27 - 52	2
53 or more	3
◆ Additional Offenses Total the maximum penalties for additional offenses, including counts	
Years: Less than 1	0
1 - 26	1
27 - 52	2
53 or more	3
◆ Victim Less than Age 13 at Time of Offense _____ If YES, add 5 → <input type="text"/>	
◆ Victim Injury Threatened or emotional <input type="text"/> Physical or serious physical <input type="text"/>	
◆ Prior Convictions/Adjudications Total maximum penalties for the 5 most recent and serious prior record events	
Years: Less than 3	0
3 - 18	1
19 - 31	2
32 - 44	3
45 or more	4
◆ Prior Felony Sexual Assault Convictions/Adjudications	
Number: 1	1
2	2
3 or more	3
◆ Prior Incarcerations/Commitments _____ If YES, add 3 → <input type="text"/>	
◆ Legally Restrained at Time of Offense _____	
None	0
Other than parole/post-release, supervised probation or CCCA	2
Parole/post-release, supervised probation or CCCA	3
◆ Risk Assessment Score (From Section A Part I)	
Less than 28	0
28 or more (Level 1, 2, or 3)	8
Total Score _____	
If total is 8 or less, go to Section B . If total is 9 or more, go to Section C .	

Offenders scoring less than nine points on Section A (Part II) are scored on Section B. Figure 51 displays the recommended modification to the Section B worksheet of the sexual assault guidelines. Offenders convicted for producing sexually explicit material with minors or a related offense, online solicitation of a minor, or any child pornography offense receive one point for the Primary Offense factor on Section B. Primary Offense points for offenses already covered by the guidelines (such as aggravated sexual battery) are increased by one. A similar adjustment must also be made on the Section B Recommendation Table (also shown in Figure 51). While these

adjustments together have no net effect on the sentencing recommendations for currently-covered offenses, they ensure that the recommendations from Section B will be in proper proportion when offenses are compared to one another. Offenders will now be recommended for probation with no active incarceration if their total score on Section B is less than four points. A total score of four or five points on Section B will result in a recommendation for incarceration from one day up to three months, while a total score exceeding five points will yield a recommendation for incarceration of three to six months.

FIGURE 51
PROPOSED OTHER SEXUAL ASSAULT SENTENCING GUIDELINES
SECTION B WORKSHEET AND SECTION B RECOMMENDATION TABLE

Other Sexual Assault  Section B		Offender Name: _____
◆ Primary Offense _____		
A. Other than listed below (1 count) <input type="text" value="2"/> B. Aggravated sexual battery 1 count <input checked="" type="checkbox"/> <input type="text" value="3"/> 2 counts <input checked="" type="checkbox"/> <input type="text" value="5"/> 3 counts <input checked="" type="checkbox"/> <input type="text" value="7"/>		
Score <input type="text" value="0"/>		
C. Produce sexually explicit materials involving minor, Entice, etc., minor to perform in sexually explicit material, Participate in filming of sexually explicit material, etc., Give distribution of sexually explicit material involving minor, Furnish sexually explicit material involving minor, Electronic means for procuring minor for obscene material, etc., Electronic means to solicit minors for sodomy, etc., Possess obscene material - child pornography, 1 st offense, Possess obscene material - child pornography, 2 nd or subsequent offense (1 count)..... 1		
◆ Primary Offense Additional Counts Total the maximum penalties for counts of the primary not scored above _____		
Years: 5 - 7 2 27 - 30 8 8 - 11 3 31 - 34 9 12 - 15 4 35 - 37 10 16 - 19 5 38 - 41 11 20 - 22 6 42 or more 12		
<input type="text" value="0"/>		
◆ Additional Offenses Total the maximum penalties for additional offenses, including counts _____		
Years: Less than 1 0 23 - 26 7 1 - 2 1 27 - 30 8 3 - 7 2 31 - 34 9 8 - 11 3 35 - 37 10 12 - 15 4 38 - 41 11 16 - 19 5 42 or more 12		
<input type="text" value="0"/>		
◆ Victim Less than Age 13 at Time of Offense _____ If YES, add 3 → <input type="text" value="0"/>		
◆ Prior Convictions / Adjudications Total the maximum penalties for the 5 most recent and serious prior record events _____		
Years: Less than 3 0 3 - 19 1 20 - 39 2 40 or more 3		
<input type="text" value="0"/>		
◆ Prior Incarcerations / Commitments _____ If YES, add 1 → <input type="text" value="0"/>		
Total Score _____		
See Other Sexual Assault Section B Recommendation Table to convert score to guidelines sentence.		
<small>Other Sexual Assault/Section B Eff. 7-1-05</small>		

RECOMMENDATION TABLE
OTHER SEXUAL ASSAULT - SECTION B

Proposed Score	Current Score	Guidelines Sentence
0 - 3	0 - 2	Probation/No Incarceration
4 - 5	3 - 4	Incarceration 1 Day up to 3 Months
6+	5+	Incarceration 3 to 6 Months

Finally, offenders who scored nine points or more on Section A (Part II) are scored on Section C to obtain their sentence length recommendation. Figure 52 displays the recommended modification to the Section C worksheet. Primary Offense points on Section C are assigned based on an offender's prior record classification. Offenders convicted for (1) an online solicitation crime (§ 18.2-374.3), (2) first offense possession of child pornography (§ 18.2-374.1:1), (3) participating in filming of sexually explicit material involving minors (§ 18.2-374.1B3), or (4) enticing minors to perform in sexually explicit material (§ 18.2-374.1B1) will receive 17 points for the Primary Offense factor if their prior record classification is Other. Offenders

FIGURE 52

**PROPOSED OTHER SEXUAL ASSAULT GUIDELINES
SECTION C WORKSHEET**

Other Sexual Assault Section C		Offender Name: _____																																																																																																																																																																																																																								
<p>— Prior Record Classification —</p> <input type="checkbox"/> Category I <input type="checkbox"/> Category II <input type="checkbox"/> Other																																																																																																																																																																																																																										
<p>◆ Primary Offense</p> <table border="1"> <tr> <td>A. All attempted or conspired sexual assault (1 count)</td> <td>24</td> <td>12</td> <td>6</td> </tr> <tr> <td>B. Completed sexual assault other than listed below (1 count)</td> <td>36</td> <td>18</td> <td>9</td> </tr> <tr> <td>C. Non-forcible sodomy, no parental relationship</td> <td></td> <td></td> <td></td> </tr> <tr> <td> 1 count</td> <td>24</td> <td>12</td> <td>6</td> </tr> <tr> <td> 2 counts</td> <td>40</td> <td>20</td> <td>10</td> </tr> <tr> <td> 3 counts</td> <td>104</td> <td>52</td> <td>26</td> </tr> <tr> <td>D. Non-forcible sodomy, parent/grandparent to child/grandchild age 13 - 17</td> <td></td> <td></td> <td></td> </tr> <tr> <td> 1 count</td> <td>36</td> <td>18</td> <td>9</td> </tr> <tr> <td>E. 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Electronic means for procuring minor for obscene material etc.</td> <td></td> <td></td> <td></td> </tr> <tr> <td> Electronic means to procure minors for sodomy, etc.</td> <td></td> <td></td> <td></td> </tr> <tr> <td> Participate in filming etc. of sexually explicit material involving minor, Entice, etc., minor to perform in sexually explicit material,</td> <td></td> <td></td> <td></td> </tr> <tr> <td> Possess obscene material-child pornography, 1st offense</td> <td></td> <td></td> <td></td> </tr> <tr> <td> 1 count</td> <td>68</td> <td>34</td> <td>17</td> </tr> <tr> <td>K. 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All attempted or conspired sexual assault (1 count)	24	12	6	B. Completed sexual assault other than listed below (1 count)	36	18	9	C. Non-forcible sodomy, no parental relationship				1 count	24	12	6	2 counts	40	20	10	3 counts	104	52	26	D. Non-forcible sodomy, parent/grandparent to child/grandchild age 13 - 17				1 count	36	18	9	E. Indecent liberties with child				1 count	24	12	6	2 counts	40	20	10	3 counts	104	52	26	F. Non-forcible carnal knowledge of child age 13 - 14 (statutory rape)				1 count	36	18	9	G. Incest with own child/grandchild (1 count)	104	52	26	H. Incest with own child/grandchild age 13 - 17 (1 count)	104	52	26	I. Aggravated sexual battery				1 count	90	60	34	2 counts	132	88	50	3 counts	288	192	108	J. 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Produce sexually explicit materials involving minor,				Sell, give, distribute, transmit sexually explicit material involving minor,				Possess obscene material-child pornography, 2nd or subsequent offense				Finance sexually explicit material - minor				1 count	100	50	25	◆ Primary Offense Additional Counts	Assign points to each count of the primary not scored above and total the points		Maximum Penalty (years)	5	5	10	10		20	19	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	◆ Additional Offenses	Assign points to each additional offense (including counts) and total the points		Maximum Penalty (years)	Less than 1	0	1	1		2	2		3	3		4	4		5	5		10	10		20	19		30	19		40 or more	29	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	◆ Weapon Used, Brandished, Feigned or Threatened	If YES, add 4	<input type="checkbox"/> <input type="checkbox"/>	◆ Victim Injury			Threatened or emotional	6	<input type="checkbox"/> <input type="checkbox"/>	Physical or serious physical	9	<input type="checkbox"/> <input type="checkbox"/>	◆ Prior Convictions/Adjudications	Assign points to the 5 most recent and serious prior record events and total the points		Maximum Penalty (years)	Less than 2	0	2, 3, 4, 5	1		10	3		20	5		30	6		40 or more	12	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	◆ Prior Felony Sexual Assault Convictions/Adjudications			Number:	1	8	2	15	<input type="checkbox"/> <input type="checkbox"/>	3 or more	23	<input type="checkbox"/> <input type="checkbox"/>	◆ On Post-Incarceration Supervision	If YES, add 5	<input type="checkbox"/> <input type="checkbox"/>	Total Score	See Other Sexual Assault Section C Recommendation Table for guidelines sentence range.	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> or n/a
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◆ Weapon Used, Brandished, Feigned or Threatened	If YES, add 4	<input type="checkbox"/> <input type="checkbox"/>																																																																																																																																																																																																																								
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◆ Prior Convictions/Adjudications	Assign points to the 5 most recent and serious prior record events and total the points																																																																																																																																																																																																																									
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Total Score	See Other Sexual Assault Section C Recommendation Table for guidelines sentence range.	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> or n/a																																																																																																																																																																																																																								

