

Virginia Criminal Sentencing Commission



**Presented to the
Senate Finance Public Safety Subcommittee**

January 18, 2013

Composition of the Sentencing Commission § 17.1-802

Chairman

Non-active member of the judiciary, appointed by the Chief Justice and confirmed by the General Assembly

6 Judges or justices appointed by the Chief Justice

2 Persons appointed by Speaker of the House of Delegates

1 Member of the House Courts Committee

1 Person appointed by Senate Rules Committee

1 Member of Senate Courts Committee

4 Persons appointed by Governor

(One must be a crime victim or represent a victims' organization)

Attorney General or his designee



Features of Truth-in-Sentencing (No Parole) Guidelines

- **Per § 19.2-298.01, a circuit judge must be presented with and review the sentencing guidelines**
- **Judicial compliance is voluntary, however, a written explanation must be filed when the sentence is outside of the guidelines**
- **No appellate review of guidelines departures**
- **Jury sentencing is retained, but juries do not receive sentencing guidelines information**
- **“Violent” offender definition is based on the entire criminal history including juvenile delinquency adjudications**



Activities in 2012

- **Monitoring and oversight of Virginia's Sentencing Guidelines system**
- **Training, education and other assistance on the preparation and use of Sentencing Guidelines**
- **Projecting the impact of proposed legislation (§ 30-19.1:4)**
- **Assisting the Secretary of Public Safety with the prison and jail population forecasting process**
- **Providing technical assistance to other agencies as requested**



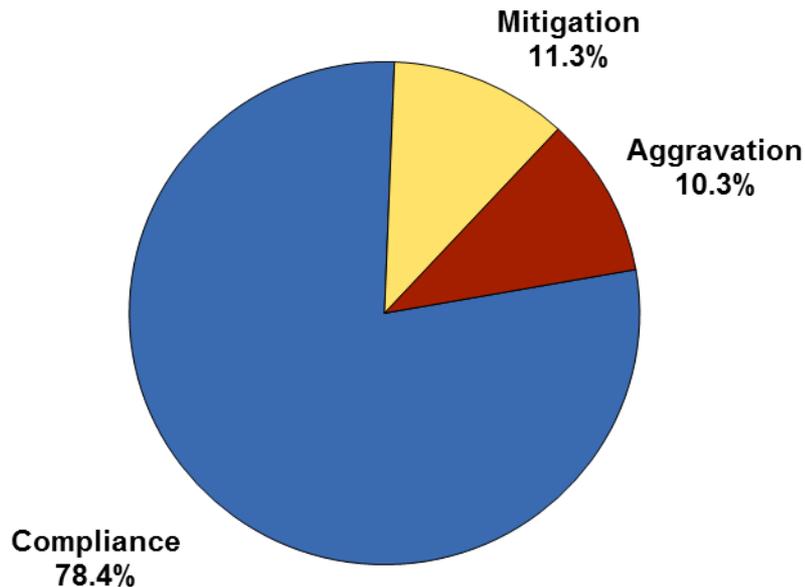
Activities in 2012

- **Continued work on the Study of Crimes Committed in the Presence of Children**
- **Completed large study to update the Commission's Nonviolent Offender Risk Assessment Instrument**
- **Designed and began implementing Virginia's Immediate Sanction Probation Pilot Program**

