

SENATE OF VIRGINIA

Senate Finance Committee

Parole Abolition and Sentencing Reform: A 20-Year Retrospective

**Senate Finance Committee Annual Meeting
November 21, 2014**



SENATE FINANCE COMMITTEE

Key Points

- Virginia successfully reformed its sentencing system. Parole was abolished and felony sentencing guidelines implemented as of January 1, 1995.
- These reforms were intended to achieve four objectives:
 - Abolish parole and establish transparency, or “truth-in-sentencing;”
 - Reduce “good time,” so offenders serve at least 85 percent of their sentence;
 - Increase actual time served in prison for violent and repeat offenders; and,
 - Divert up to 25 percent of non-violent offenders to alternative sanctions.
- These objectives have been met, and the policy goals articulated in 1994 have been achieved to a great extent:
 - Growth in the rate of incarceration has slowed, but a higher percentage of expensive prison beds is now occupied by violent offenders, and,
 - Crime and recidivism rates have been reduced – and Virginia’s ranking among the states has improved.



Overview

- The purpose of this report is to assess the implementation of sentencing reform in Virginia, as measured against the goals and objectives set out in the 1994 special session, when parole was abolished and felony sentencing guidelines adopted. This report covers:
 - How Virginia’s guidelines work;
 - How Virginia’s guidelines differ from the federal sentencing guidelines and sentencing guidelines adopted in other states;
 - How risk assessment works in Virginia’s sentencing system;
 - Actual results (with national data comparisons when available);
 - The findings from SFC staff surveys of judges, prosecutors, public defenders, defense attorneys, and chief probation officers to determine the views of key participants as to how effective the sentencing reforms have been; and,
 - Current budget challenges facing the Department of Corrections (DOC).



Background: 1994 Crime Bill

- Violent crime was a front-burner issue in the early 90's.
- Federal Violent Crime Control and Law Enforcement Act of 1994.
 - \$30.2 billion over six years (largest amount ever in a federal crime bill).
- Key provisions included:
 - Community Oriented Policing Services – 100,000 COPS on the streets;
 - Violence Against Women Act;
 - Federal Assault Weapons Ban (allowed to sunset in 2004);
 - Federal death penalty expanded to 60 new offenses (plus three-strikes law);
 - Elimination of Pell grants for inmate higher education;
 - Other programs, including in-school, after-school and anti-gang programs, midnight basketball, drug courts, and substance abuse treatment; and,
 - \$7.9 billion for federal grants to build state prisons for violent offenders, on the condition that states adopt truth-in-sentencing for violent offenders.



Virginia's Old Parole System

- Parole was based on the idea that inmates could be rehabilitated in prison, and that a panel of citizens could determine when an inmate was ready to be released back into society.
- Under existing law in 1994, inmates served only a fraction of the sentence pronounced by the court before becoming eligible for release.
 - A first-time inmate, for example, became eligible for parole after serving only one-fourth of his pronounced sentence.
 - In addition, inmates could (and most did) earn up to 30 days in “good time” sentence credits for every 30 days served.
 - Half of this sentence credit (up to 15 days for every 30 days served) could be applied towards the offender’s parole eligibility date.
- As a result, some inmates might serve as little as one-fifth of their sentence, which undermined confidence in the system.



Previous Reform Efforts

- By the time the General Assembly abolished parole and adopted felony sentencing guidelines 20 years ago, Virginia already had several years of experience in this area.
 - Governor Robb and the Chief Justice of the Supreme Court appointed task forces in the early 1980's to explore the feasibility of guidelines to reduce sentencing disparities, especially racial disparities.
 - Discretionary guidelines were pilot-tested in several circuits and then adopted (by the Judicial Department) for statewide use beginning in 1991.
 - The General Assembly created a Commission on Sentencing and Parole Reform in 1993 (HJR 464), which was continued in 1994 (HJR 249).
 - Recognized the public's legitimate expectation for longer sentences for violent or serious offenders, consistency in sentencing, and programs to reduce recidivism.
 - In early 1994 Governor Allen created a Commission on Parole Abolition and Sentencing Reform, and called a special session to adopt its recommendations.



Policy Choices in 1994

- In the late 1980's/early '90's, the rate of violent crime had been increasing rapidly, due in part to the growing use and trafficking of crack cocaine.
 - Increased arrests and rapid growth in the offender population led to large expenditures for prison and jail construction.
 - These issues were addressed by Commissions on Prison and Jail Overcrowding under Governor Baliles, and on Violent Crime under Governor Wilder.
 - By 1994, there was widespread agreement that reforms were necessary.
- The policy choices embedded in the 1994 reforms included:
 - Reduction of unwarranted sentencing disparities, i.e. comparable sanctions for offenders with similar crimes and similar criminal histories;
 - Sentence enhancements based on the offense and the criminal history;
 - No change in actual time served for non-violent offenders; and,
 - Voluntary (not mandatory) sentencing guidelines.



Calculating the Initial Guidelines

- The sentencing system authorized by the General Assembly in 1994 was based on the existing voluntary Judicial Department guidelines. The new guidelines were implemented statewide effective January 1, 1995.
- The new guidelines included sentencing ranges for each offense:
 - The initial determination of the sentencing range was based on a review of the actual time served in prison by every offender released from prison over five previous years (1988 through 1992). For each offense:
 - The bottom quartile and the top quartile of actual time served were eliminated;
 - The middle two quartiles (50 percent of all cases) provided the range for the new guideline, so the extremes at either end were eliminated; and,
 - The median length of stay marked the midpoint of the new sentencing range.
- Offenders would now serve at least 85 percent of their sentence.
 - Instead of good time, offenders could earn sentence credits of up to 15 percent, i.e. up to 4.5 days off for every 30 days served.



Sentence Enhancements

- Once initial sentencing ranges were calculated, a series of enhancements were adopted by the General Assembly:
 - Sentence enhancements were based on the nature of the primary offense and the seriousness of the offender’s prior record of violence:
 - For example, for murder, rape, forcible sodomy, object sexual penetration, and aggravated sexual battery, the sentencing range mid-points were increased by:
 - 125% for offenders with no violent prior offenses;
 - 300% for offenders with at least one Category II violent prior (max. < 40 years);
 - 500% for offenders with at least one Category I violent prior (max. ≥ 40 years); and,
 - Life for Category I violent prior and First Degree Murder conviction.
 - A “life sentence” was clarified to mean life in prison without parole.
 - For purposes of the sentencing guidelines, burglary of an occupied dwelling was defined as a violent offense.
 - For non-violent offenders, there were no enhancements, compared to the old parole system (based on actual experience 1988-1992).



Other Features of the 1994 Reforms

- Virginia's guidelines are voluntary; however, the judge must review a worksheet for each case and indicate the reasons for departing (either above or below) the sentencing range.
- Offender's juvenile adjudications of delinquency for felony-level offenses are considered as part of the offender's prior criminal record.
- Parole remained in place for offenders whose crimes were committed prior to January 1, 1995. (*4,677 offenders still eligible for parole*)
- Post-release supervision was maintained.
- A new Virginia Criminal Sentencing Commission was created within the Judicial Department to develop and implement the guidelines.
 - Each year, in its annual report to the General Assembly, the commission may recommend changes in the guidelines. If the changes are not rejected by the General Assembly, the changes go into effect the following July 1.
 - Changes are driven by analysis of actual judicial sentencing practice.