are assigned to the Other category if they do not have a prior conviction for a violent felony defined in § 17.1-805. Category II offenders convicted of these offenses will score 34 points on the Primary Offense factor, while Category I offenders receive 68 points. Offenders are assigned to Category II if they have a prior conviction for a violent felony 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 with a statutory maximum of 40 years or more. Convictions for sexually explicit material involving minors, child pornography and online solicitation offenses are all classified as Category II crimes by § 17.1-805. Any offender who has one of these offenses in his criminal history will be categorized as a Category II offender and will receive the corresponding points on the Primary Offense factor of Section C. This will produce a longer sentence recommendation for offenders with prior convictions for these crimes.

Section C offenders convicted of other child pornography-related crimes will score higher on the Primary Offense factor. Specifically, offenders convicted of (1) producing sexually explicit material involving minors (§ 18.2-374.1B2), or (2) selling, giving, distributing, or transmitting sexually explicit material involving minors (§ 18.2-374.1B4) will receive 25 points for the Primary Offense factor if their prior record classification is Other(3) financing the production of sexually explicit material involving minors (§ 18.2-374.1C), (4) second or subsequent offense possession of child pornography (§ 18.2-374.1:1D),. Category II offenders convicted of these offenses will score 50 points on the Primary Offense factor, while Category I offenders receive 100 points. Additional counts of the primary offense will be scored on the Section C Primary Offense Additional Counts factor.

The Commission has carefully considered these modifications and believes they offer the best way to integrate offenses related to the production of sexually-explicit materials involving minors, child pornography and online solicitation of minors into Virginia's sentencing guidelines. Because the Commission's proposal is based on current judicial sanctioning practices, no impact on correctional bed space is expected.

RECOMMENDATION 2

Refine the probation violation sentencing guidelines to better reflect judicial sentencing practices for felony offenders returned to court for reasons other than a new conviction, offenders also known as “technical violators.”

ISSUE

The 2003 General Assembly directed the Commission to develop discretionary sentencing guidelines, based on historical judicial sanctioning practices, for felony probation violators returned to court for reasons other than a new conviction, offenders also known as “technical violators” (Chapter 1042 of the Acts of Assembly 2003). In 2003, the Commission conducted an extensive study of this population of offenders and developed historically-based sentencing guidelines applicable in these cases. The Commission recommended, and the General Assembly approved, statewide implementation beginning July 1, 2004. Early use of the probation violation guidelines suggested that the guidelines could be refined to better reflect current judicial thinking in the punishment of supervision violators. The Commission proposed and the General Assembly accepted revisions to the guidelines, which became effective July 1, 2005. Compliance with the revised guidelines and ongoing feedback from judges suggest that further refinement could improve their utility as a benchmark for judges.

DISCUSSION

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

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

The Commission encountered many challenges in developing sentencing guidelines for this population. Lack of standardized data was critical, and extensive manual data collection from offender files was necessary. The Commission's analysis revealed significant variation in the punishment of these violators. Disparate practices across the state made it difficult to identify factors used consistently by judges in making their sentencing decisions. Moreover, much of the variation simply could not be explained by guidelines factors or the numerous other legal and extra-legal factors examined by the Commission.

The variation found by the Commission is illustrated by Figure 53, which shows the relative importance of the significant factors found in judges' incarceration decisions. The circuit/region in the state where the case was heard was by far the most influential factor in determining whether or not a violator receives an active term of incarceration. Circuit/region was more than twice as important as any other factor. This result suggests that, all other factors being equal, there

has been significant disparity in sentencing these violators across Virginia's circuits. Divergent practices were also found in the sentence length decision. Developing historically-based sentencing guidelines, when past practices have varied so widely, was very difficult. While many statistical tests were performed, application of the guidelines in courtrooms, ultimately, is the most critical validation test of any sentencing tool.

Accepted by the 2004 General Assembly, the probation violation guidelines first became effective statewide on July 1, 2004. Early use of the new probation violation guidelines suggested that the guidelines, and the incarceration recommendation (Section A) in particular, needed further refinement for the guidelines to be more in sync with judicial sanctioning of supervision violators. Judicial compliance with probation violation guidelines in the first months of statewide use was lower than expected, with only 38% of the violators sentenced within the range recommended by the new guidelines. This lower than anticipated compliance prompted the Commission to recommend revisions to the

FIGURE 53
SENTENCING OF PROBATION VIOLATORS NOT CONVICTED OF A NEW CRIME RELATIVE IMPORTANCE OF SIGNIFICANT FACTORS IN INCARCERATION DECISIONS

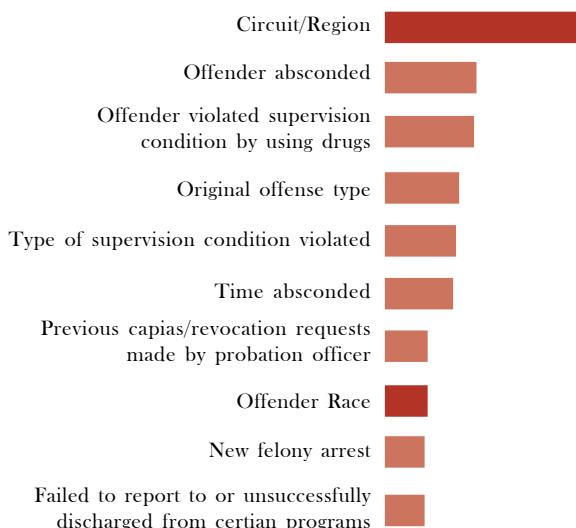
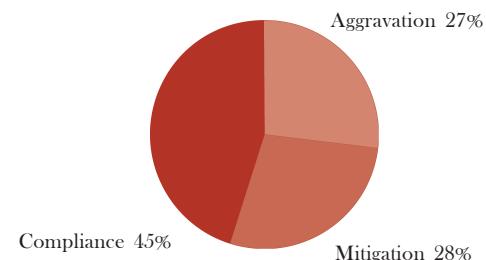


FIGURE 54
COMPLIANCE WITH PROBATION VIOLATION GUIDELINES
NUMBER OF CASES = 5,553



probation violation guidelines in its *2004 Annual Report*. The recommendations were based on analysis of compliance and departure patterns and feedback provided by judges, prosecutors and seasoned probation officials. Accepted by the 2005 General Assembly, these changes went into effect on July 1, 2005. These changes resulted in improved compliance. In FY2006, compliance with the probation violation guidelines had increased to 45% (Figure 54). In addition, the rate of aggravation departures declined from 36% in the early months of FY2005 to 27% in FY2006. The rate of mitigation departures has remained roughly the same, increasing slightly from 26% to 28% in FY2006.

FIGURE 55
PROPOSED PROBATION VIOLATION SENTENCING GUIDELINES
SECTION A WORKSHEET

Probation Violation Guidelines  Section A Offender Name: _____

◆ **Original Felony Offense Type** select the type of most serious original felony offense _____

A. Drug10	13
B. Person14	15
C. Traffic/Weapon	24	
D. Other6	1
E. Property	3	

Score 

◆ **Previous Capias/Revocation Requests** _____

Previous Adult Probation Revocation Events

Number: 1 - 2	7
2 or more 3 or more	9
10	



◆ **New Felony Arrests** _____

Number: 1 - 32	4
4 or more16	18



◆ **Never Reported to following Programs/Unsuccessful Discharge from:** — If YES, add 13 → 

Community service, Day Reporting, Detention and/or Diversion Center, Boot Camp, Employment and/or Residential programs
Community service, Day Reporting, Employment and/or Residential programs

15	
18	

Detention or Diversion Center

◆ **Condition(s) Violated:** _____ If YES, add 15 → 

Fail to report any arrests within 3 days to probation officer

17	
17	

Fail to maintain employment/report changes in employment

17	
18	

Fail to report as instructed

17	
18	

Fail to allow probation officer to visit home or place of employment

17	
18	

Fail to follow instructions and be truthful and cooperative

17	
18	

Use, possess, distribute controlled substances or paraphernalia

31	
31	

Use, own, possess, transport or carry firearm

17	
17	

Abscond from supervision

34	
34	

Fail to follow special conditions (sex offender)

19	
19	

Fail to follow special conditions (other than sex offender conditions)

11	
11	

Change of residence or leave Commonwealth of Virginia

1	
1	

Score only the violation receiving the highest points

◆ **Used, Possessed, Distributed Controlled Substances or Paraphernalia** - If YES, add 15 → 

◆ **Absconded from supervision** _____ If YES, add 16 → 

◆ **Time Absconded** _____

-5 months or less6
-6 months to 12 months	11
13 months or more	18
5	



Total Score  36

If total is 39 or less, the recommendation is Probation/No Incarceration.

If total is 34 or more, go to **Section C Worksheet**.