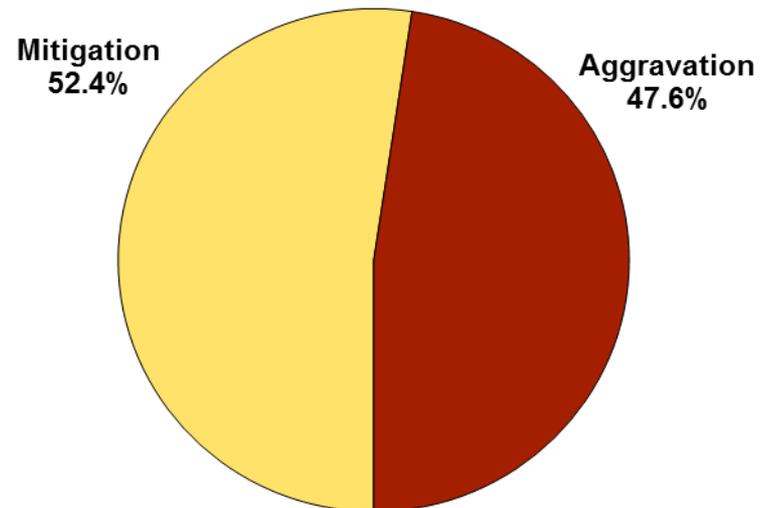


Judicial Compliance/Concurrence with Sentencing Guidelines

Overall Compliance



Direction of Departures

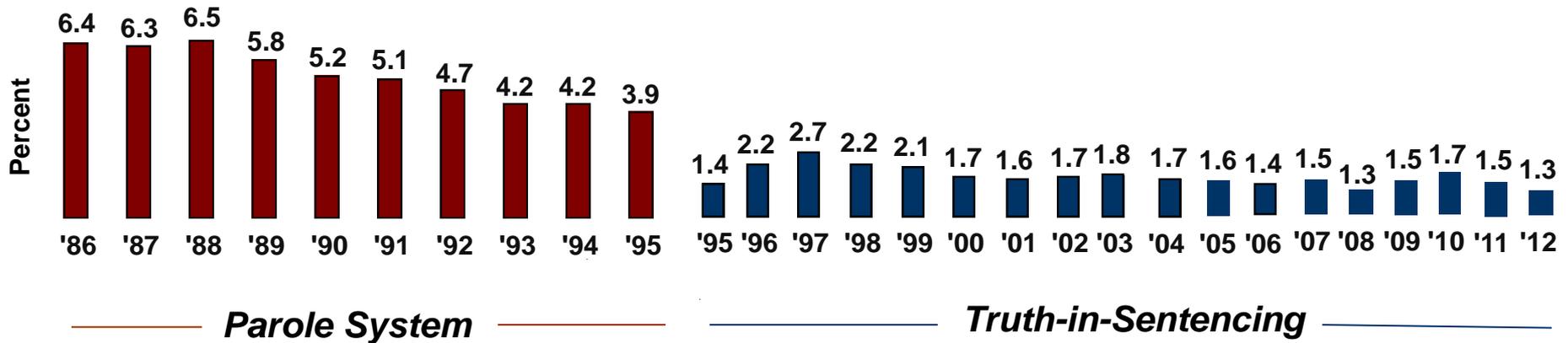


FY2012

Number of Cases = 23,268

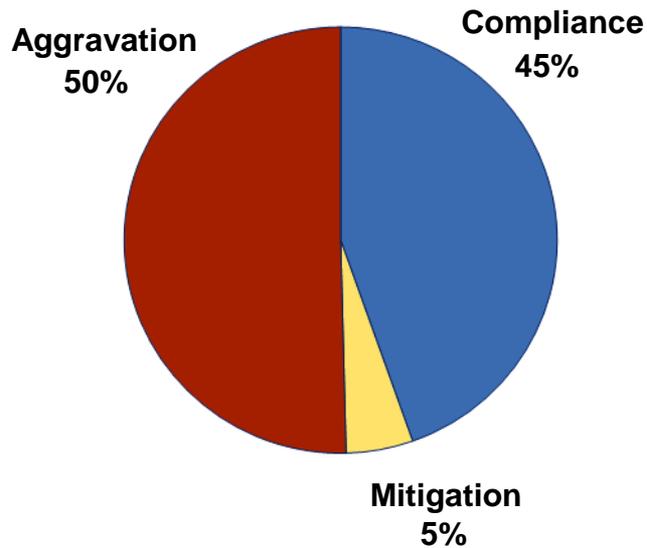
Of the state's 31 circuits, 11 circuits had compliance rates of 80% or higher, while 13 circuits had compliance rates between 75% and 79%. The remaining 7 circuits had compliance rates below 75%.