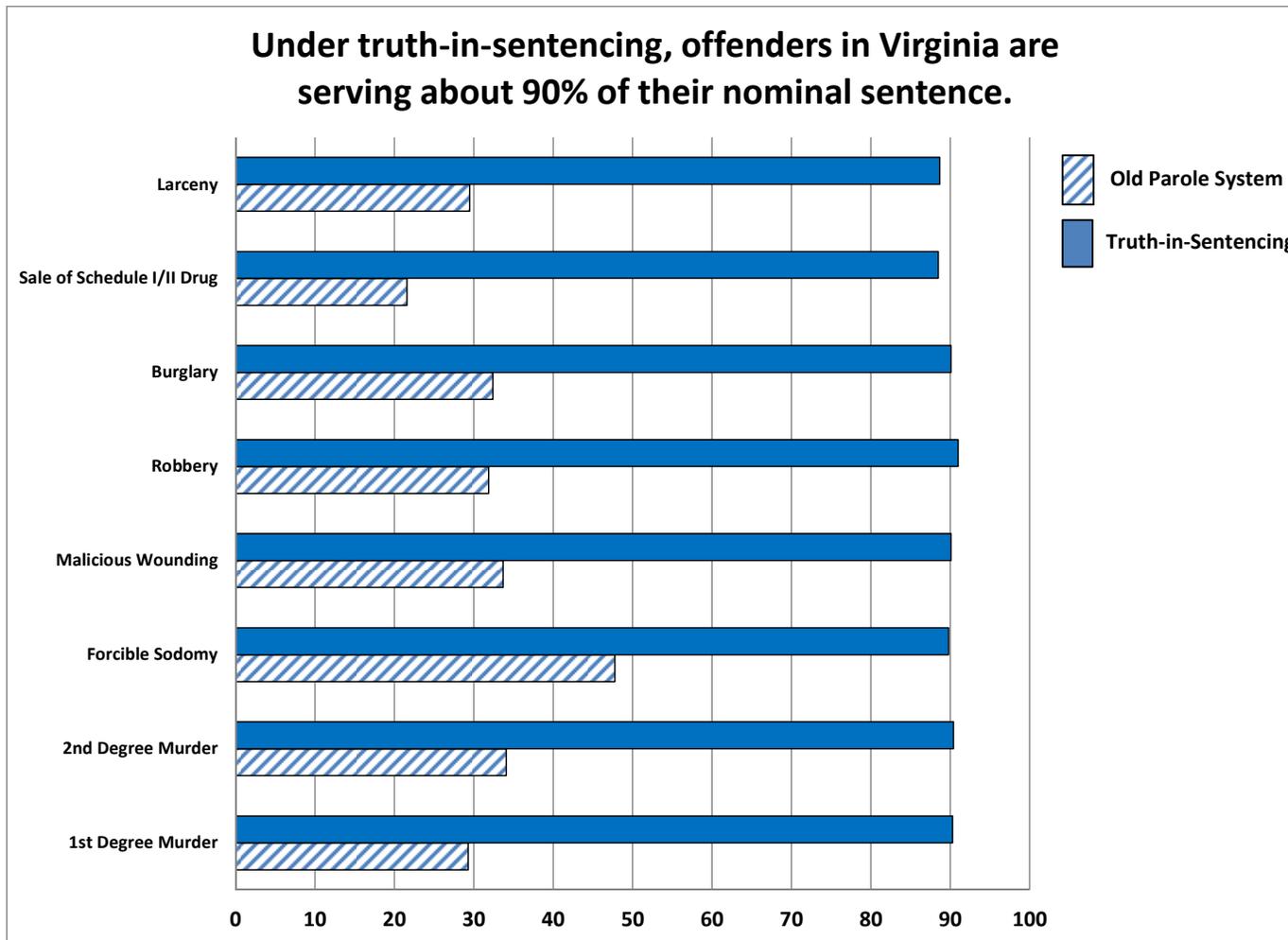


Sentencing Commission

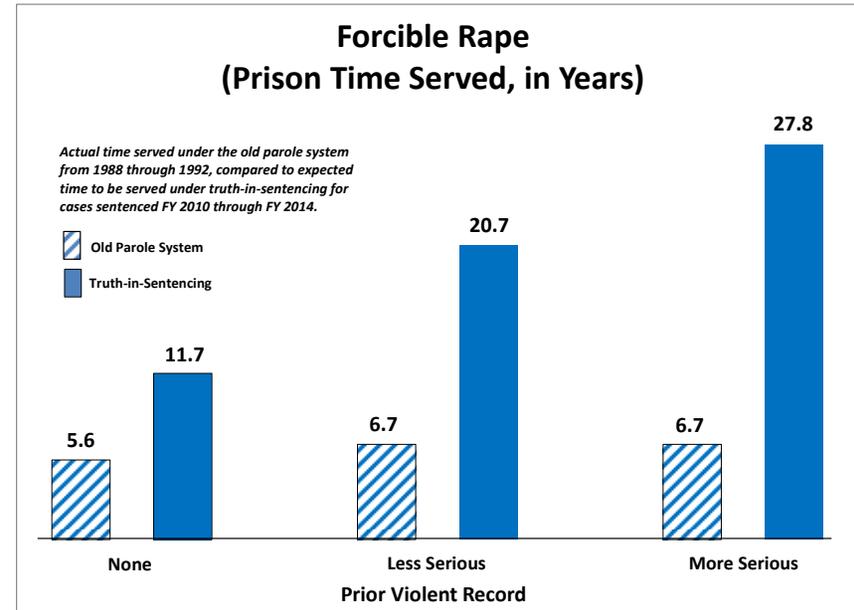
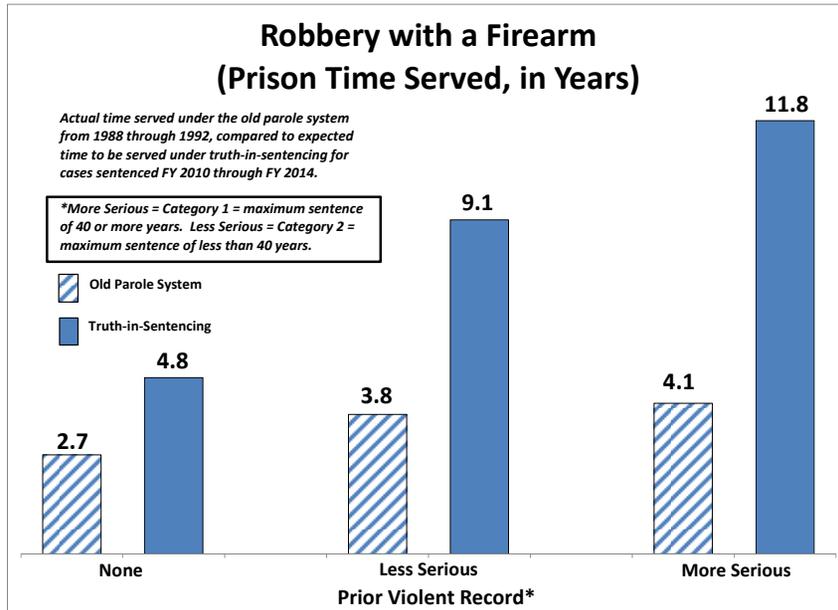
- The Commission is a Judicial Department agency, with 17 members:
 - Chairman appointed by the Chief Justice, confirmed by the General Assembly;
 - Six judges or justices appointed by the Chief Justice;
 - Attorney General or designee;
 - Chairman of Senate Courts plus one appointed by Senate Rules;
 - Chairman of House Courts plus two appointed by the Speaker; and,
 - Four members appointed by the Governor (including a crime victim).
- The Commission has a professional staff which manages a data base of all felony sentencing events, provides training and oversight, and conducts special studies. The staff also assesses the corrections bedspace impact of proposed criminal sentencing bills.
- Virginia's commission is one of the most successful, according to the National Center for State Courts (NCSC).



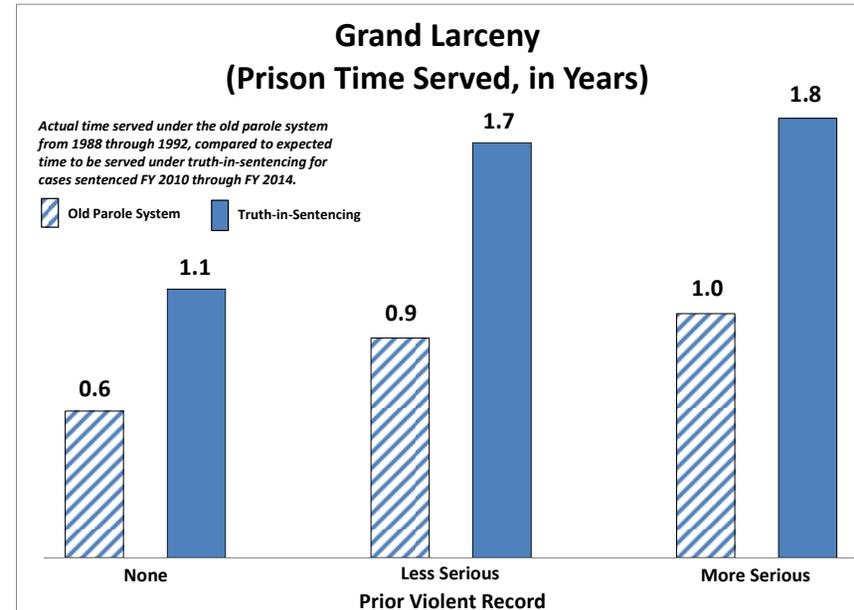
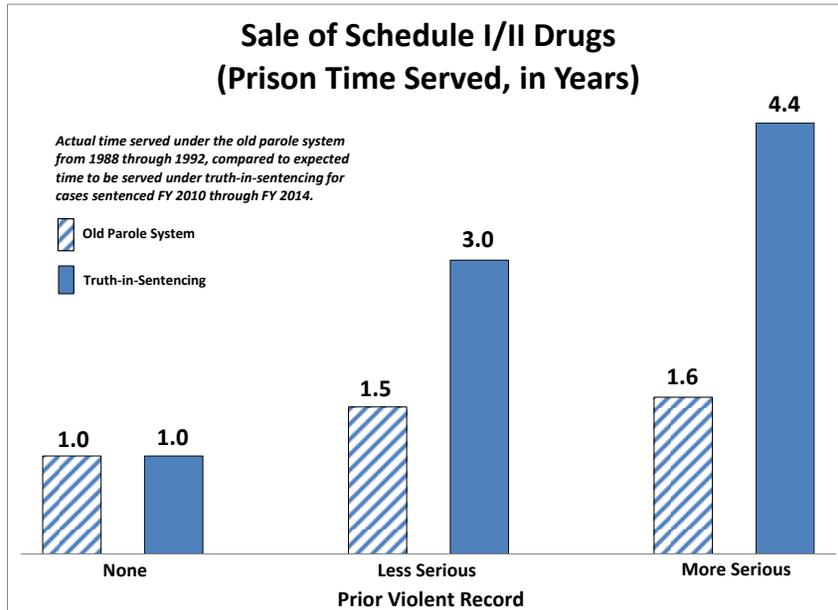
Percentage of Sentence Served (Parole v. Truth-in-Sentencing)



Actual Time Served (Violent Offenses)



Actual Time Served (Nonviolent Offenses)