37

This year, the Commission once again recommends refinement of the incarceration/no incarceration worksheet (Section A). The worksheet proposed by the Commission is shown in Figure 55. While most of the same factors appear on the current and proposed worksheets, the scoring of the factors has been modified. Points assigned for the original felony offense type have been revised, and points are now assigned for property offenders. The factor for previous capias/revocation requests has been modified. The factor, which now scores the number of capias and revocation requests made by the probation officer during the current

supervision period only, has been changed to score all previous adult probation revocation events throughout the offender's adult criminal history. Points assigned for new felony arrests have been increased. Never reporting to, or being unsuccessfully discharged from, a detention or diversion center program will now result in more points. Failure to report to or complete a community service, day reporting, employment and/or residential programs will also result in higher points on the proposed worksheet. The factor for scoring the specific conditions violated has been revised significantly, with different levels of points given depending on the condition violated. Only the violation receiving the highest points is to be scored on this factor. Two other factors on the current worksheet (the factors scoring offenders for use/possession of drugs and for absconding from supervision) have been removed as separate factors and have been added into the overall factor for conditions violated by the offender. The factor relating to the period of time an offender absconded has been modified so that offenders will receive points only if they abscond for 13 months or more. One new factor

has been added to the incarceration/no incarceration worksheet (Section A). This factor adds one point to the offender's score if he had received an active term of incarceration (including a sentence to a detention or diversion center) as part of the original sanction for which he is on probation. The addition of this factor increases the likelihood that an offender will be recommended for an active term of incarceration for the violation. In conjunction with these factor and scoring changes, the Commission recommends a change in the threshold that determines which offenders will be recommended for an active term of incarceration for the violation. Specifically, the Commission recommends changing the threshold from 31 to 37 points. This threshold is tied to the actual rate of incarceration for supervision violators during FY2006. The percentage of offenders recommended for incarceration by the guidelines reflects the actual rate at which judges sentence probation violators not convicted of a new crime to serve active time.

For violators recommended for an active term of incarceration, the preparer must complete the sentence length (Section C) recommendation worksheet. The Commission also recommends refinement of this worksheet. The worksheet proposed by the Commission is shown in Figure 56. A single modification is recommended. The points assigned for offenders who violate sex offender restrictions, such as having prohibited contact with the victim or entering

prohibited areas, have been changed from 40 to 5. At the same time, however, this factor has been expanded to assign points to all offenders who fail to attend sex offender treatment as required. Due to case law related to the admissibility of polygraph tests in probation violation hearings, a failure on a polygraph test conducted in association with sex offender treatment will no longer be scored on this factor.

FIGURE 56
PROPOSED PROBATION VIOLATION SENTENCING GUIDELINES
SECTION C WORKSHEET

Probation Violation Guidelines  Section C Offender Name: _____

◆ Original Felony Offense Type select the type of most serious original felony offense _____

A. DWI or Habitual Offender	3	Score ↓
B. Property	4	
C. Drug	5	
D. Person	13	
E. Weapon	16	
F. Other	1	

◆ Previous Adult Probation Revocation Events _____

Events: 1 - 2	4	↓
3 or more	16	

◆ New Arrests for Crimes Against Person _____

Number: 0	0	↓
1	4	
2	15	
3 - 4	30	

5 or more	38
-----------------	----

◆ New Arrests for Nonperson Crimes _____

Number: 0 - 1	0	↓
2	9	
3 - 4	12	

5 or more	19
-----------------	----

◆ Months until First Noncompliant Incident _____

10 months or less	28	↓
11 months to 22 months	22	
23 months or more	0	

◆ Unsuccessful Discharge from Detention Center Program _____ If YES, add 30 →

◆ Never Reported to Drug Treatment/Drug Education Program _____

Number: 1 - 2	9	↓
3 or more	16	

◆ Positive Drug Test or Signed Admission (not marijuana or alcohol) — If YES, add 10 →

◆ Violated Sex Offender Restrictions _____ If YES, add 40 → 5

◆ Time Absconded _____

2 months or less	0	↓
3 months to 24 months	9	
25 months or more	12	

Total Score →

See Probation Violation Guidelines Section C Recommendation Table for guidelines sentence range.

Additionally, the Commission proposes revising the sentence length (Section C) recommendation table as shown in Figure 57. Sentence length recommendations begin with a range of one day to three months in jail. The proposed modifications to the sentence length range table are modest and reflect judicial practice in FY2006. The Commission proposes combining two cells in the table to create a single range for one year up to one year six months. Due to the small number of cases falling into the highest ranges, all recommendations for incarceration of four years or more have been collapsed into a single recommendation.

To develop this proposal, the Commission carefully considered compliance and departure patterns and judicial feedback regarding the probation violation guidelines. The Commission concluded that sentencing guidelines for violators are a useful tool for circuit court judges, but that the guidelines can be improved. As with the felony sentencing guidelines first implemented in 1991, the development of useful sentencing tools for judges in dealing with probation violators will be an iterative process, with improvements made each year. Continued feedback from judges is of critical importance to this process. The changes proposed by the Commission are made with the goal of enhancing the usefulness of these guidelines for Virginia's circuit court judges as they make difficult sentencing decisions.

FIGURE 57
PROPOSED CHANGES TO PROBATION VIOLATION GUIDELINES
SENTENCE LENGTH (SECTION C) RECOMMENDATION TABLE

Sentence Length Recommendation	Current Range (points)	Proposed Range (points)
Up to 3 Months	Up to 33	Up to 40
3 Months up to 6 Months	34 - 41	41 - 45
6 Months up to 12 Months	42 - 43	46 - 48
1 to 1 Year 3 Months	44 - 48	49 - 56
1 Year 3 Months to 1 Year 6 Months	49 - 51	
1 Year 6 Months to 2 Years	52 - 55	57 - 59
2 Years to 3 Years	56 - 62	60 - 67
3 Years to 4 Years	63 - 66	68 - 73
4 Years to 5 Years	67 - 74	
5 Years to 6 Years	75 - 85	
More than 6 Years	86+	

RECOMMENDATION 3

Amend the robbery sentencing guidelines by adding a factor to increase the midpoint recommendation by 63 months for offenders who have an accompanying conviction for second-degree murder.

ISSUE

For scoring the sentencing guidelines, the primary (most serious) offense is selected based on the statutory maximum penalty as defined in the *Code of Virginia*. Robbery carries a statutory maximum penalty of life in prison. For second-degree murder, the maximum penalty is 40 years. If an offender is convicted of robbery and second-degree murder, robbery is selected as the primary offense on the guidelines because it has the higher maximum penalty. Scoring this case on the robbery sentencing guidelines, however, yields a lower recommendation than if the case were scored on the murder/homicide guidelines.

DISCUSSION

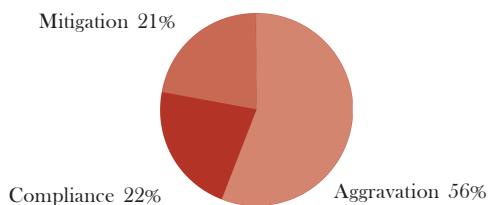
The Commission has received feedback from judges, prosecutors and other criminal justice professionals expressing concern about the sentencing guidelines recommendations in cases involving the combination of robbery and second-degree murder. This combination of offenses is relatively rare. Sentencing data reveal only 18 cases of robbery sentenced with a second-degree murder over the last seven fiscal years (FY2000 through FY2006). Although these cases occur infrequently, the guidelines have been criticized for producing a recommendation that is too low in those circumstances.

When the guidelines are completed in these cases, robbery is scored as the primary offense because it carries a maximum penalty of life in prison, while the maximum penalty for second-degree murder is 40 years. The conviction for second-degree murder is scored as an additional offense in the case. Scoring the guidelines in this manner, however, results in a lower sentencing recommendation than if second-degree murder were scored as the primary offense on the murder/homicide sentencing guidelines.

Sentencing guidelines data reveal that compliance in cases with robbery and second-degree murder convictions is much lower than overall compliance in robbery cases , at only 22% (Figure 58). In more than half (56%) of these cases, judges are sentencing offenders to prison terms longer than the term recommended by the guidelines.

FIGURE 58

SENTENCING GUIDELINES COMPLIANCE IN ROBBERY CASES WITH ACCOMPANYING SECOND-DEGREE MURDER CONVICTION, FY2000 - FY2006
NUMBER OF CASES = 18



To address the disproportionate rate of aggravation, the Commission recommends amending the robbery sentencing guidelines. Specifically, the Commission recommends adding a factor to Section C of the robbery guidelines to increase the midpoint recommendation by 63 months for offenders who have an accompanying conviction for second-degree murder (Figure 59). The result will be longer prison sentence recommendations for robbery offenders with both accompanying second-degree murder convictions.