Felony Conviction Cases Adjudicated by Juries Parole System v. Truth-in-Sentencing System

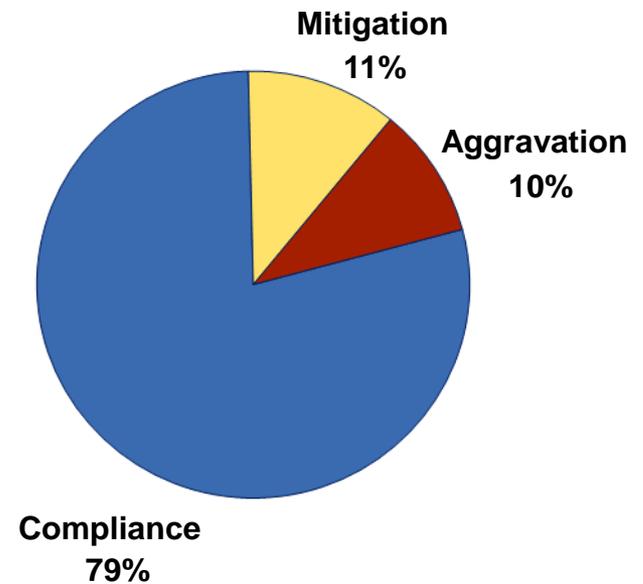


Concurrence with the Sentencing Guidelines in Jury and Non-Jury Cases

Jury Cases*
N=286



Non-Jury Cases
N=22,982



FY2012

Number of Cases = 23,268

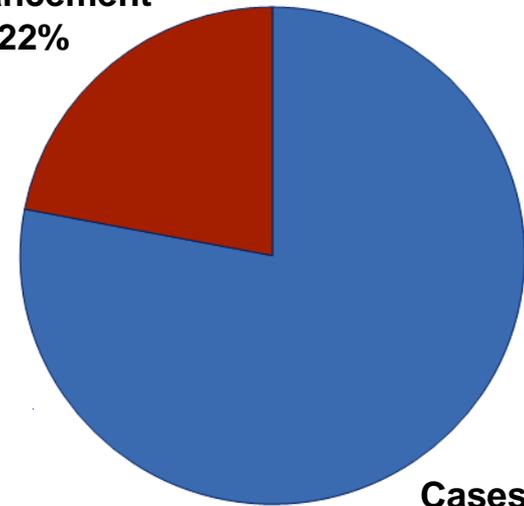
* Analysis based on the sentence recommended by a jury



Guidelines Midpoint Enhancements for Violent Offenders (as defined in § 17.1-805)

- Midpoint enhancements produce sentence recommendations for violent offenders that are significantly greater than the time served by these offenders 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, receive these enhancements

Cases with
Violent Offender
Enhancement
22%



Cases without
Violent Offender
Enhancement
78%

FY2012

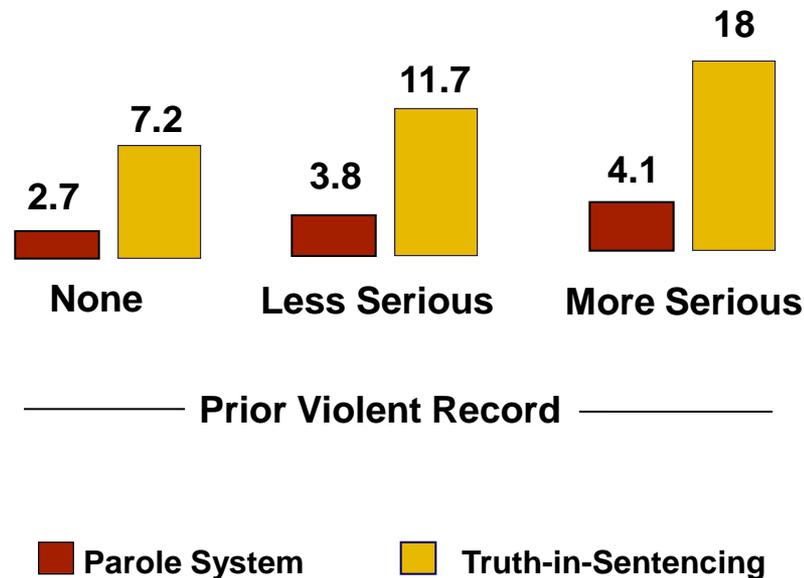
Number of Cases = 23,268



Prison Time Served Parole System v. Truth-in-Sentencing System

Prison Time Served (in years)

Robbery with Firearm



These figures present values of actual incarceration time served under parole laws (1988-1992) and expected time to be served under truth-in-sentencing provisions for cases sentenced FY2004 through FY2008. Time served values are represented by the median (the middle value, where half the time served values are higher and half are lower). Truth-in-sentencing data only include cases recommended for, and sentenced to, incarceration of more than six months.