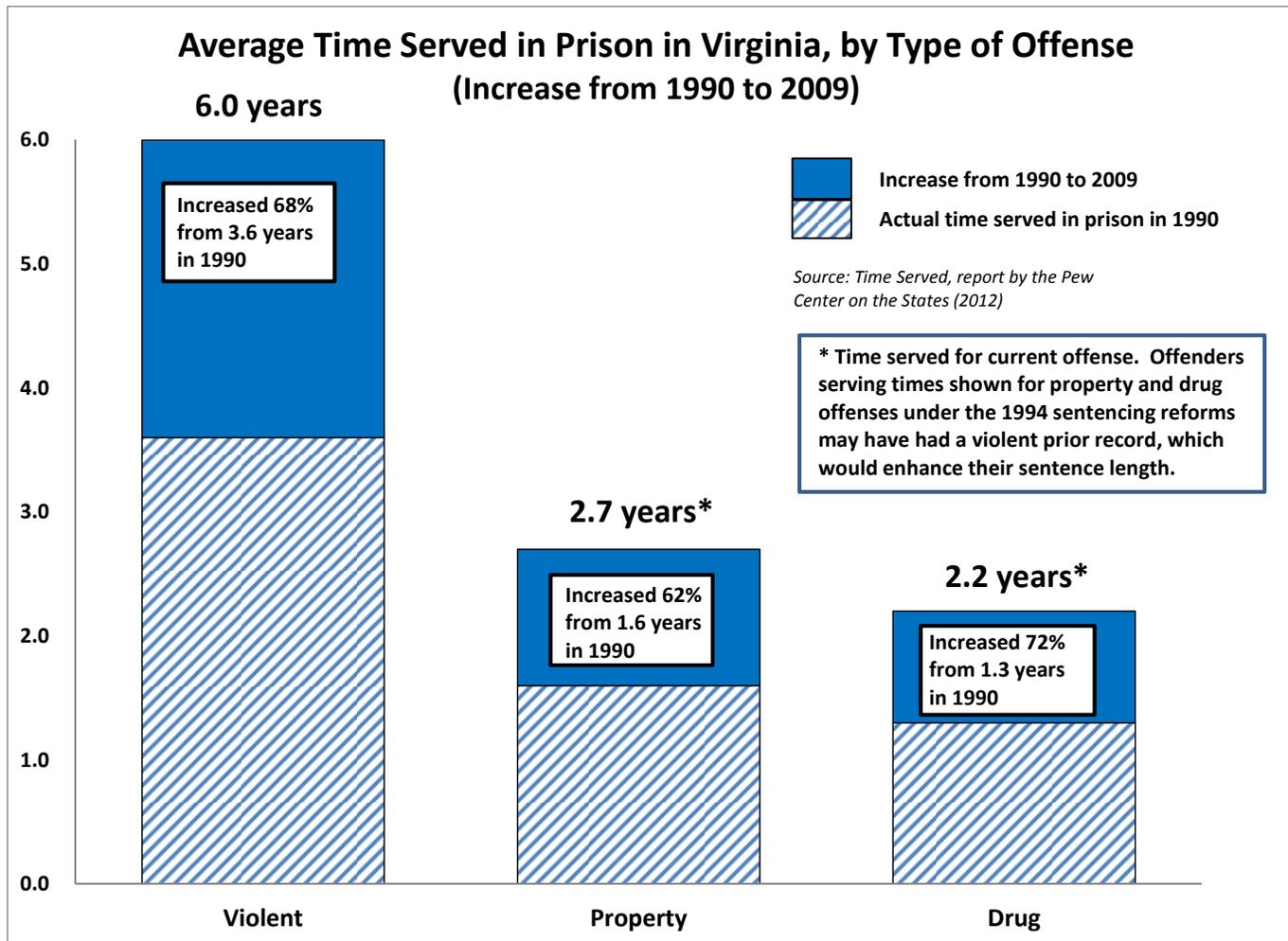


Actual Time Served (35-State Comparison)

- The Pew Center for the States published a study in 2012 of actual time served in prison; 35 states (including Virginia) provided data.
- From 1990 to 2009, the average actual time served in prison across the 35 states increased 36 percent, from 2.1 to 2.9 years (for all offenses).
- In Virginia, the increase was 91 percent, from 1.7 to 3.3 years.
 - Only Florida had a higher percentage increase (166%, or from 1.1 to 3.0 years).
 - In 1990, Virginia ranked 25th longest in actual time served, among the 35 states responding to the Pew survey.
 - In 2009, Virginia ranked 4th longest in actual time served, behind Michigan (4.3 years), Pennsylvania (3.8 years), and New York (3.6 years).
- *For violent offenses, five states (Louisiana, Missouri, Nevada, Nebraska, and South Dakota) reduced actual time served from 1990 to 2009.*
 - *See pp. 22-23.*



Actual Time Served



Sentencing and Prison Costs

- The 1994 Special Session devoted a great deal of attention to balancing the goals of sentencing reform with the costs of prisons and jails.
 - Actual time served in prison for violent and repeat offenders was intended to be increased, **but for non-violent offenders, actual time served was not to be increased above the actual experience from 1988-1992.**
 - Low-risk, non-violent offenders were to be redirected from expensive prison beds towards less costly alternative sanctions.
- The General Assembly determined that the projected cost of the proposed 1994 sentencing reform was only marginally more expensive than the cost of maintaining the current system.
 - Proposal X, the sentencing reform plan, was projected to increase the state-responsible offender population to 51,000 by 2005, but the baseline forecast (under the old parole system) was already projecting 49,500.
 - However, actual population growth was slower than either 1994 projection.