FIGURE 59
PROPOSED ROBBERY SECTION C WORKSHEET

Robbery — Section C

◆ Primary Offense	<input type="checkbox"/> Prior Record Classification <input type="checkbox"/> Category I <input type="checkbox"/> Category II <input type="checkbox"/> Other																																														
<table border="0" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 10%;">A.</td> <td style="width: 80%;">Attempted or conspired robbery or carjacking without a gun or simulated gun (1 count)</td> <td style="width: 10%; text-align: right;">20 10 5</td> </tr> <tr> <td>B.</td> <td>Attempted or conspired robbery or carjacking with gun or simulated gun (1 count)</td> <td style="text-align: right;">92 46 23</td> </tr> <tr> <td>C.</td> <td>Residence or street with gun or simulated gun</td> <td></td> </tr> <tr> <td> 1 count</td> <td style="text-align: right;">192 128 64</td> <td></td> </tr> <tr> <td> 2 counts</td> <td style="text-align: right;">270 180 90</td> <td></td> </tr> <tr> <td> 3 counts</td> <td style="text-align: right;">444 296 148</td> <td></td> </tr> <tr> <td>D.</td> <td>Bank or business with gun or simulated gun</td> <td></td> </tr> <tr> <td> 1 count</td> <td style="text-align: right;">168 112 56</td> <td></td> </tr> <tr> <td> 2 counts</td> <td style="text-align: right;">348 232 116</td> <td></td> </tr> <tr> <td> 3 counts</td> <td style="text-align: right;">528 352 176</td> <td></td> </tr> <tr> <td>E.</td> <td>Residence, bank, business, street or carjacking without a gun or simulated gun</td> <td></td> </tr> <tr> <td> 1 count</td> <td style="text-align: right;">84 56 28</td> <td></td> </tr> <tr> <td> 2 counts</td> <td style="text-align: right;">168 108 54</td> <td></td> </tr> <tr> <td> 3 counts</td> <td style="text-align: right;">336 224 112</td> <td></td> </tr> <tr> <td>F.</td> <td>Carjacking with gun or simulated gun (1 count)</td> <td style="text-align: right;">246 164 82</td> </tr> </table>			A.	Attempted or conspired robbery or carjacking without a gun or simulated gun (1 count)	20 10 5	B.	Attempted or conspired robbery or carjacking with gun or simulated gun (1 count)	92 46 23	C.	Residence or street with gun or simulated gun		1 count	192 128 64		2 counts	270 180 90		3 counts	444 296 148		D.	Bank or business with gun or simulated gun		1 count	168 112 56		2 counts	348 232 116		3 counts	528 352 176		E.	Residence, bank, business, street or carjacking without a gun or simulated gun		1 count	84 56 28		2 counts	168 108 54		3 counts	336 224 112		F.	Carjacking with gun or simulated gun (1 count)	246 164 82
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F.	Carjacking with gun or simulated gun (1 count)	246 164 82																																													
Score																																															
◆ Primary Offense Additional Counts Assign points to each count of the offense not scored above and total the points																																															
Maximum Penalty: 10 5 (years) Life 19																																															
◆ Additional Offenses Assign points to each additional offense (including counts) and total the points																																															
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◆ Second Degree Murder Conviction for Current Event If YES, add 63 →																																															
◆ Weapon Used <table border="0" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 10%;">Firearm/simulated firearm (firearm points included with primary offense)</td> <td style="width: 10%; text-align: right;">0</td> </tr> <tr> <td>Simulated weapon other than simulated firearm</td> <td style="text-align: right;">7</td> </tr> <tr> <td>Weapon other than firearm, knife or explosive</td> <td style="text-align: right;">9</td> </tr> <tr> <td>Knife</td> <td style="text-align: right;">16</td> </tr> <tr> <td>Explosive</td> <td style="text-align: right;">16</td> </tr> </table>			Firearm/simulated firearm (firearm points included with primary offense)	0	Simulated weapon other than simulated firearm	7	Weapon other than firearm, knife or explosive	9	Knife	16	Explosive	16																																			
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Knife	16																																														
Explosive	16																																														
◆ Prior Incarcerations/Commitments If YES, add 7 →																																															
◆ Legally Restrained at Time of Offense If YES, add 5 →																																															
◆ Prior Juvenile Record If YES, add 8 →																																															
SCORE THE FOLLOWING FACTORS ONLY IF PRIMARY OFFENSE IS COMPLETED ROBBERY OR CARJACKING																																															
◆ Victim Injury <table border="0" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 10%;">Threatened</td> <td style="width: 10%; text-align: right;">0</td> </tr> <tr> <td>Emotional</td> <td style="text-align: right;">2</td> </tr> <tr> <td>Physical</td> <td style="text-align: right;">6</td> </tr> <tr> <td>Serious physical</td> <td style="text-align: right;">23</td> </tr> </table>			Threatened	0	Emotional	2	Physical	6	Serious physical	23																																					
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◆ Prior Convictions/Adjudications Assign points to the 5 most recent and serious prior record events and total the points																																															
Maximum Penalty: Less than 2 0 20 5 (years) 2, 3, 4, 5 1 30 8 10 3 40 or more 11																																															
◆ Prior Felony Convictions/Adjudications Against Person <table border="0" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 10%;">Number: 1</td> <td style="width: 10%; text-align: right;">3</td> </tr> <tr> <td>2</td> <td style="text-align: right;">7</td> </tr> <tr> <td>3 or more</td> <td style="text-align: right;">10</td> </tr> </table>			Number: 1	3	2	7	3 or more	10																																							
Number: 1	3																																														
2	7																																														
3 or more	10																																														
SCORE THE FOLLOWING FACTOR ONLY IF PRIMARY OFFENSE IS COMPLETED CARJACKING																																															
◆ Felony Kidnapping or Felony Assault (other than use of firearm) scored as additional offense If YES, add 57 →																																															
Total Score																																															
See Robbery Section C Recommendation Table for guidelines sentence range.																																															

Amending the robbery guidelines in this way is expected to improve the compliance rate in these cases, while providing a more balanced split between aggravation and mitigation departures (Figure 60). Given judicial sentencing practices from FY2000 through FY2006, compliance with the sentencing guidelines is anticipated to increase from 22% to 61%. Aggravation departures are expected to decline from 56% to 17%, with mitigation departures remaining at 22%. The proposed modification will bring the sentencing guidelines more in line with judicial practices in these cases.

FIGURE 60

CURRENT AND PROJECTED SENTENCING GUIDELINES COMPLIANCE RATES IN ROBBERY CASES WITH ACCOMPANYING SECOND-DEGREE MURDER CONVICTION

	Compliance	Mitigation	Aggravation
Current	22%	22%	56%
Projected	61%	22%	17%

RECOMMENDATION 4

Amend the larceny sentencing guidelines to better reflect current judicial sentencing practices in cases of larceny of a firearm and to ensure this crime will be scored as an additional offense when it accompanies a conviction for burglary of a dwelling.

ISSUE

While overall compliance with existing guidelines for larceny of a firearm is quite high, compliance is lower in those cases in which the guidelines recommendation includes a prison term. In addition, when judges do depart from the recommended prison term, they are four times more likely to sentence below the guidelines recommendation than above it. This suggests that the guidelines could be refined to more closely reflect judicial thinking in these cases. In addition, under the current guidelines, larceny of a firearm is scored as the primary offense when an offender is convicted of this crime together with a burglary of a dwelling. This results in a lower sentence recommendation than if the case were scored on the burglary of dwelling guidelines.

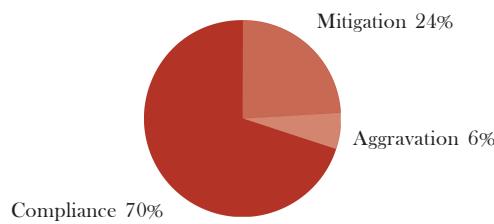
DISCUSSION

Each year, the Commission closely analyzes compliance with the guidelines by offense, including departure patterns, to pinpoint specific areas where the guidelines may need adjustment to better reflect current judicial thinking. While overall compliance with the guidelines for larceny of a firearm is as high as 78%, judges are less likely to comply with the guidelines when the

recommendation includes a prison term. When the guidelines recommend a term that includes prison for larceny of a firearm, compliance drops to 70% (this excludes cases with an accompanying conviction for burglary of a dwelling). Even more striking is the departure pattern in these cases. The departure pattern reveals that judges are much more likely to sentence below the guidelines range than above the range in these cases (Figure 61). The mitigation rate (24%) is four times higher than the aggravation rate (6%).

FIGURE 61

**SENTENCING GUIDELINES COMPLIANCE WITH LARCENY OF FIREARM CASES (NO ACCOMPANYING BURGLARY), PRISON (SECTION C) RECOMMENDATIONS ONLY FY2001 - FY2005
NUMBER OF CASES = 47**



In addition, the guidelines have been criticized for being too low when an offender is convicted of larceny of a firearm together with burglary of a dwelling. For scoring the sentencing guidelines, if there are two offenses with the same statutory maximum penalty, the primary offense is the offense that receives the greatest number of points on the Primary Offense factor on Section C of the respective guidelines worksheets. Burglary of a dwelling (no deadly weapon) carries a statutory maximum penalty of 20 years, as does larceny of a firearm. If an offender is convicted of both of these crimes, larceny of a firearm is selected as the primary offense for scoring the guidelines because it receives more points on the Section C Primary Offense factor than does the burglary charge. Scoring this case on the larceny sentencing guidelines produces a much lower recommendation than if the case were scored on the guidelines for burglary of a dwelling.

The Commission recommends refining the guidelines for larceny of a firearm to better reflect current judicial sentencing practices and to ensure that this crime will be scored as an additional offense when an offender is also convicted for burglary of a dwelling. The proposed modification is shown in Figure 62. Specifically, the Commission recommends modifying the Primary Offense scores for larceny of a firearm that appear on Section C of the larceny guidelines. Under the proposal, the primary offense score for an offender who does not have a prior violent felony conviction (i.e., the "Other" category score shown in Figure 62) would change from 22 to 17 points. For an offender who has a Category II prior violent felony conviction (i.e., a prior conviction for a felony listed in § 17.1-805 with a statutory maximum penalty of less than 40 years), the primary offense score would change from 44 to 34 points. Finally, the primary offense score for

FIGURE 62
PROPOSED PRIMARY OFFENSE FACTOR
LARCENY GUIDELINES - SECTION C WORKSHEET

Primary Offense Factor			
	Score	Score	Score
A. Attempted or conspired larceny (1 count)	8	4	2
B. Statutory maximum penalty equals 5 or 10 years			
1 count	20	10	5
2 counts	28	14	7
3 counts	40	20	10
C. Grand larceny auto			
1 count	32	16	8
2 - 3 counts	56	28	14
4 counts	72	36	18
D. Grand larceny from person			
1 count	40	20	10
2 counts	56	28	14
3 counts	68	34	17
E. Grand larceny of a firearm (1 count)	88	68	44 34 22 17
F. Failure of bailee to return animal, aircraft, vehicle or boat (1 count)	28	14	7
G. Larceny of bank notes, checks, etc. or any book of accounts			
1 - 2 counts	32	16	8
3 counts	96	48	24
H. Any other larceny offense with a maximum penalty of 20 years			
1 count	28	14	7
2 counts	44	22	11
3 counts	56	28	14

an offender with a Category I prior violent felony conviction (i.e., a prior conviction for a felony listed in § 17.1-805 with a statutory maximum penalty of 40 years or more), would change from 88 to 68 points under the proposal.