Legislative Directive for Nonviolent Offender Risk Assessment

- In 1994, the General Assembly directed the newly-created Sentencing Commission to:
 - Develop an empirically-based risk assessment instrument predictive of a felon's relative risk to public safety
 - Apply the instrument to nonviolent felons recommended for prison, with a goal of placing 25% of those offenders in alternative sanctions
- ~ Implemented statewide in 2002



Use of Nonviolent Offender Risk Assessment

- **For nonviolent offenders who score low enough on the risk scale, the sentencing guidelines indicate a dual recommendation**
 - **Traditional incarceration**
 - **Alternative punishment**
- **Compliance with the risk assessment recommendation is discretionary**
- **If a judge follows either sentencing recommendation, he or she is considered in compliance with the guidelines**



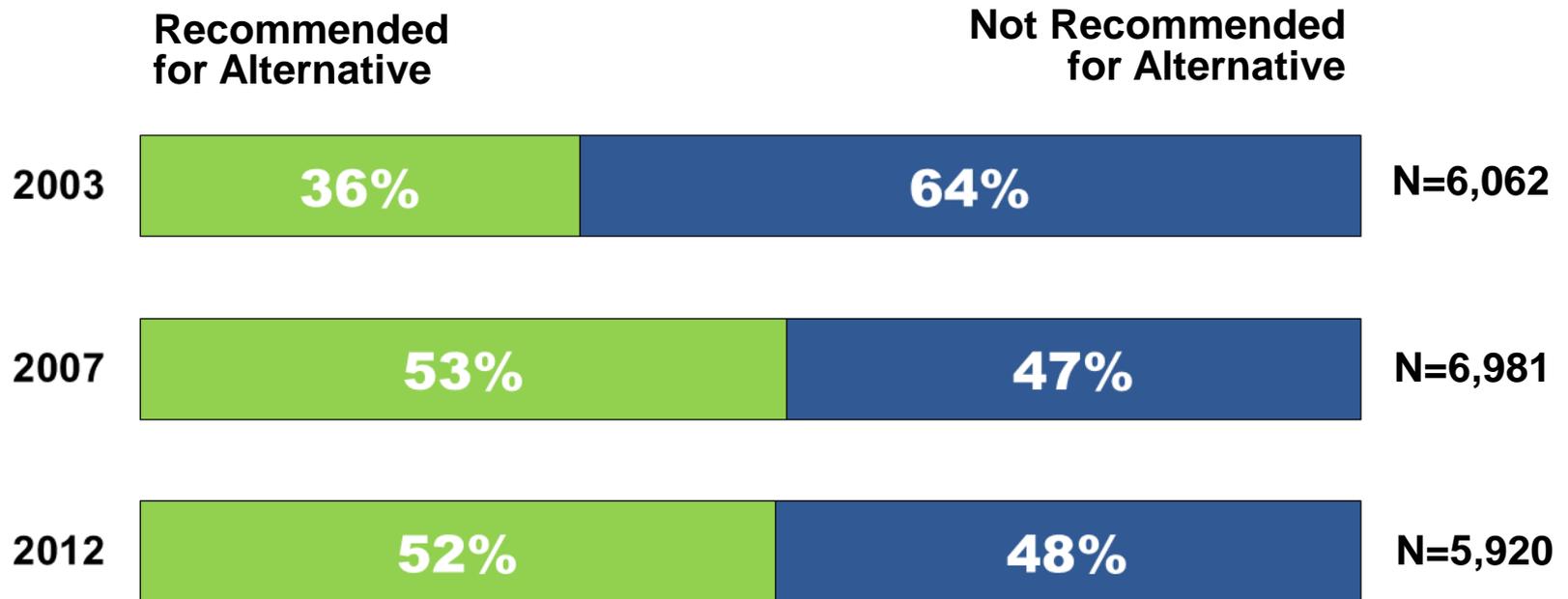
Legislative Directive to Revisit Nonviolent Offender Risk Assessment