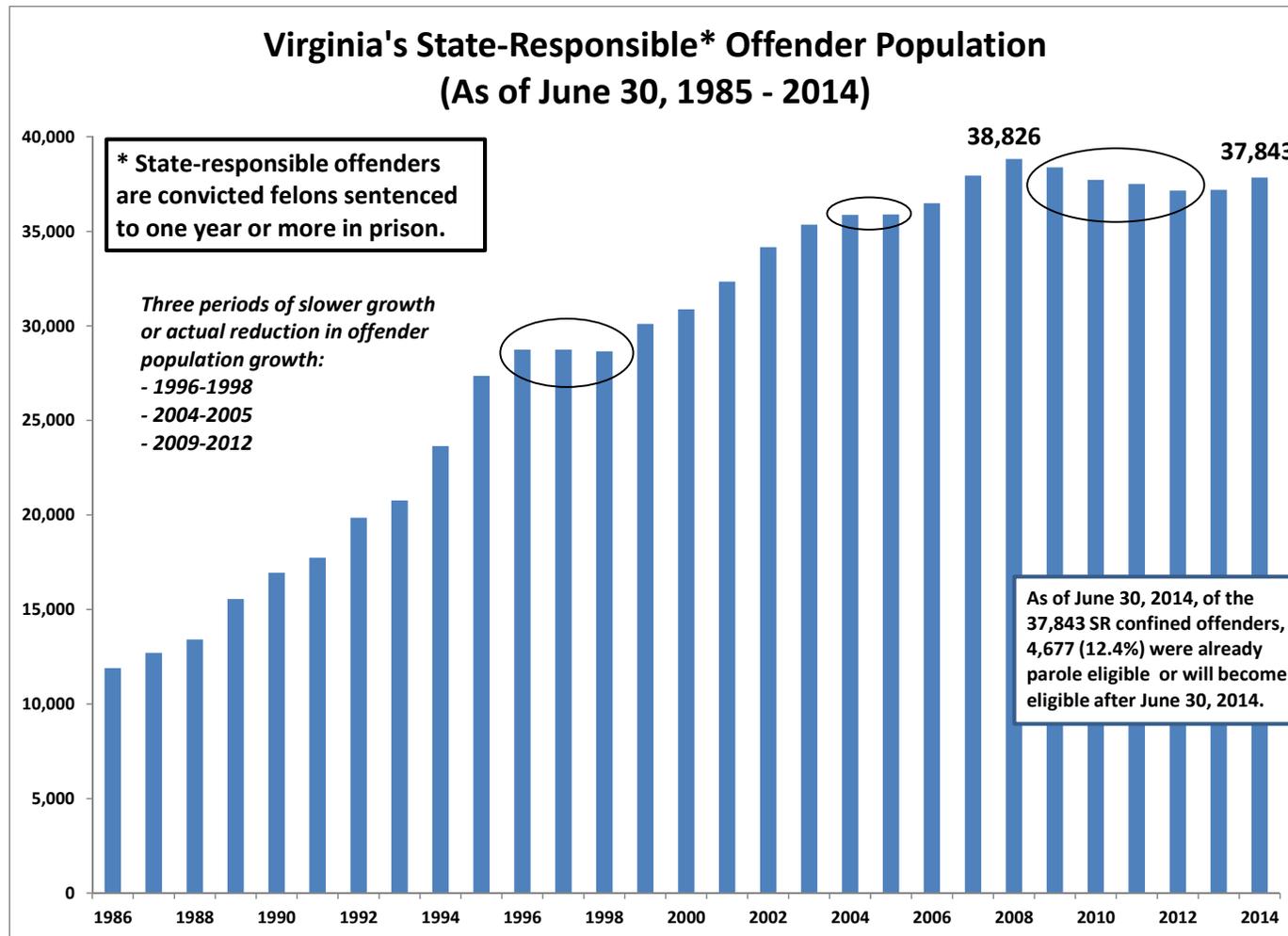


Offender Population Growth

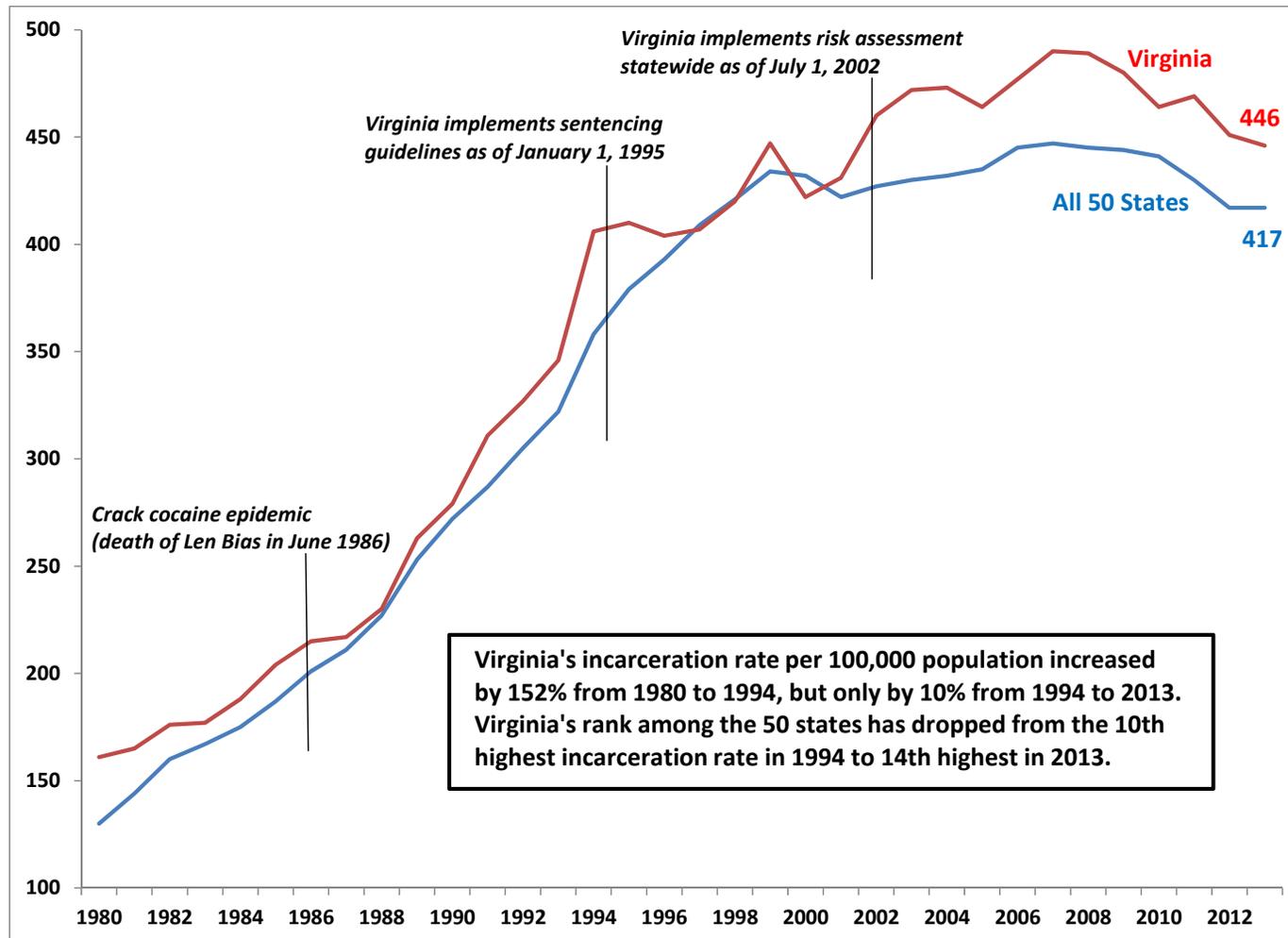
- The actual offender population only reached 38,826 by 2008, and then declined for four years, despite the increase in length of time served.
- Rather than steady growth, there have been two periods of leveling off (1996-98 and 2004-05), and a period of actual decline (2009-12).
 - These periods reflect the trend in Virginia’s incarceration rate, which slowed noticeably in 1996 and 1997 and then declined after the peak in 2007.
- Slower growth in the offender population is largely due to the reduction in crime rates which began about the same time reform efforts were underway in Virginia and in many other states.
- The most recent official forecast suggests Virginia’s state-responsible offender population is increasing again, but at a slow pace.
 - The June 30, 2014 state responsible population of 37,843 is projected to increase only 4.8% over the next six years – to 39,666 by 2020.



State-Responsible Offenders



Incarceration Rates

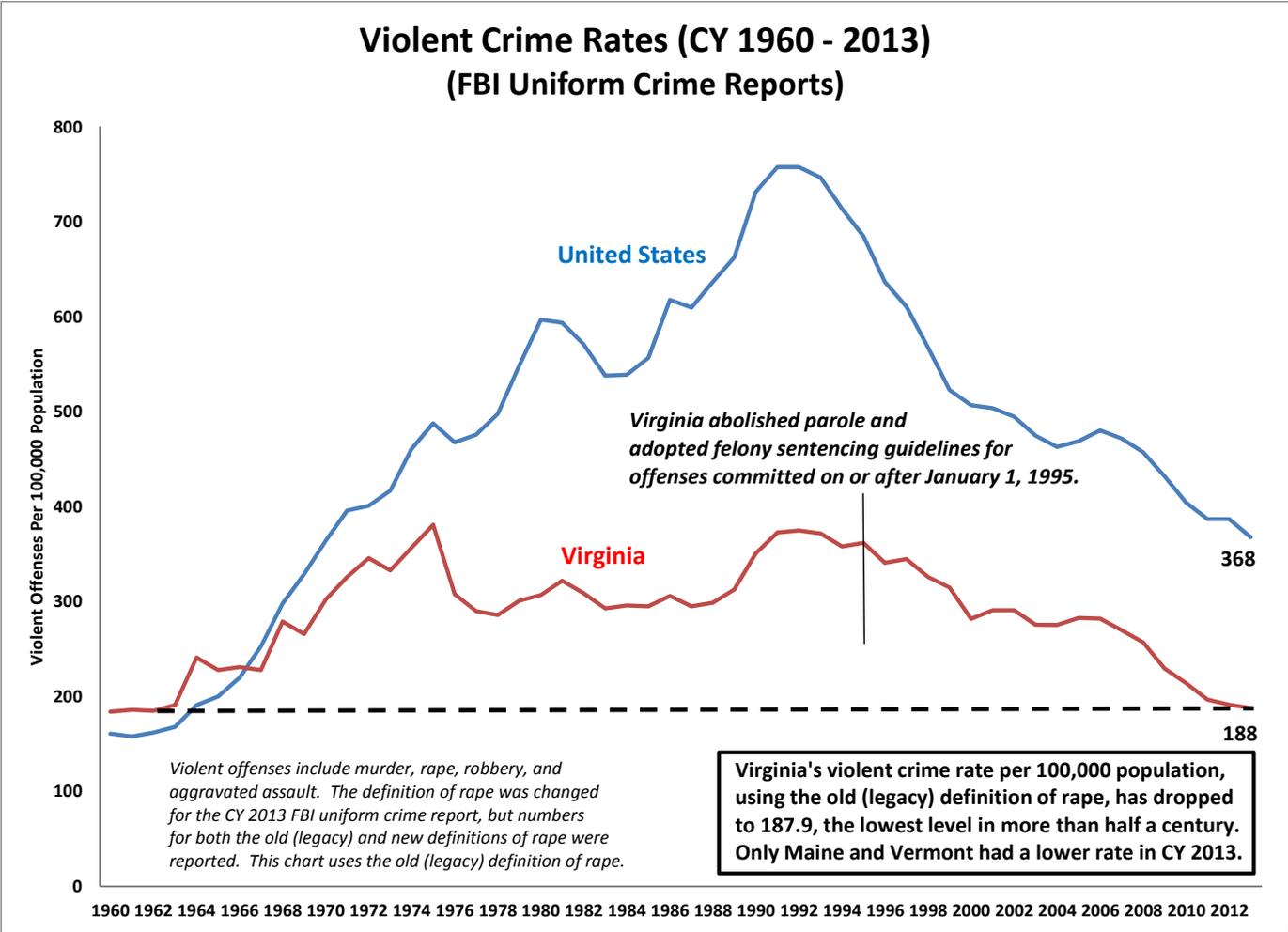


Crime Rates Have Fallen

- Virginia had the third lowest violent crime rate among the 50 states in CY 2013, a significant improvement from 14th lowest in both 1994 and 2004
 - Only Vermont (lowest) and Maine reported lower rates in 2013.
- Virginia had the eighth lowest property crime rate in 2013, compared to 11th lowest in 1994 and 13th lowest in 2004.
 - Only New York (lowest), Idaho, New Jersey, South Dakota, Connecticut, Massachusetts, and Pennsylvania reported lower rates in 2013.
- There are many factors involved in the national drop in crime rates over the past two decades, many of which are not unique to Virginia.
 - In fact, 18 other states experienced a greater percentage drop in the violent crime rate between 1995 and 2012.