While the proposal reduces the Primary Offense scores for larceny of a firearm on Section C, the proposed changes more accurately reflect current judicial practices and are expected to increase judicial concurrence with the guidelines in these cases (Figure 63). Given actual judicial sentencing practices from FY2000 through FY2005, compliance with the sentencing guidelines for this crime is anticipated to increase from 70% to 77%. This change is also expected to reduce the disproportionate rate at which judges have been sentencing below the guidelines in recent years. Mitigation departures are expected to decline from 24% to 15%. This change would also affect cases

in which offenders have been convicted for both larceny of a firearm and burglary of a dwelling. Under the proposed primary offense scores, larceny of a firearm will no longer be selected as the primary offense when the offender has also been convicted for a burglary of a dwelling. This change ensures that burglary of a dwelling will be selected as the primary offense for scoring the sentencing guidelines whenever these two crimes appear together in a case.

FIGURE 63

**CURRENT AND PROJECTED SENTENCING GUIDELINES COMPLIANCE RATES IN LARCENY OF FIREARM CASES (NO ACCOMPANYING BURGLARY), PRISON (SECTION C) RECOMMENDATIONS ONLY
FY2001 - FY2005
NUMBER OF CASES = 47**

	Compliance	Mitigation	Aggravation
Current	70%	24%	6%
Projected	77%	15%	8%

RECOMMENDATION 5

Amend the Schedule I/II drug sentencing guidelines to ensure that drug offenders will always receive a sentence recommendation for more than six months of incarceration whenever the drug charge is accompanied by an offense that requires a mandatory minimum sentence of at least six months

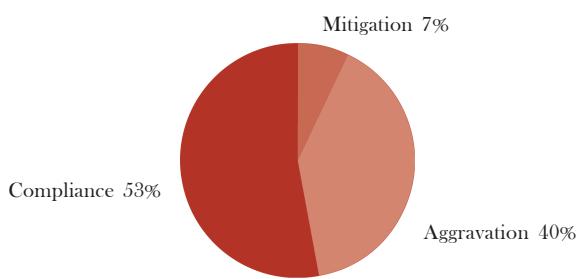
ISSUE

Currently, the sentencing guidelines for Schedule I or II drug offenses always recommend drug offenders for more than six months of incarceration whenever the offender has an accompanying conviction for a firearm charge that carries a mandatory minimum term of confinement. There are other types of crimes, however, unrelated to firearms, that carry a mandatory minimum penalty. Many of these require at least six months of confinement. For example, assault on a law enforcement officer, a habitual traffic offender violation, and a fourth conviction for driving while intoxicated within 10 years all require mandatory incarceration of at least six months. Drug offenders who have an additional conviction for a non-firearm offense that carries a mandatory minimum penalty are not automatically recommended by the guidelines for a term of incarceration long enough to account for the mandatory term and the drug charge.

DISCUSSION

This recommendation is designed to address Schedule I/II drug cases in which the offender has been convicted of an additional offense, unrelated to a firearm, that nonetheless carries a mandatory minimum penalty of at least six months. In some cases, such as those in which the primary offense is simple possession of a Schedule I or II drug, the current sentencing guidelines recommend probation or incarceration less than the mandatory term required by law. Guidelines preparers are instructed to adjust the guidelines range to be equal to the required mandatory term whenever the guidelines fall short of that term. When the guidelines range has been adjusted in this manner, the judge must sentence the offender exactly to the mandatory minimum term in order to be considered in compliance with the guidelines. If the judge sentences the offender to any additional time for the drug offense, the sentence is recorded as an aggravation departure from the guidelines.

FIGURE 64
SENTENCING GUIDELINES COMPLIANCE IN SCHEDULE I/II DRUG POSSESSION CASES WITH ACCOMPANYING OFFENSE CARRYING A MANDATORY MINIMUM PENALTY OF SIX MONTHS OR MORE
FY2001 - FY2005
NUMBER OF CASES = 285



In these circumstances, it appears judges often give drug offenders some additional time to serve for the possession of a Schedule I or II drug conviction, beyond the statutorily-prescribed mandatory minimum term for the accompanying charge. Guidelines data indicate that when a conviction for possession of a Schedule I or II drug is accompanied by a non-firearm offense for which at least six months of incarceration is statutorily required, judges have complied with the guidelines recommendation in 53% of the cases (Figure 64). In nearly all of the departures, judges sentenced the offender to a term above the guidelines recommendation. For FY2001-FY2005 cases, the aggravation rate was 40%. It is evident that the guidelines could be adjusted to more accurately reflect judicial thinking in these specific circumstances.

The Commission recommends expanding an existing factor on Section A of the Schedule I/II drug guidelines. This factor currently is scored only in cases in which the drug charge is accompanied by a conviction for a firearm offense carrying a mandatory minimum penalty. Under the proposal, the factor would be expanded to include non-firearm offenses with mandatory minimums. Specifically, the expanded factor would be scored in any case with an offense requiring a mandatory minimum penalty of six months or more. The expanded factor is shown in Figure 65. With this change, offenders will automatically receive a sentence recommendation for more than six months of incarceration whenever the drug charge is accompanied by an offense that requires a mandatory minimum sentence of at least six months. For cases fitting this profile, this means the score on Section A of the Schedule I/II drug guidelines will always require the completion of the Section C worksheet. The proposed modification will increase sentence

recommendations for some offenders. This change, however, provides a recommended range that, in most of the affected cases, will allow a judge to sentence an offender to serve time for the drug possession, in addition to the mandatory minimum term required for the accompanying offense, and still be in compliance with the sentencing guidelines.

By amending the Schedule I/II drug guidelines in this way, judicial concurrence with the guidelines is expected to improve. The modification is also expected to yield a more balanced split between aggravation and mitigation departures (Figure 66). Given judicial sentencing practices from FY2000 through FY2005, compliance with the sentencing guidelines is anticipated to increase from 53% to 64%, while aggravation departures should decline from 40% to approximately 20%.

FIGURE 65
PROPOSED ROBBERY SECTION C WORKSHEET

Drug/Schedule I/II → Section A		Offender Name: _____
◆ Primary Offense		
A. Possess Schedule I or II drug		
1 count	2 counts	3 counts
4 counts	5 counts	6 counts
7 counts	8 counts	9 counts
10 counts	11 counts	12 counts
13 counts	14 counts	15 counts
16 counts	17 counts	18 counts
19 counts	20 counts	21 counts
22 counts	23 counts	24 counts
25 counts	26 counts	27 counts
28 counts	29 counts	30 counts
31 counts	32 counts	33 counts
34 counts	35 counts	36 counts
37 counts	38 counts	39 counts
40 counts	41 counts	42 counts
43 counts	44 counts	45 counts
46 counts	47 counts	48 counts
49 counts	50 counts	51 counts
52 counts	53 counts	54 counts
55 counts	56 counts	57 counts
58 counts	59 counts	60 counts
61 counts	62 counts	63 counts
64 counts	65 counts	66 counts
67 counts	68 counts	69 counts
70 counts	71 counts	72 counts
73 counts	74 counts	75 counts
76 counts	77 counts	78 counts
79 counts	80 counts	81 counts
82 counts	83 counts	84 counts
85 counts	86 counts	87 counts
88 counts	89 counts	90 counts
91 counts	92 counts	93 counts
94 counts	95 counts	96 counts
97 counts	98 counts	99 counts
100 counts	101 counts	102 counts
103 counts	104 counts	105 counts
106 counts	107 counts	108 counts
109 counts	110 counts	111 counts
112 counts	113 counts	114 counts
115 counts	116 counts	117 counts
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121 counts	122 counts	123 counts
124 counts	125 counts	126 counts
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145 counts	146 counts	147 counts
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1012 counts	1013 counts	1014 counts
1015 counts		