- In 2003, the General Assembly directed the Commission to determine, with due regard for public safety, the feasibility of adjusting the instrument threshold to recommend additional low-risk nonviolent offenders for alternative punishment
- The Sentencing Commission concluded that the threshold could be raised from 35 to 38 points without significant risk to public safety

~ Change became effective in 2004



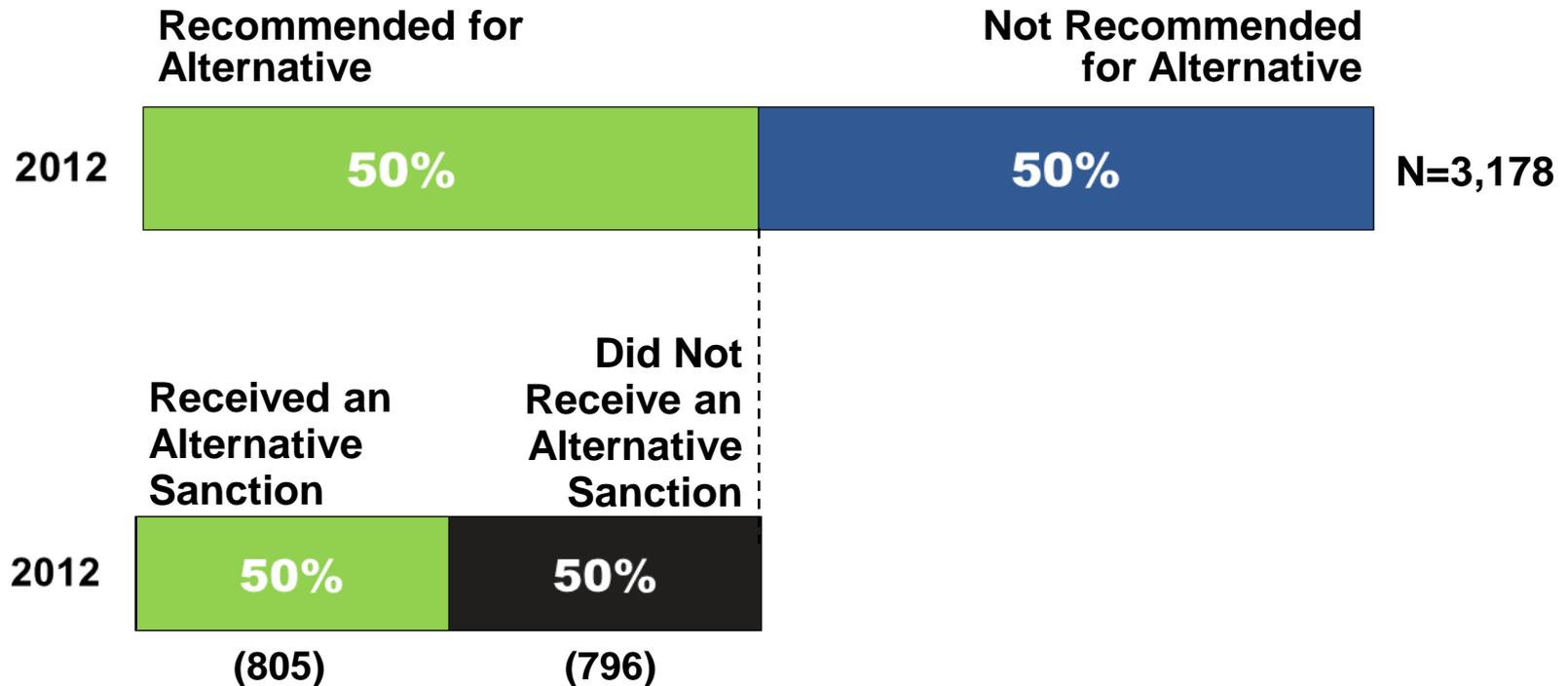
Risk Assessment Outcomes for Nonviolent Offenders*



* Offenders recommended by the sentencing guidelines for prison or jail incarceration



Risk Assessment Outcomes for Nonviolent Offenders (as applied to those recommended for PRISON incarceration)*



* Sentencing guidelines recommendation is for incarceration with a midpoint of one year or more