Violent Crime Rate



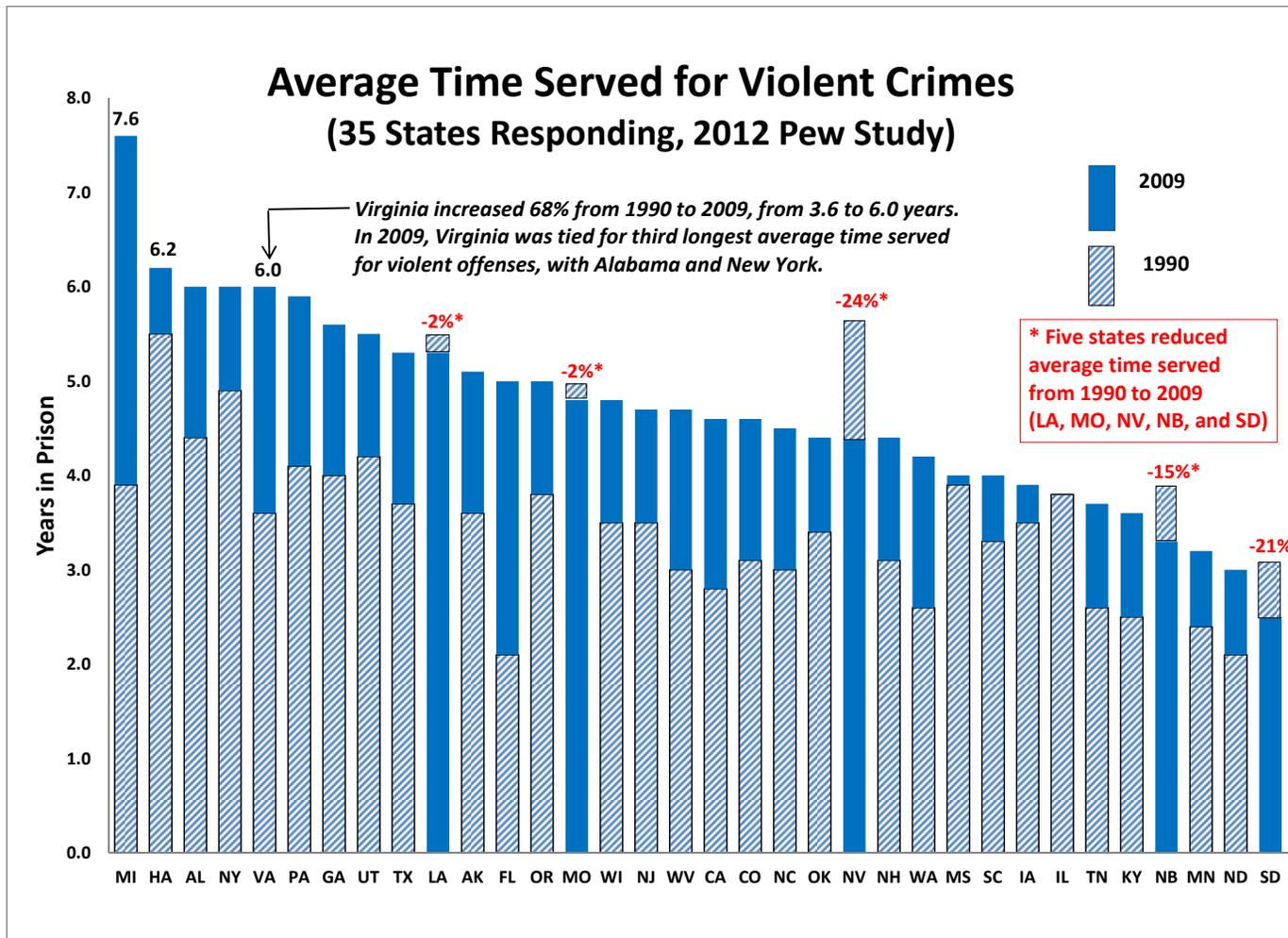
Crime and Incarceration Rates

22 States with the Largest Drop in Violent Crime Rate

State	Change in Crime Rate (1994-2010)	Change in Incarceration Rate (1994-2010)
Kentucky	-59.9%	59.0%
New York	-59.4%	-22.1%
California	-56.5%	14.3%
Illinois	-54.7%	20.3%
Florida	-52.7%	36.9%
Oregon	-51.6%	89.0%
New Jersey	-49.9%	-8.0%
Mississippi	-45.4%	73.7%
Alabama	-44.7%	44.0%
North Carolina	-44.4%	15.5%
Louisiana	-44.1%	55.9%
Maryland	-42.2%	-2.0%
Arizona	-42.0%	24.6%
South Carolina	-42.0%	0.2%
Virginia	-40.3%	15.3%
Indiana	-40.1%	68.2%
Georgia	-39.6%	20.6%
Washington	-38.6%	33.8%
Connecticut	-38.2%	17.1%
Colorado	-37.0%	54.0%
Texas	-36.3%	1.7%
Michigan	-36.0%	4.2%



Actual Time Served



States That Reduced Time Served

	Change in Violent Crime Rate (1994-2010)	Change In Incarceration Rate (1994-2010)	Change in Time Served Violent Offenses (1990-2009)
Five states reduced their actual time served for violent offenses (1990-2009), based on Pew study, but increased their overall incarceration rate and had a lower drop in their violent crime rate, on average:			
Louisiana	-44%	56%	-2%
Missouri	-39%	50%	-2%
Nevada	-34%	1%	-24%
Nebraska	-28%	51%	-15%
South Dakota	18%	76%	-21%
Average	-25%	47%	-13%
Compared to nine* states with largest drop in violent crime rate and 21% or lower growth in incarceration rate:			
New York	-59%	-22%	22%
California	-57%	14%	64%
Illinois	-55%	20%	0%
New Jersey	-50%	-8%	34%
North Carolina	-44%	16%	55%
Maryland (did not respond to Pew study)			NA
South Carolina	-42%	0.2%	21%
Virginia	-40%	15%	68%
Georgia	-40%	21%	41%
Connecticut (did not respond to Pew study)			NA
Texas	-36%	2%	44%
Michigan	-36%	4%	97%
Average*	-45%	5%	50%
<i>* Excludes Illinois, which was the only one of these 10 states which did not increase time served for violent offenses.</i>			



Selective Incapacitation

- The 2012 report by the Pew Center for the States found that five states reduced actual time served for violent offenses between 1990 and 2009, by an average of 13 percent.
 - These five states increased their average incarceration rate by 47% and experienced an average reduction of 25% in their violent crime rate.
- In comparison, nine states which increased actual time served for violent offenses by 50 percent, raised their incarceration rate by only five percent and saw a much larger 44 percent drop in their violent crime rate.
- Many factors must be considered in drawing conclusions. However, one factor which was emphasized in Virginia's sentencing reform effort was the selective incapacitation of the highest-risk offenders.
 - This may be one factor which could explain why some states increased time served for violent offenders, but with a smaller increase (or decrease) in the incarceration rate achieved a greater reduction in violent crime.

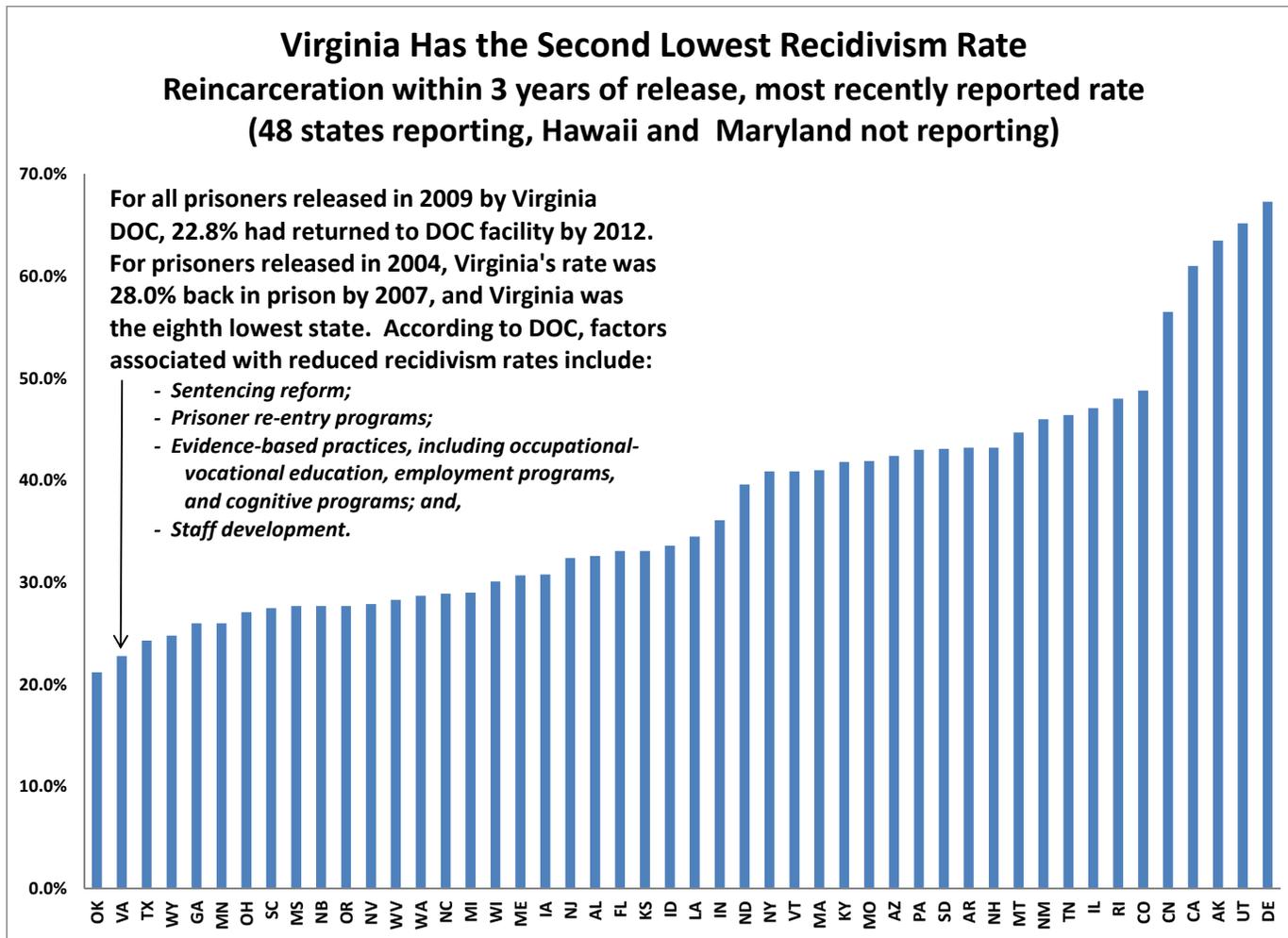


Recidivism

- Virginia and 46 other states measure recidivism in terms of re-incarceration within three years of release.
- Virginia's rate has dropped from 28.0 percent for offenders released in FY 2004 to 22.9 percent for those released in FY 2009.
 - Virginia has the second lowest recidivism rate among the states that have a comparable measure.
 - Virginia had the eighth lowest recidivism rate for offenders released in 2004.
- Why has Virginia's position improved? Possible explanations include:
 - Beginning about ten years ago, the incapacitation effect of longer prison terms for violent, repeat offenders began to be seen;
 - Virginia was the first state to implement risk assessment statewide for all non-violent felony offenders, to determine their suitability for diversion; and,
 - Virginia has added significant resources for reentry programs, to assist inmates in making the transition from prison back to the community.