APPENDICES

APPENDIX 1
JUDICIAL REASONS FOR DEPARTURE FROM SENTENCING GUIDELINES
PROPERTY, DRUG AND MISCELLANEOUS OFFENSES

Reasons for MITIGATION	Burg. of Dwelling (N=180)	Burg. Structure (N=92)	Other Sch. I/II Drugs (N=639)	Other Drugs (N=34)	Fraud (N=267)	Larceny (N=385)	Misc (N=63)	Traffic (N=107)
No reason given	31	15	143	15	49	80	20	38
Minimal property or monetary loss	1	6	0	0	1	11	2	10
Minimal circumstances/facts of the case	24	0	31	1	19	24	8	0
Offender not the leader	1	2	5	0	0	1	0	0
Small amount of drugs involved in the case	1	0	17	0	0	0	1	0
Offender and victims are relatives/friends; Victim Request	4	2	1	0	2	6	0	0
Little or no injury/offender did not intend to harm;								
victim requested lenient sentence	4	1	0	0	6	9	1	1
Offender has no prior record	0	0	7	1	1	0	1	0
Offender has minimal prior record	10	3	17	2	7	7	3	2
Offender's criminal record overstates his degree of criminal orientation	1	1	18	0	3	7	3	1
Offender cooperated with authorities	19	7	79	4	14	27	9	2
Offender is mentally or physically impaired	7	3	21	2	12	13	2	4
Offender has emotional or psychiatric problems	1	2	7	0	4	8	0	0
Offender has drug or alcohol problems	5	1	4	0	1	5	0	0
Offender needs counseling	0	1	3	0	1	2	1	0
Offender has good potential for rehabilitation	12	10	46	2	45	31	3	13
Offender shows remorse	6	1	5	1	3	3	0	1
Age of Offender	2	3	8	0	1	1	0	0
Jury sentence	2	1	1	1	0	1	0	2
Multiple charges are being treated as one criminal event	0	1	1	0	1	2	0	0
Guilty plea	0	1	1	0	1	2	0	0
Sentence recommended by Commonwealth Attorney or probation officer	8	5	36	4	16	14	1	2
Weak evidence or weak case	6	2	19	1	9	11	4	3
Plea agreement	22	14	142	6	66	109	10	26
Sentencing consistency with co-defendant or with similar cases in the jurisdiction	3	0	10	0	1	3	0	1
Time served	9	5	13	1	7	11	2	0
Offender already sentenced by another court or in previous proceeding for other offenses	0	5	21	0	14	12	1	1
Offender will likely have his probation revoked	0	1	5	0	4	4	0	0
Offender is sentenced to an alternative punishment to incarceration	22	13	47	1	16	25	0	0
Guidelines recommendation is too harsh	3	1	4	0	5	3	0	1
Guidelines recommendation exceeded the statutory maximum	2	0	0	0	0	0	0	0
Judge rounded guidelines minimum to nearest whole year	2	4	3	0	1	2	0	0
Other mitigating factors	4	2	9	0	3	7	0	2

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=114)	Burg. Other Structure (N=71)	Sch. I/II Drugs (N=683)	Other Drugs (N=101)	Fraud (N=162)	Larceny (N=428)	Misc N=94)	Traffic (N=222)
No reason given	21	18	155	18	30	87	26	61
Extreme property or monetary loss	3	2	0	0	7	28	0	0
The offense involved a high degree of planning	2	0	2	1	8	22	0	1
Aggravating circumstances/flagrancy of offense	32	9	54	6	16	32	12	27
Offender used a weapon in commission of the offense	0	0	3	2	0	4	0	0
Offender was the leader	0	1	0	0	0	3	0	0
Offender's true offense behavior was more serious than offenses at conviction	3	1	30	2	7	21	5	3
Offender is related to or is the caretaker of the victim	8	0	1	0	2	1	5	0
Extraordinary amount of drugs or purity of drugs involved in the case	0	0	9	5	0	0	0	1
Aggravating circumstances relating to sale of drugs	0	0	4	5	0	0	0	0
Drugs were involved	0	0	2	1	0	1	0	0
Offender immersed in drug culture	0	0	2	0	0	0	1	0
Unprovoked attack	0	1	0	0	1	0	0	0
Victim vulnerability	0	0	1	0	2	2	6	1
Victim request	0	1	2	0	5	2	2	9
Victim injury	4	0	5	0	0	0	11	5
Previous punishment of offender has been ineffective	5	2	21	3	6	17	3	11
Offender was under some form of legal restraint at time of offense	1	0	24	4	4	9	0	4
Offender has a serious juvenile record	0	0	1	1	0	2	0	0
Offender's criminal record understates the degree of his criminal orientation	8	5	33	5	11	34	2	9
Offender has previous conviction(s) or other charges for the same type of offense	6	3	50	12	15	23	3	31
New crime committed after current offense	0	0	22	3	3	8	1	5
Offender failed to cooperate with authorities	2	0	23	3	1	19	0	3
Offender has drug or alcohol problems	0	0	10	1	0	5	0	5
Offender has poor rehabilitation potential	8	1	30	2	10	26	1	19
Offender shows no remorse	3	5	8	2	4	11	3	7
Age of offender	1	0	0	0	0	0	0	0
Jury sentence	6	6	17	0	4	12	3	8
Sentence recommended by Commonwealth Attorney or probation officer	1	0	6	1	4	0	0	1
Plea agreement	13	15	136	21	31	62	21	27
Community sentiment	0	0	5	1	1	0	0	3
Sentencing consistency with codefendant or with other similar cases in the jurisdiction	0	3	3	1	0	3	1	0
Teach offender a lesson	0	0	2	0	1	2	0	1
Offender is sentenced to an alternative punishment to incarceration	8	3	45	7	9	17	0	5
Guidelines recommendation is too low	10	3	36	1	11	28	4	14
Mandatory minimum penalty is required in the case	1	1	12	4	2	0	2	5
Judge rounded guidelines minimum to nearest whole year	1	1	6	0	4	10	1	1
Other reason for aggravation	4	2	11	0	2	6	1	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**

Reasons for MITIGATION	Assault (N=179)	Homicide (N=45)	Kidnapping (N=13)	Robbery (N=163)	Rape (N=46)	Sexual Assault (N=67)
No reason given	25	7	2	24	10	7
Minimal property or monetary loss	0	0	0	0	0	0
Minimal circumstances/facts of the case	13	5	3	17	4	1
Offender was not the leader or active participant in offense	1	0	0	10	0	0
Offender and victim are related or friends	5	1	1	1	1	2
Little or no victim injury/offender did not intend to harm; victim requested lenient sentence	22	4	0	2	7	2
Victim was a willing participant or provoked the offense	8	1	3	0	0	0
Offender has no prior record	3	1	1	8	1	0
Offender has minimal prior criminal record	3	1	0	7	0	1
Offender's criminal record overstates his degree of criminal orientation	1	7	0	2	0	0
Offender cooperated with authorities or aided law enforcement	6	0	2	35	2	1
Offender has emotional or psychiatric problems	3	0	0	0	0	0
Offender is mentally or physically impaired	5	0	0	6	0	5
Offender has drug or alcohol problems	1	0	0	1	1	0
Offender needs counseling	1	0	0	1	0	0
Offender has good potential for rehabilitation	13	1	3	12	1	2
Offender shows remorse	5	2	0	5	2	3
Age of offender	3	0	1	10	1	3
Multiple charges are being treated as one criminal event	0	0	0	2	0	1
Jury sentence	2	11	0	1	2	2
Sentence was recommended by Commonwealth's attorney or probation officer	11	2	2	14	0	1
Weak evidence or weak case against the offender	8	4	4	8	3	5
Plea agreement	68	3	5	20	4	18
Sentencing consistency with codefendant or with other similar cases in the jurisdiction	0	0	0	6	0	0
Time served	7	0	2	1	0	4
Offender already sentenced by another court or in previous proceeding for other offenses	2	0	0	5	0	1
Offender will likely have his probation revoked	2	0	1	0	0	0
Offender is sentenced to an alternative punishment to incarceration	14	0	0	13	3	2
Guidelines recommendation is too harsh	1	0	1	2	1	0
Attempt, not a completed act	0	0	0	0	0	0
Guidelines recommendation exceeded the statutory maximum	0	0	0	0	0	0
Judge rounded guidelines minimum to nearest whole year	4	0	0	3	0	0
Other reasons for mitigation	4	1	0	2	0	2

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

Reasons for AGGRAVATION	Assault (N=141)	Homicide (N=49)	Kidnapping (N=24)	Robbery (N=96)	Rape (N=15)	Sexual Assault (N=64)
No reason given	23	2	2	14	0	9
The offense involved a high degree of planning	0	0	4	0	1	1
Aggravating circumstances/flagrancy of offense	25	9	6	22	3	16
Offender used a weapon in commission of the offense	4	3	2	6	0	0
Offender's true offense behavior was more serious than offenses at conviction	11	2	0	3	1	6
Offender is related to or is the caretaker of the victim	2	0	0	0	1	3
Offense was an unprovoked attack	1	1	0	1	0	0
Offender knew of victim's vulnerability	5	1	1	6	1	8
The victim(s) wanted a harsh sentence	2	1	0	5	0	9
Extreme violence or severe victim injury	21	13	4	9	2	0
Previous punishment of offender has been ineffective	1	0	0	1	0	0
Offender was under some form of legal restraint at time of offense	0	0	0	1	0	0
Offender's record understates the degree of his criminal orientation 2	2	0	2	0	0	0
Offender has previous conviction(s) or other charges for the same offense	4	1	0	5	0	0
New crime committed after current offense	0	0	0	0	0	1
Offender failed to cooperate with authorities	2	2	0	0	0	2
Offender has mental health problems	0	0	0	0	1	0
Offender has drug or alcohol problems	0	2	0	0	1	0
Offender has poor rehabilitation potential	7	4	1	9	3	1
Offender shows no remorse	3	1	0	2	3	6
Jury sentence	15	10	5	12	4	1
Sentence was recommended by Commonwealth's attorney or probation officer	1	2	1	3	0	0
Plea agreement	20	4	3	5	0	7
Community sentiment	1	0	0	4	0	0
Offender is sentenced to an alt. punishment to incarceration	0	0	0	0	0	1
Guidelines recommendation is too low	17	3	2	9	1	5
Mandatory minimum penalty is required in the case	1	0	0	4	0	0
Judge rounded guidelines minimum to nearest whole year	3	1	1	0	0	1
Other reasons for aggravation	3	0	0	1	3	6

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, DRUGS, AND MISCELLANEOUS OFFENSES**