Virginia Criminal Sentencing Commission
Recommendations
2012 Annual Report



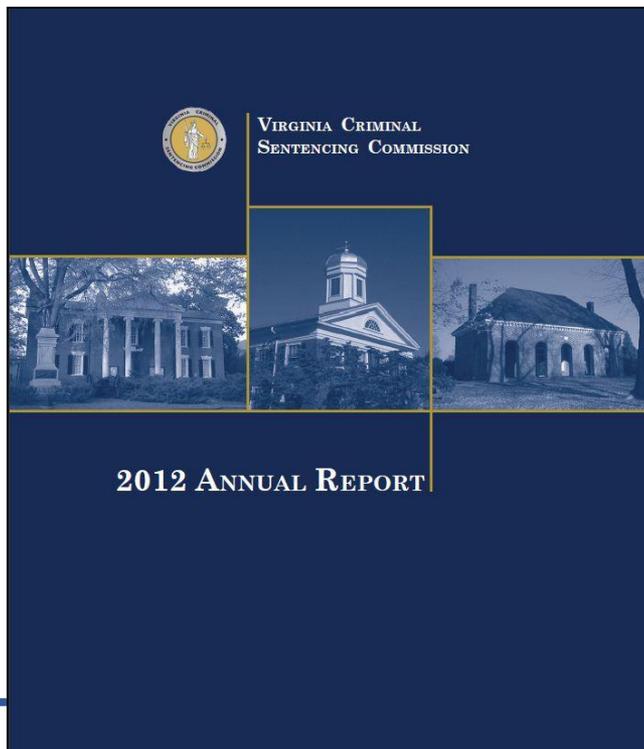
Revisions to Sentencing Guidelines § 17.1-806

After adoption of initial guidelines, modifications adopted by the Commission must be presented in an annual report and submitted by December 1 to the Governor, Chief Justice, and the Legislature

Winter legislative session provides opportunity for lawmakers to veto Commission recommendations

The Commission's recommendations, unless otherwise provided by law, become effective the following July 1

**The 2012 Annual Report is available at:
www.vcsc.virginia.gov**



About Sentencing Commission Recommendations

- **Recommendations are based on analysis of the available data and reflect the best fit for the data**
- **Recommendations are designed to closely match the current rate of incarceration in prison and jail**
- **Because the Commission's recommendations are designed to integrate actual sanctioning practices (or existing mandatory minimum penalties) into the guidelines, no impact on correctional bed space is anticipated**



Recommendation 1

Replace the current Nonviolent Offender Risk Assessment Instrument, used in conjunction with the guidelines for fraud, larceny, and drug offenses, with risk assessment instruments developed based on the Commission's newest study of felony recidivism

Nonviolent Offender Risk Assessment Study: Findings

3

Introduction

In 1994, as part of the reform legislation that instituted truth-in-sentencing, the General Assembly required the Commission to study the feasibility of using an empirically-based risk assessment instrument to select 25% of the lowest risk, incarceration-bound, drug and property offenders as candidates for placement in alternative (non-prison) sanctions. By 1996, the Commission developed such an instrument and implementation began in pilot sites in 1997. The National Center for State Courts (NCSC) conducted an evaluation of the nonviolent offender risk assessment instrument used in the pilot sites 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. Upon conclusion of the validation study, the Commission reviewed the nonviolent risk assessment instrument and concluded that the refined nonviolent risk assessment tool should be implemented statewide. In July 2002, the nonviolent

Development of the Risk Assessment Instrument

To develop the original risk assessment instrument for nonviolent offenders, the Commission studied a random sample of over 1,500 drug and property offenders who had been released from incarceration between July 1, 1991, and December 31, 1992. The use of a release cohort was necessary because the early stages of the original analysis included offenders convicted of burglary, who traditionally receive longer sentences than fraud, larceny, and drug offenders. To use an actual sentence group, the Commission would have had to limit the amount of time burglary offenders were tracked for recidivism following release. The Commission later decided to exclude burglary offenders from nonviolent risk assessment. A stratified sampling technique was used to increase the chance of including offenders with juvenile criminal records, since juvenile criminal behavior has been shown to be a common precursor to later adult crime. The sample was also stratified to draw equal numbers of drug, larceny, and fraud cases.