Recidivism by State



What Conclusions Can We Draw?

- Most states experienced a drop in the violent crime rate since 1994.
- Several states experienced a large percentage drop in their violent crime rates and at the same time reduced their incarceration rates, including New York, New Jersey and Maryland.
- Several other states, like Virginia, experienced large drops in their violent crime rates without huge increases in their incarceration rates.
 - Illinois (which did not increase time served for violent offenses), Connecticut, North and South Carolina, Georgia, Texas, and Michigan are deserving of further study to determine how they have reformed their sentencing systems.
- However, of any of these states, Virginia has by far the lowest violent crime rate and the lowest recidivism rate.
 - Virginia has focused its sentencing system and its correctional system on the most serious offenders, to a very great extent, as intended in 1994.



Fiscal Impact

Budget and Debt Implications

Cost Per Inmate

Older Inmates and Medical Costs



Adding (and Subtracting) Capacity

- Virginia's offender population forecasting process has been relatively accurate in the short term, but somewhat less accurate in the long term.
- Virginia has responded to changes in the population growth rate by:
 - Building new, more efficient correctional facilities;
 - Increasing (or decreasing) the level of double-bunking in state dormitory-style facilities; and,
 - Increasing (or decreasing) the out-of-compliance backlog in jails.
- When there has been excess bed capacity, DOC has contracted to house out-of-state inmates and has closed older, less efficient facilities.
 - As a result, there was only one period of about two years where a new prison (in Grayson County) sat vacant.
 - With the closing of 5,725 older beds since 2002, including six major facilities, DOC has modernized its capital stock – thereby improving security as well as staffing and energy efficiency.

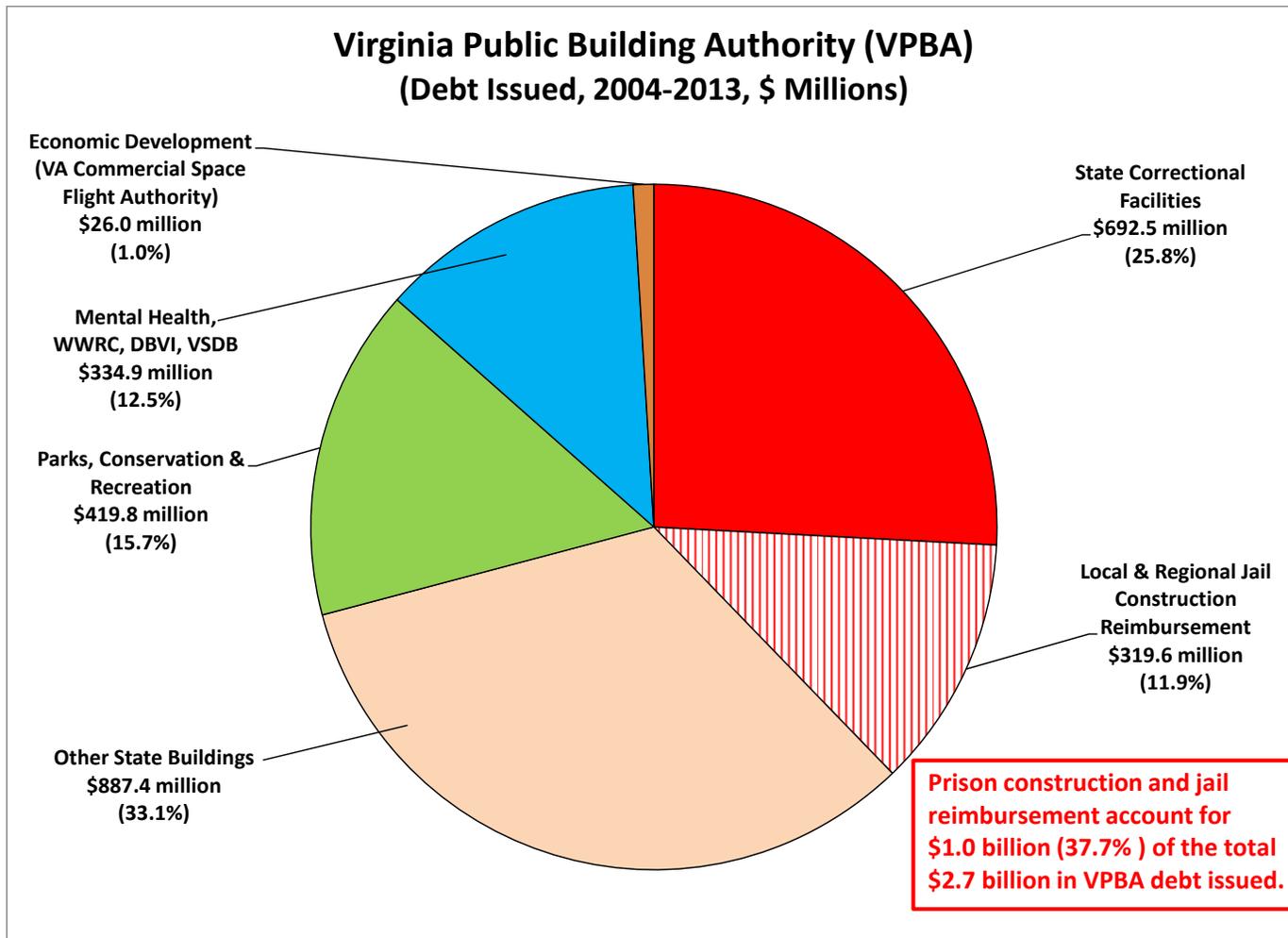


Debt for Prisons

- With the authorization of Greensville and Keen Mountain in 1988, Virginia began to use the Virginia Public Building Authority (VPBA) to finance construction of new correctional facilities.
- Virginia has added about 22,000 new prison beds since 1990 at a capital cost of \$1.1 billion, and over 23,000 new regional and local jail beds since 1993 at a total state and local capital cost of over \$1.5 billion.
 - Of the \$2.7 billion in state debt issued by the Virginia Public Building Authority (VPBA) from 2004-2013, \$1.0 billion (37.7%) represents debt for prison construction and local and regional jail reimbursements.
- VPBA debt service for prisons and jails represents \$104.5 million (37.7%) of the FY 2014 annual debt service cost of \$276.8 million for all VPBA bonds outstanding.



VPBA Debt



Periods of Excess Capacity

- Since 1994, there have been two periods during which the Department of Corrections (DOC) had excess capacity, corresponding with two of the three periods of either slow growth or a downturn in the state-responsible offender population.
 - From 1998-2002, DOC housed up to 4,000 out-of-state inmates, including Washington, D.C. inmates from Lorton and inmates from other states.
 - From 2008-2012, about 1,000 inmates from Pennsylvania and a few other states were held in new DOC facilities. Only 71 are left today.
- As the offender population declined from 2009-2012 and budget reductions were required, older facilities were closed and double-bunking in dormitory facilities was reduced.