BURGLARY OF DWELLING					BURGLARY OF OTHER STRUCTURE				OTHER DRUGS				SCHEDULE I/II DRUGS						
Circuit	Compliance	Mitigation	Aggravation	# of Cases	Circuit	Compliance	Mitigation	Aggravation	# of Cases	Circuit	Compliance	Mitigation	Aggravation	# of Cases	Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	83.9%	12.9%	3.2%	31	1	76.2%	9.5%	14.3%	21	1	91.3%	8.7%	0.0%	23	1	85.3%	3.1%	11.6%	259
2	62.1	22.7	15.2	66	2	79.5	11.4	9.1	44	2	86.1	7.6	6.3	79	2	86.0	6.7	7.3	498
3	70.6	17.6	11.8	17	3	70.6	17.6	11.8	17	3	73.9	4.3	21.7	23	3	84.8	8.2	7.0	514
4	69.1	23.6	7.3	55	4	85.7	10.7	3.6	28	4	90.7	4.7	4.7	43	4	81.8	13.5	4.7	813
5	59.4	28.1	12.5	32	5	84.6	15.4	0.0	13	5	90.0	10.0	0.0	10	5	84.8	4.8	10.5	105
6	53.8	15.4	30.8	13	6	68.8	12.5	18.8	16	6	64.3	7.1	28.6	14	6	80.4	5.2	14.4	97
7	84.0	4.0	12.0	25	7	76.5	11.8	11.8	17	7	88.5	3.8	7.7	26	7	92.9	1.7	5.4	350
8	86.4	4.5	9.1	22	8	100.0	0.0	0.0	13	8	100.0	0.0	0.0	6	8	86.6	5.6	7.7	142
9	53.8	23.1	23.1	26	9	73.3	6.7	20.0	15	9	84.2	5.3	10.5	19	9	84.0	8.3	7.8	206
10	65.4	19.2	15.4	26	10	85.0	15.0	0.0	20	10	80.0	5.0	15.0	20	10	83.0	10.4	6.6	182
11	85.7	7.1	7.1	14	11	100.0	0.0	0.0	7	11	70.0	0.0	30.0	10	11	88.3	5.8	5.8	103
12	57.6	15.2	27.3	33	12	70.0	16.7	13.3	30	12	69.4	4.1	26.5	49	12	72.7	3.5	23.8	231
13	85.7	14.3	0.0	21	13	76.9	11.5	11.5	26	13	100.0	0.0	0.0	14	13	85.0	8.5	6.5	615
14	73.9	15.2	10.9	46	14	52.6	31.6	15.8	19	14	80.4	8.7	10.9	46	14	75.9	11.4	12.7	386
15	58.2	21.8	20.0	55	15	61.3	22.6	16.1	31	15	70.3	1.4	28.4	74	15	67.6	8.3	24.0	408
16	61.5	26.9	11.5	26	16	78.9	5.3	15.8	19	16	83.3	0.0	16.7	24	16	80.4	8.1	11.5	148
17	33.3	0.0	66.7	6	17	77.8	5.6	16.7	18	17	76.0	0.0	24.0	25	17	83.1	8.1	8.9	124
18	50.0	33.3	16.7	18	18	82.4	17.6	0.0	17	18	100.0	0.0	0.0	7	18	87.2	8.5	4.3	94
19	77.8	11.1	11.1	27	19	60.7	32.1	7.1	28	19	90.4	1.4	8.2	73	19	85.6	9.8	4.6	306
20	78.6	21.4	0.0	14	20	100.0	0.0	0.0	5	20	91.4	5.7	2.9	35	20	91.3	4.9	3.9	108
21	65.0	35.0	0.0	20	21	60.0	40.0	0.0	10	21	100.0	0.0	0.0	7	21	78.9	16.8	4.2	95
22	79.2	16.7	4.2	24	22	67.9	10.7	21.4	28	22	88.9	0.0	11.1	18	22	74.0	9.1	16.9	154
23	38.7	51.6	9.7	31	23	65.0	30.0	5.0	20	23	86.7	6.7	6.7	30	23	81.4	11.2	7.4	285
24	45.8	35.4	18.8	48	24	55.6	22.2	22.2	18	24	81.5	11.1	7.4	27	24	78.6	13.2	8.2	257
25	70.0	17.5	12.5	40	25	78.0	13.6	8.5	39	25	92.3	2.6	5.1	39	25	80.0	10.9	9.1	330
26	69.0	24.1	6.9	29	26	56.5	21.7	21.7	28	26	88.5	3.8	7.7	26	26	81.4	10.4	8.2	269
27	73.0	13.5	13.5	37	27	88.5	3.8	7.7	26	27	96.9	0.0	3.1	32	27	91.4	5.1	3.5	257
28	80.0	10.0	10.0	20	28	68.2	13.6	18.2	22	28	89.7	3.4	6.9	29	28	90.1	3.5	6.4	141
29	65.2	19.6	15.2	46	29	71.4	4.8	23.8	21	29	76.7	0.0	23.3	30	29	61.2	7.8	31.1	108
30	81.8	13.6	4.5	22	30	100.0	0.0	0.0	5	30	83.3	5.6	11.1	18	30	89.5	3.5	7.0	86
31	62.5	12.5	25.0	16	31	90.0	10.0	0.0	10	31	100.0	0.0	0.0	14	31	85.5	7.2	7.2	138
Total	66.6	20.4	13.0	906	Total	74.1	14.6	11.3	646	Total	84.4	3.9	11.7	890	Total	82.4	8.5	9.1	7794

APPENDIX 3

SENTENCING GUIDELINES COMPLIANCE BY JUDICIAL CIRCUIT: PROPERTY, DRUGS, AND MISCELLANEOUS OFFENSES

FRAUD					LARCENY					TRAFFIC					MISCELLANEOUS				
Circuit	Compliance	Mitigation	Aggravation	# of Cases	Circuit	Compliance	Mitigation	Aggravation	# of Cases	Circuit	Compliance	Mitigation	Aggravation	# of Cases	Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	96.6%	3.4%	0.0%	87	1	88.7%	5.1%	6.2%	195	1	90.7%	2.1%	7.2%	97	1	66.7%	25.0%	8.3%	12
2	86.1	7.9	6.0	151	2	86.6	8.5	4.8	351	2	80.9	5.2	13.9	173	2	94.6	27	27	37
3	74.4	25.6	0.0	39	3	89.4	2.9	7.7	104	3	86.4	9.1	4.5	22	3	83.3	8.3	8.3	12
4	87.8	8.9	3.3	123	4	82.6	11.8	5.6	357	4	82.9	7.1	10.0	70	4	65.7	29	31.4	35
5	90.5	9.5	0.0	63	5	80.6	9.7	9.7	103	5	86.4	3.4	10.2	59	5	66.7	25.9	7.4	27
6	83.7	14.0	2.3	48	6	71.7	10.9	17.4	46	6	92.3	3.8	3.8	26	6	56.3	25.0	18.8	16
7	85.5	13.0	1.4	69	7	89.7	5.2	5.2	97	7	85.9	5.6	8.5	71	7	84.6	0.0	15.4	26
8	93.2	6.8	0.0	44	8	82.7	11.8	5.5	110	8	90.9	6.1	3.0	33	8	92.3	0.0	7.7	13
9	83.6	3.6	12.7	55	9	77.0	6.9	16.1	87	9	74.7	4.0	21.3	75	9	33.3	0.0	66.7	3
10	89.5	8.1	2.3	86	10	90.4	4.8	4.8	83	10	83.9	4.8	11.3	62	10	81.8	4.5	13.6	22
11	84.6	7.7	7.7	52	11	85.4	6.3	8.3	48	11	81.8	4.5	13.6	22	11	82.4	5.9	11.8	17
12	80.3	7.6	12.1	132	12	81.7	5.6	12.7	252	12	89.2	9.6	1.2	83	12	80.0	16.0	40	25
13	78.5	13.8	7.7	65	13	82.8	11.7	5.5	145	13	90.6	0.0	9.4	32	13	83.3	10.0	6.7	30
14	80.3	14.6	5.1	137	14	83.3	8.0	8.7	401	14	90.2	2.4	7.3	82	14	64.3	9.5	26.2	42
15	83.9	6.7	9.4	224	15	74.3	8.5	17.2	343	15	82.9	2.6	14.5	152	15	82.9	9.8	7.3	41
16	83.6	8.2	8.2	73	16	80.8	8.3	10.8	120	16	84.3	10.0	5.7	70	16	47.1	23.5	29.4	17
17	88.7	4.8	6.5	62	17	83.5	2.9	13.7	139	17	76.5	2.9	20.6	34	17	33.3	33.3	33.3	6
18	89.2	6.2	4.6	65	18	91.6	3.6	4.8	166	18	63.6	18.2	18.2	11	18	40.0	40.0	20.0	5
19	87.7	8.6	3.7	163	19	84.5	7.6	7.9	304	19	80.2	0.9	18.9	106	19	66.7	11.1	22.2	18
20	86.4	4.5	9.1	88	20	94.7	0.0	5.3	113	20	83.1	3.4	13.6	59	20	88.9	0.0	11.1	9
21	84.1	15.9	0.0	44	21	85.1	8.9	5.9	101	21	86.7	13.3	0.0	30	21	80.0	10.0	10.0	20
22	81.7	9.8	8.5	82	22	82.6	6.6	10.8	167	22	73.1	5.8	21.2	52	22	79.2	0.0	20.8	24
23	71.4	19.3	9.2	119	23	75.8	16.4	7.8	128	23	75.6	4.4	20.0	45	23	73.3	6.7	20.0	15
24	78.1	18.2	3.6	137	24	75.4	17.4	7.2	167	24	77.9	10.4	11.7	77	24	74.1	11.1	14.8	27
25	86.2	8.8	5.0	159	25	86.0	7.3	6.7	164	25	76.3	10.5	13.2	76	25	66.7	3.7	29.6	27
26	79.0	11.8	9.2	119	26	82.4	10.0	7.6	170	26	84.0	4.7	11.3	106	26	60.9	17.4	21.7	23
27	93.1	5.0	1.9	160	27	94.7	4.0	1.3	151	27	98.3	1.7	0.0	59	27	76.0	16.0	8.0	25
28	85.9	10.3	3.8	78	28	89.7	7.2	3.1	97	28	76.1	15.2	8.7	46	28	70.0	10.0	20.0	10
29	76.5	10.6	12.9	85	29	70.5	6.1	23.5	132	29	58.6	10.3	31.0	29	29	80.0	0.0	20.0	5
30	87.9	9.1	3.0	33	30	88.2	5.3	6.6	76	30	77.8	11.1	11.1	27	30	66.7	25.0	8.3	12
31	83.3	10.0	6.7	60	31	82.9	7.6	9.5	105	31	72.1	7.0	20.9	43	31	69.2	7.7	23.1	13
Total	84.4	9.8	5.8	2897	Total	83.5	7.9	8.6	5022	Total	82.5	5.6	11.8	1929	Total	73.8	10.4	15.8	614