Recommendation 1

- It had been a number of years since the nonviolent offender risk assessment instrument was last examined
- In 2010, the Commission directed staff to begin a new recidivism study to evaluate the current instrument and potentially update the instrument based on more recent felony cases from Virginia's circuit courts
- This complex, multi-stage project was completed in 2012



Recommendation 1

- **The current instrument will be replaced by two new instruments (one for fraud/larceny offenses and another for drug offenses)**
- **In addition to being easier to score, the predictive accuracy of the two new instruments is slightly higher than the current instrument**
- **The recidivism rate for offenders who are recommended for alternative sanctions is expected to be lower than under the current instrument**
- **The new risk assessment instruments will recommend roughly the same proportion of offenders for alternative sanctions as the current instrument**



Recommendation 2

Revise several worksheets to ensure that the guidelines recommend an incarceration term of greater than six months when there is an offense that requires a mandatory minimum sentence of six months or more



Recommendation 2

- **There are instances in which the guidelines were developed prior to the implementation of current mandatory minimum penalties**
- **As a result, the guidelines may produce sentence recommendations that fall below the mandatory minimum sentence required in some cases**
- **The changes ensure that offenders subject to a mandatory minimum sentence of six months or more would be recommended for an incarceration term that is at least that long**

As the Commission's recommendation integrates existing mandatory minimum penalties into the guidelines, no impact on correctional bed space is expected

Recommendations 3 and 4

Amend the Larceny Sentencing Guidelines to add new offenses not currently covered by the guidelines:

- Recommendation 3** ■ **Larceny of property with a value of \$200 or more with the intent to sell or distribute (§ 18.2-108.01(A))**

- Recommendation 4** ■ **Possession, etc., of stolen property with an aggregate value of \$200 or more with the intent to sell or distribute (§ 18.2-108.01(B))**

No impact on correctional bed space is anticipated, since the Commission's recommendation is based on analysis of current sanctioning practices for these offenses

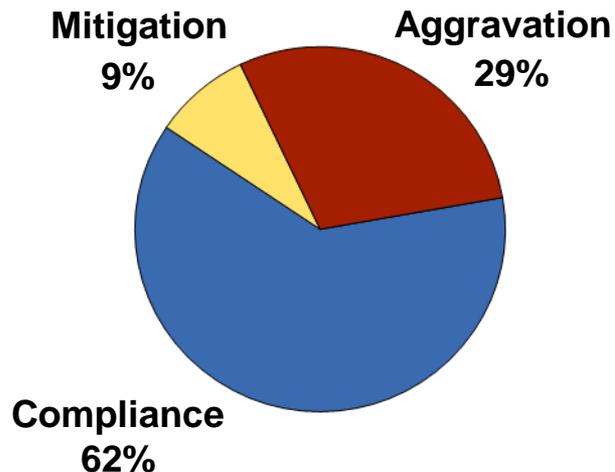
Recommendation 5

Revise the guidelines for involuntary manslaughter associated with driving under the influence (§ 18.2-36.1(A)) to more closely reflect current sentencing practices for this offense



Recommendation 5

Compliance for Manslaughter-DUI (§ 18.2-36.1(A))



- **Compliance with the guidelines for manslaughter-DUI is well below the overall compliance rate, and nearly all of the departures are above the guidelines range**
- **By revising the guidelines, all offenders convicted of this crime will be recommended for more than six months of incarceration**
- **In addition, if the manslaughter-DUI involved a felony hit and run offense, the recommended sentence will be increased by nearly two years**

As the Commission's recommendation brings the guidelines more in line with current sentencing practices for this offense, no impact on correctional bed space is expected