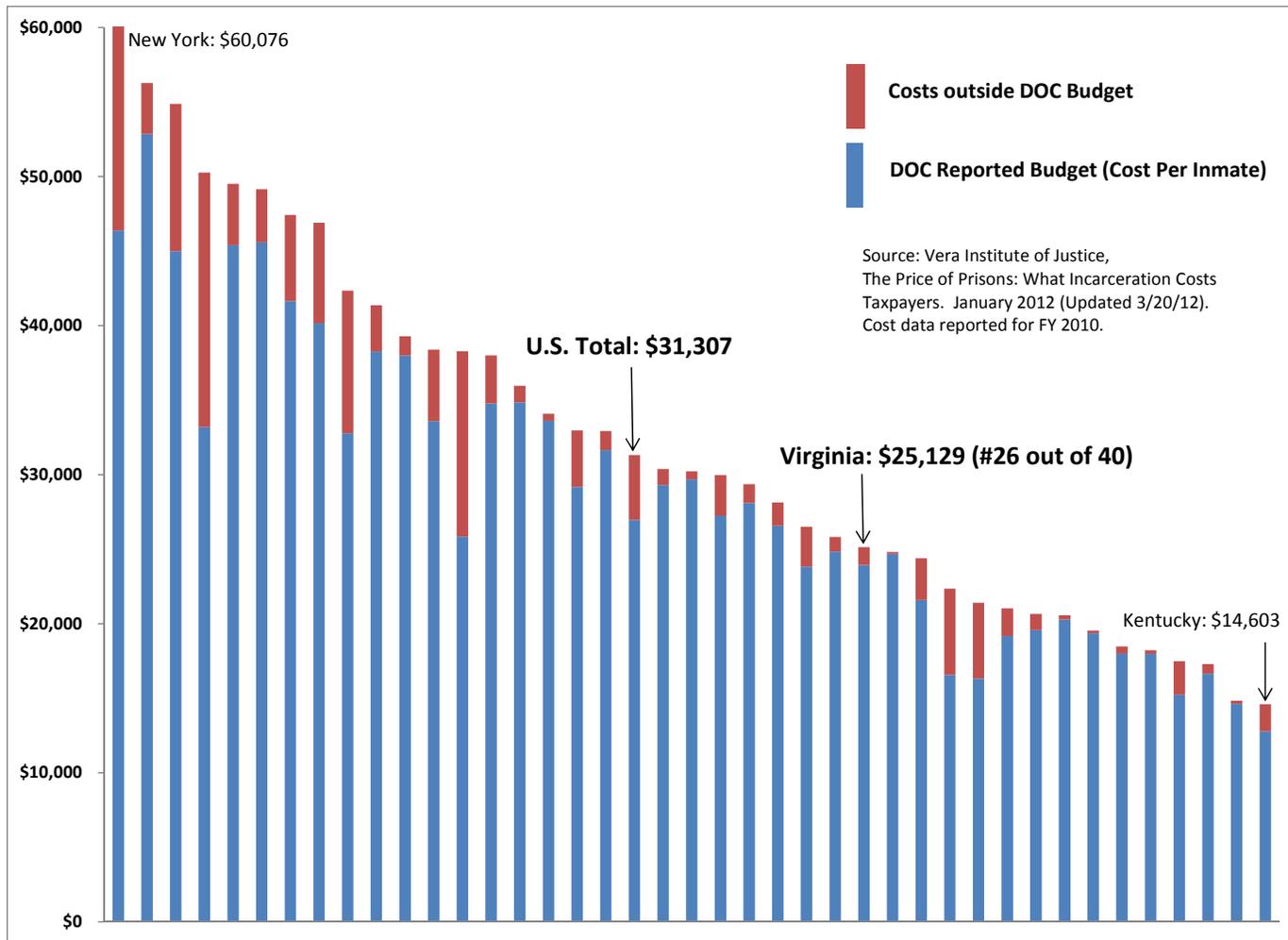


Current Budget Situation

- DOC FY 2015 appropriation is \$1.06 billion GF (Chapter 2).
- October savings amount is -\$20.3 million (-1.9%, 509 layoffs expected).
 - Closure of Powhatan Correctional Center and Cold Spring Work Center (loss of 959 beds), and closure of White Post Diversion Center (loss of 128 community corrections beds). This, in turn, will require:
 - Adding 437 beds at three medium security institutions;
 - Constructing 380 dormitory beds at Keen Mountain and Marion; and,
 - Adding 54 beds at Harrisonburg and Stafford Diversion Centers.
 - DOC has not increased double-bunking in dormitory facilities.
 - Out-of-compliance backlog in jails is 5,630 state prisoners as of November 10.
 - Projected shortfall in jail per diems is \$29 million GF for the 2014-16 biennium.
- There is no excess capacity which can be closed to absorb the budget reductions, without other actions to offset the reduction in beds -- either by increasing capacity at the remaining state facilities or the jail backlog.



Total Taxpayer Cost Per Inmate (FY 2010)

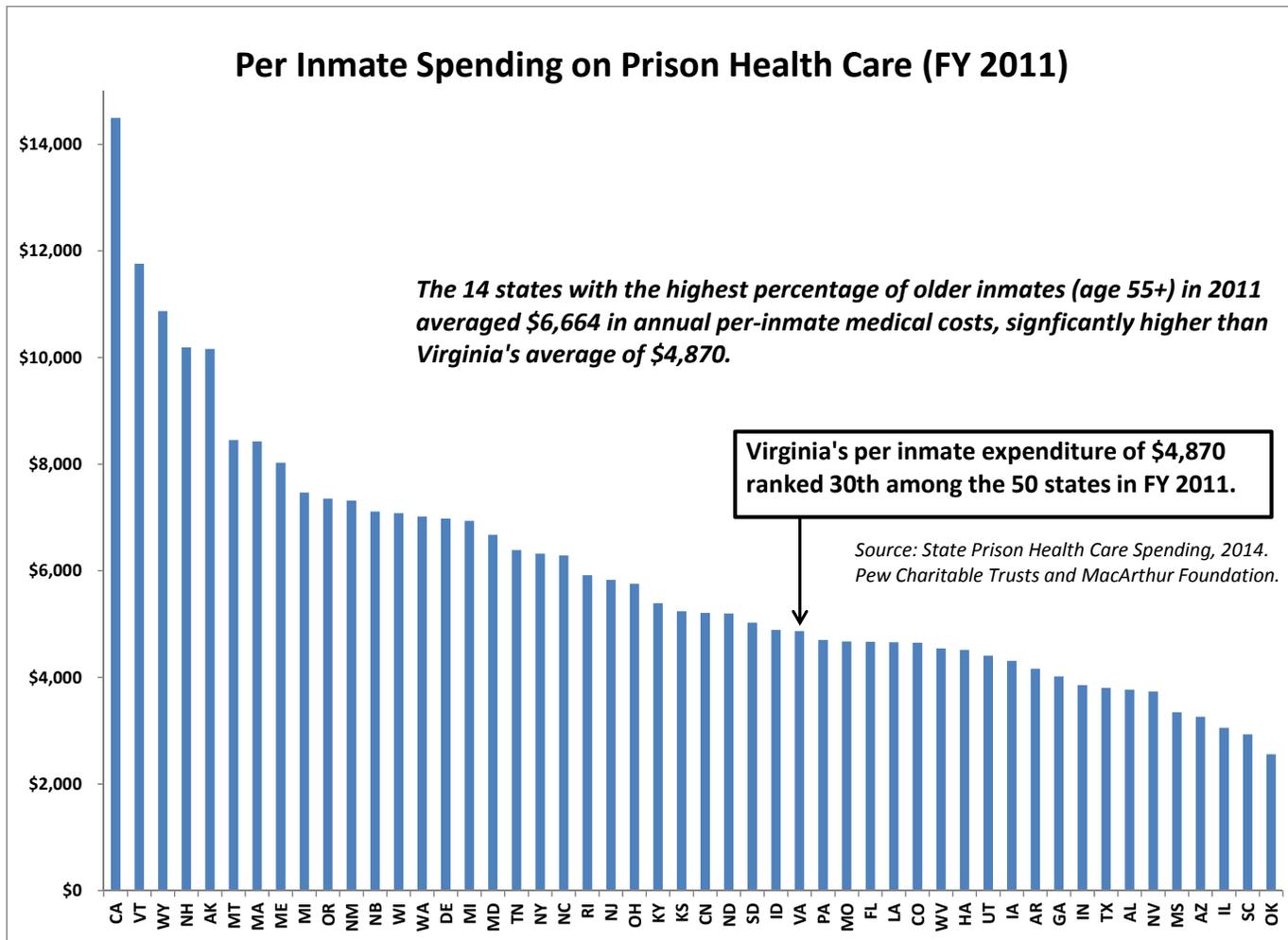


Older Inmates and Medical Costs

- Very limited use has been made of the geriatric parole provisions approved in 1994, which provides the possibility of parole at age 60 after serving ten years, or at age 65 after serving five years (other than for a Class I felony).
 - The Parole Board has indicated most of the prisoners eligible for consideration are turned down because they have been convicted of violent offenses.
 - However, it may be possible to make greater use of this provision.
- A recent national study reported that Virginia ranked 14th highest of 42 states with 8.6 percent of its DOC inmate population over age 55.
- With an aging population, prison health care costs are increasing.
 - Additional \$44 million GF required in current 2014-16 biennium.
 - Steps needed to control long term health care costs, in addition to shifting some costs to Medicaid in the short term.
- Prisons and jails are the largest provider of mental health beds.



Per Inmate Medical Costs



Impact of Sentencing on Virginia's Prison Population

**More Prison Beds Reserved for Violent Offenders
Alternatives for Lower-Risk, Non-Violent Offenders
Risk Assessment
Probation Violators**