APPENDIX 4
SENTENCING GUIDELINES COMPLIANCE BY JUDICIAL CIRCUIT: OFFENSES AGAINST THE PERSON

ASSAULT					KIDNAPPING					HOMICIDE				
Circuit	Compliance	Mitigation	Aggravation	# of Cases	Circuit	Compliance	Mitigation	Aggravation	# of Cases	Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	81.1%	10.8%	8.1%	37	1	100.0%	0.0%	0.0%	2	1	33.3%	0.0%	66.7%	3
2	80.7	14.8	4.5	88	2	75.0	12.5	12.5	8	2	78.6	7.1	14.3	14
3	79.5	9.1	11.4	44	3	75.0	0.0	25.0	4	3	37.5	37.5	25.0	8
4	68.1	21.3	10.6	94	4	100.0	0.0	0.0	2	4	65.2	21.7	13.0	23
5	70.9	18.2	10.9	55	5	33.3	33.3	33.3	3	5	44.4	0.0	55.6	9
6	69.2	7.7	23.1	26	6	100.0	0.0	0.0	2	6	33.3	33.3	33.3	6
7	73.3	13.3	13.3	45	7	100.0	0.0	0.0	5	7	83.3	16.7	0.0	12
8	73.8	14.3	11.9	42	8	16.7	50.0	33.3	6	8	33.3	33.3	33.3	3
9	77.1	14.3	8.6	35	9	50.0	0.0	50.0	2	9	33.3	0.0	66.7	3
10	73.1	19.2	7.7	52	10	50.0	25.0	25.0	4	10	66.7	11.1	22.2	9
11	80.8	3.8	15.4	26	11	100.0	0.0	0.0	1	11	50.0	0.0	50.0	2
12	72.2	9.3	18.5	54	12	50.0	50.0	0.0	2	12	57.1	28.6	14.3	7
13	70.5	14.8	14.8	61	13	100.0	0.0	0.0	1	13	75.6	12.2	12.2	41
14	64.2	28.3	7.5	53	14	50.0	30.0	20.0	10	14	50.0	41.7	8.3	12
15	72.2	17.8	10.0	90	15	10.0	30.0	60.0	10	15	68.8	12.5	18.8	16
16	76.1	13.0	10.9	46	16	40.0	40.0	20.0	5	16	60.0	20.0	20.0	5
17	52.4	19.0	28.6	21	17	66.7	0.0	33.3	3	17	100.0	0.0	0.0	2
18	78.4	8.1	13.5	37	18	0.0	16.7	83.3	6	18	0.0	33.3	66.7	3
19	66.7	14.8	18.5	54	19	50.0	0.0	50.0	6	19	50.0	12.5	37.5	8
20	52.6	21.1	26.3	19	20	0.0	0.0	0.0	0	20	66.7	33.3	0.0	3
21	88.0	8.0	4.0	25	21	0.0	100.0	0.0	1	21	40.0	40.0	20.0	5
22	71.7	8.7	19.6	46	22	50.0	50.0	0.0	2	22	50.0	0.0	50.0	4
23	70.7	19.5	9.8	41	23	0.0	66.7	33.3	3	23	75.0	25.0	0.0	4
24	72.7	18.2	9.1	66	24	100.0	0.0	0.0	8	24	40.0	10.0	50.0	10
25	72.2	27.8	0.0	54	25	63.6	27.3	9.1	11	25	75.0	16.7	8.3	12
26	62.5	22.9	14.6	48	26	66.7	0.0	33.3	6	26	88.9	11.1	0.0	9
27	87.5	6.3	6.3	48	27	0.0	0.0	0.0	0	27	50.0	0.0	50.0	2
28	55.6	38.9	5.6	18	28	100.0	0.0	0.0	1	28	71.4	14.3	14.3	7
29	64.0	16.0	20.0	25	29	0.0	0.0	0.0	0	29	0.0	0.0	100.0	2
30	76.0	12.0	12.0	25	30	0.0	0.0	0.0	0	30	50.0	0.0	50.0	2
31	83.7	7.0	9.3	43	31	75.0	25.0	0.0	4	31	44.4	11.1	44.4	9
Total	72.9	15.7	11.4	1418	Total	55.1	20.3	24.6	118	Total	61.6	16.5	22.0	255

APPENDIX 4
SENTENCING GUIDELINES COMPLIANCE BY JUDICIAL CIRCUIT: OFFENSES AGAINST THE PERSON

ROBBERY					RAPE					OTHER SEXUAL ASSAULT				
Circuit	Compliance	Mitigation	Aggravation	# of Cases	Circuit	Compliance	Mitigation	Aggravation	# of Cases	Circuit	Compliance	Mitigation	Aggravation	# of Cases
1	58.8%	23.5%	17.6%	17	1	50.0%	50.0%	0.0%	4	1	66.7%	11.1%	22.2%	9
2	81.7	13.3	5.0	60	2	60.0	30.0	10.0	10	2	81.0	9.5	9.5	21
3	68.8	31.3	0.0	16	3	60.0	20.0	20.0	5	3	85.7	14.3	0.0	7
4	61.3	31.3	7.5	80	4	66.7	26.7	6.7	15	4	68.2	13.6	18.2	22
5	70.6	11.8	17.6	17	5	87.5	12.5	0.0	8	5	100.0	0.0	0.0	4
6	58.8	41.2	0.0	17	6	50.0	50.0	0.0	2	6	66.7	22.2	11.1	9
7	66.7	23.1	10.3	39	7	77.8	11.1	11.1	9	7	47.4	21.1	31.6	19
8	42.9	28.6	28.6	14	8	40.0	40.0	20.0	5	8	40.0	60.0	0.0	5
9	54.5	18.2	27.3	11	9	42.9	14.3	42.9	7	9	80.0	6.7	13.3	15
10	66.7	0.0	33.3	6	10	81.8	9.1	9.1	11	10	61.5	23.1	15.4	13
11	42.9	42.9	14.3	7	11	66.7	33.3	0.0	3	11	66.7	33.3	0.0	3
12	73.3	20.0	6.7	45	12	66.7	16.7	16.7	6	12	53.3	0.0	46.7	15
13	63.6	20.5	15.9	44	13	85.7	14.3	0.0	7	13	84.6	15.4	0.0	13
14	62.3	30.4	7.2	69	14	50.0	50.0	0.0	2	14	73.7	15.8	10.5	19
15	46.3	33.3	20.4	54	15	66.7	19.0	14.3	21	15	55.2	17.2	27.6	29
16	71.4	14.3	14.3	7	16	83.3	0.0	16.7	6	16	71.4	0.0	28.6	14
17	54.2	16.7	29.2	24	17	50.0	12.5	37.5	8	17	42.9	28.6	28.6	7
18	64.3	35.7	0.0	28	18	0.0	50.0	50.0	2	18	100.0	0.0	0.0	1
19	68.0	24.0	8.0	25	19	75.0	12.5	12.5	16	19	57.9	15.8	26.3	38
20	50.0	31.3	18.8	16	20	100.0	0.0	0.0	3	20	60.0	0.0	40.0	10
21	87.5	0.0	12.5	8	21	33.3	33.3	33.3	3	21	66.7	16.7	16.7	6
22	63.0	22.2	14.8	27	22	55.6	33.3	11.1	9	22	77.8	0.0	22.2	9
23	80.0	10.0	10.0	10	23	50.0	40.0	10.0	10	23	33.3	40.0	26.7	15
24	84.6	15.4	0.0	26	24	100.0	0.0	0.0	5	24	70.6	23.5	5.9	17
25	64.3	35.7	0.0	14	25	75.0	25.0	0.0	4	25	63.6	22.7	13.6	22
26	78.6	21.4	0.0	14	26	90.0	0.0	10.0	10	26	72.7	13.6	13.6	22
27	87.5	12.5	0.0	8	27	80.0	10.0	10.0	10	27	84.6	15.4	0.0	26
28	50.0	25.0	25.0	4	28	100.0	0.0	0.0	1	28	85.7	0.0	14.3	7
29	0.0	22.2	77.8	9	29	75.0	0.0	25.0	4	29	66.7	16.7	16.7	6
30	50.0	0.0	50.0	2	30	100.0	0.0	0.0	3	30	75.0	0.0	25.0	4
31	87.5	12.5	0.0	16	31	100.0	0.0	0.0	7	31	81.8	4.5	13.6	22
Total	64.6	24.1	11.3	735	Total	69.6	18.0	12.4	217	Total	67.2	15.1	17.7	430