Recommendation 6

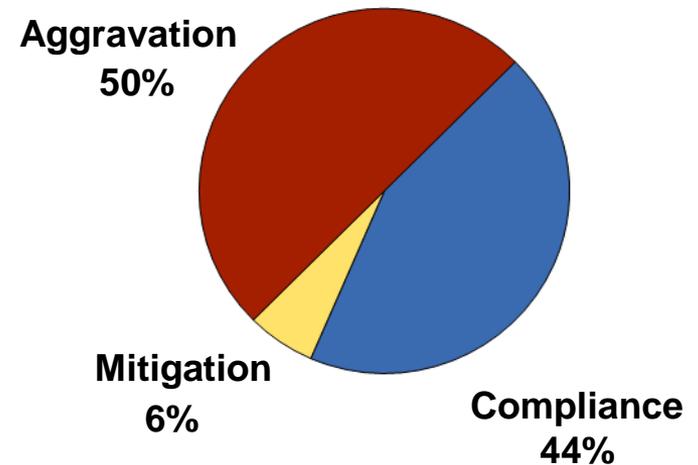
Revise the sentencing guidelines to increase the sentence recommendation for offenders convicted of burglary with a deadly weapon together with a homicide or malicious wounding offense



Recommendation 6

- Compliance with the guidelines for burglary with a deadly weapon* when there is an additional offense of homicide** or malicious wounding is well below the overall compliance rate
- When departing from the guidelines, judges nearly always give a sentence above the recommended range

Compliance for Completed Burglary with a Deadly Weapon with Additional Offense of Homicide** or Malicious Wounding



* Analysis based on completed burglaries only

** Excluding completed 1st-degree murder

Recommendation 6

- **For completed burglary with a deadly weapon, the prison recommendation will be increased by:**
 - **Nearly 12 years in cases involving an additional offense of homicide*,**
 - **Nearly 3 years in cases involving a completed malicious wounding**
 - **8 months in cases involving an attempted or conspired malicious wounding**

* Excluding completed 1st-degree murder

**As the Commission's recommendation brings the guidelines more
In line with current sentencing practices in these cases,
no impact on correctional bed space is expected**

Recommendation 7

Modify the labeling of two guidelines factors on the worksheets and the wording of instructions in the guidelines manual in order to clarify the scoring of those factors

- ~ **The changes are not intended to modify how the guidelines should be scored, but rather improve the degree to which the guidelines are scored accurately under existing rules**



Immediate Sanction Probation Pilot Program



Directive for Immediate Sanction Probation Pilot Project (2012)

- In 2012, the General Assembly directed the Virginia Criminal Sentencing Commission to implement an Immediate Sanction Probation program in up to 4 pilot sites
- The program is designed to target technical probation violators
- The concurrence of the chief judge of the circuit court and the Commonwealth's attorney is needed for the locality to participate as a pilot site
- Pilot program will last two years



Model for Virginia's Pilot Program

- **Hawaii's Opportunity Probation with Enforcement (HOPE) program was established in 2004**
- **Focus is on offenders at-risk for failing probation**
- **The goal is to improve compliance with the conditions of probation by applying swift and certain, but moderate, sanctions for each violation**
- **A recent evaluation of HOPE found a significant reduction in technical violations and drug use among participants, as well as lower recidivism rates and use of prison beds**



Key Elements of Virginia's Pilot Program

- **Immediate Sanction Probation is a different approach to dealing with technical violators**
- **Only nonviolent offenders are eligible (per § 19.2-303.5)**
- **By design, use of program resources is tied to offender risk and behavior**
 - **Risk will be assessed using COMPAS, the instrument already used in Probation Offices**
- **Henrico and Lynchburg have agreed to serve as pilot sites, while a third site will be announced soon**



Key Elements of Virginia's Pilot Program

- **When placed in the program, the offender is warned that probation terms will be strictly enforced**
- **Participants will undergo frequent, unannounced drug testing**
- **Participants who violate the terms of probation will be immediately arrested**
- **An expedited process for dealing with violations is established in the court**
 - **The participant is not eligible for an expedited hearing in certain circumstances, in which case a full violation will be held at a later date**



Key Elements of Virginia's Pilot Program

- **A public defender or court-appointed attorney will be present for the expedited hearings**
- **For each violation, the judge orders a short jail term**
- **If drug or alcohol addicted, the participant may be referred to substance abuse treatment**
- **The court may remove the offender from the program at any time**



Reports to the General Assembly

- **The Commission must submit a report to the General Assembly by October 1, 2013, regarding program implementation and any preliminary recidivism results**
- **The Commission is also responsible for conducting an overall evaluation of the program, which will likely be submitted to the General Assembly in 2014**





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