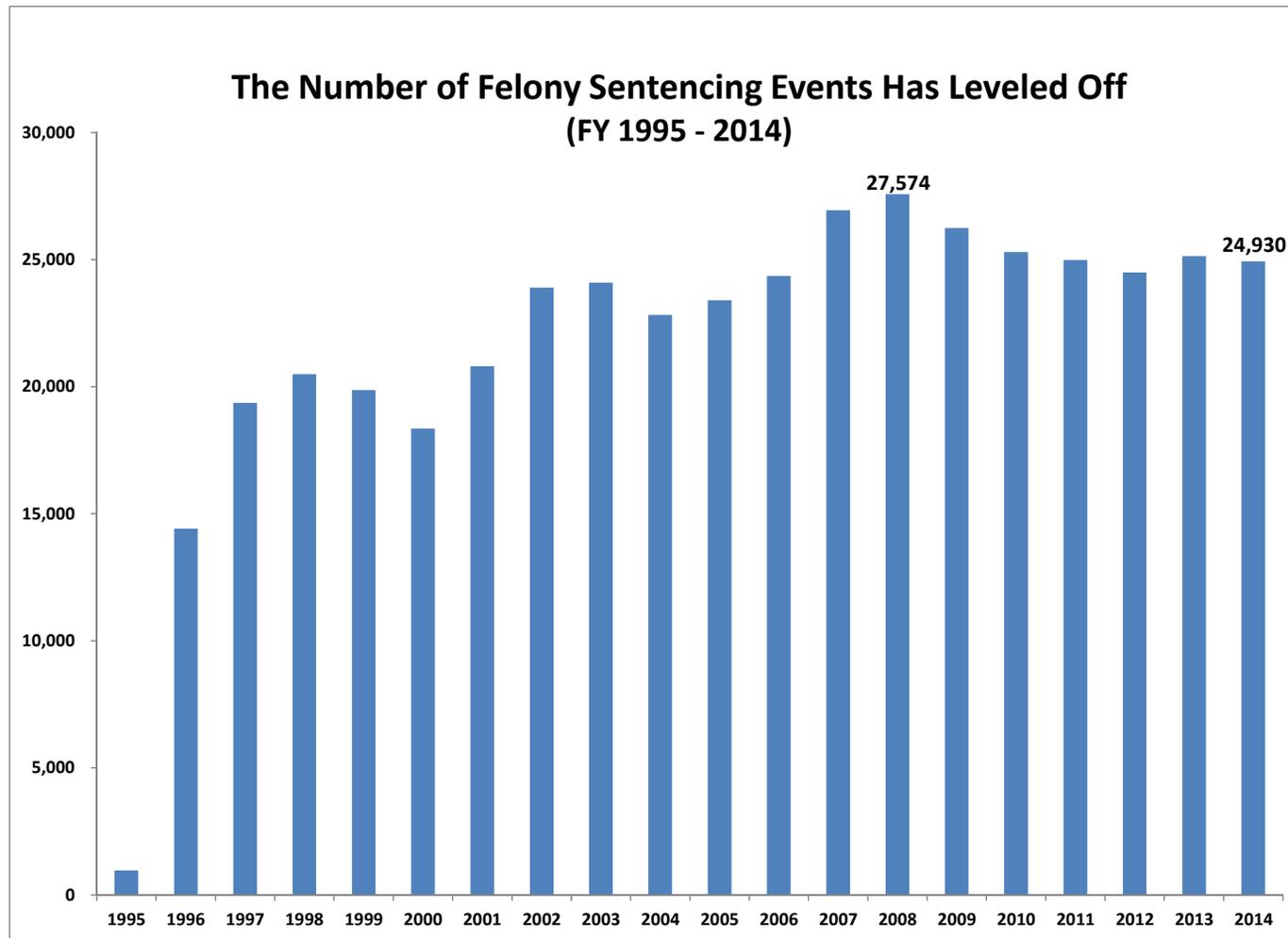


Impact on DOC Facilities

- Virginia's sentencing system has reserved more expensive prison bed space for the more serious violent and repeat offenders, as intended.
 - Since 1994, the proportion of offenders incarcerated in DOC facilities who are deemed violent by the sentencing guidelines (i.e. violent current offense or violent prior offense, including burglary of an occupied dwelling) has increased from about 60 to 80 percent.
- The remaining one-fifth of our inmate population who are considered non-violent are mainly the more serious, repeat offenders.
 - Guidelines do not recommend incarceration for first-time offenders for simple possession of Schedule I/II drugs or grand larceny.
- Adding mandatory-minimum sentences and increasing the number of offenses defined as violent will increase long-term costs.
 - All sentencing bills with corrections bedspace fiscal impact are reviewed by the Public Safety Subcommittee of Senate Finance.



Felony Sentencing Events



First Time, Non-Violent Offenders

- In FY 2014, there were almost 24,930 felony sentencing events in Circuit Court, of which over one-third (9,314) were sentenced to prison, over one-third were sentenced to jail, and the rest were sentenced to probation without an active term of probation, or sentence was suspended.
- Of the 9,314 sentencing events resulting in a prison term, 446 (or 4.8%) were sentenced to prison for simple possession of a Schedule I or II drugs.
 - Of these, only 15 had no additional felony offense or prior felony conviction.
- Of the 9,314 sentencing events resulting in a prison term, 1,567 (or 16.8%) were sentenced to prison for grand larceny.
 - Of these, only 47 had no additional felony offense or prior felony conviction.
 - The \$200 threshold for grand larceny was last raised in 1980 (from \$100).
 - A recent proposal to raise the threshold to \$500 was projected to save 192 state beds (but would increase the need for jail beds by 91).



Alternatives to Incarceration

- The General Assembly also made the policy choice that alternatives to incarceration for lower-risk, non-violent offenders should be expanded.
 - Separate legislation was adopted in 1994 creating a community corrections program for state-responsible offenders under DOC, and authorizing and funding local community corrections and pre-trial release programs for local-responsible offenders through the Department of Criminal Justice Services (DCJS), to be overseen by local boards.
 - The legislation specified that the local programs would not be mandated, so that no locality would be required to provide these programs for local-responsible offenders if state funding was not provided.
- The General Assembly also directed the Sentencing Commission to study the use of risk assessment, to determine if up to 25 percent of non-violent offenders, who would otherwise be incarcerated, could be diverted, “with due regard for public safety.” This objective has been achieved.



Risk Assessment

- In Virginia, risk assessment applies only to non-violent felons (fraud, larceny, and drug offenders), who have already been determined to be prison-bound (or jail-bound) under the sentencing guidelines.
 - Considers current offense, age, gender, and measures of prior record.
 - Education, employment, race, and geographic location are not considered.
- After extensive study, a risk assessment instrument was pilot-tested from 1997-2001 in six circuits, and an evaluation study was conducted of the pilot program by the National Center for State Courts (NCSC).
 - The evaluation concluded Virginia’s risk assessment instrument provided an objective, reliable, transparent and more accurate alternative for assessing an offender’s potential for recidivism than traditional judicial intuition.
- In 2001, the Commission recommended that risk assessment be expanded statewide, and statewide implementation began July 1, 2002.
 - Virginia was the first state in the nation to apply this process statewide.



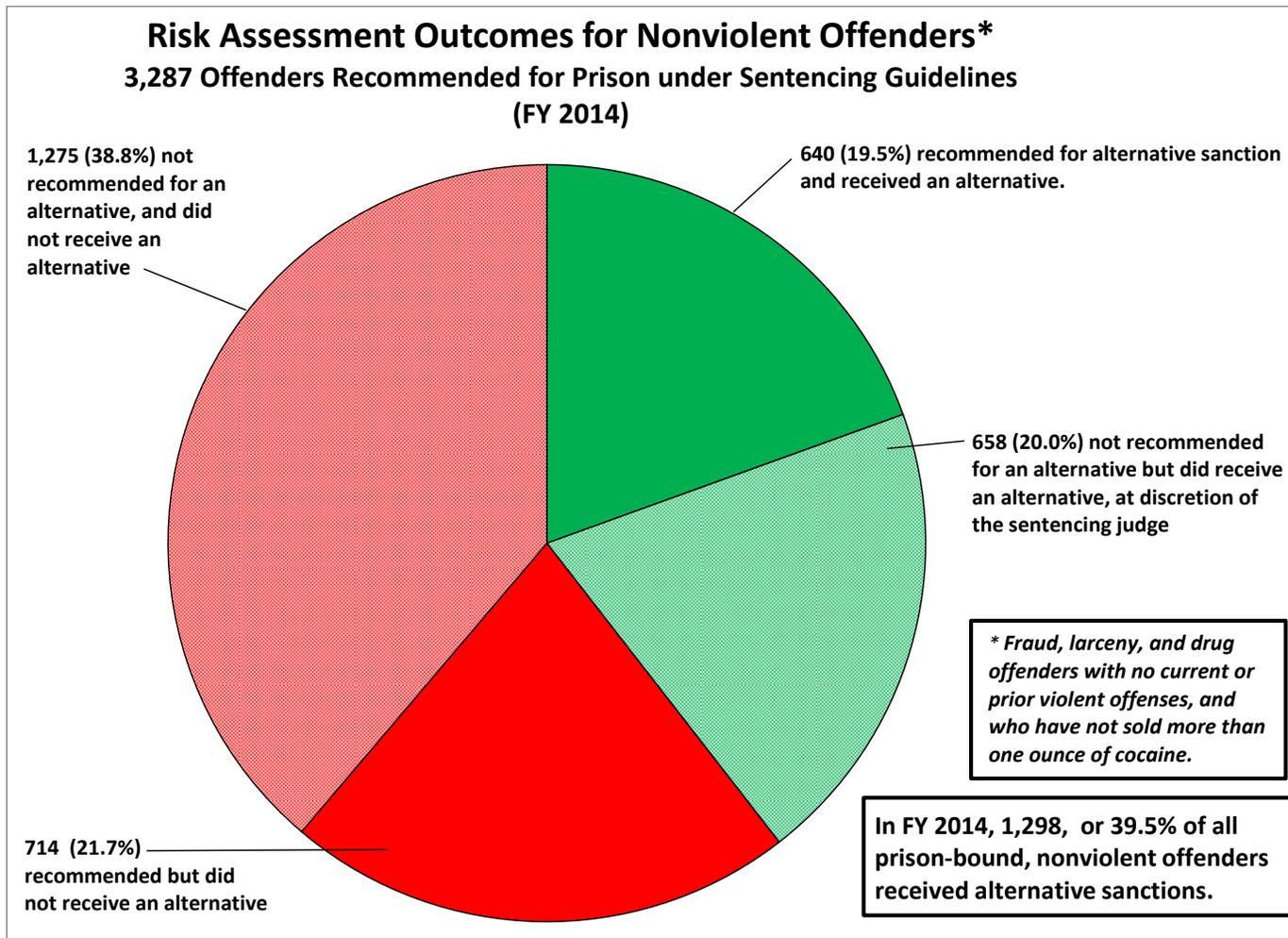
Adjustments in Risk Assessment

- The 2003 General Assembly directed the Sentencing Commission to use the risk assessment process to identify additional offenders who were not at that point being recommended for alternative punishment options, and who would pose no significant risk to public safety.
 - The commission was to determine the feasibility of adjusting the risk assessment scale to divert more low-risk offenders, without increasing the overall recidivism rate.
 - This change went into effect July 1, 2004.

- **Note:** In Virginia, risk assessment only applies in felony fraud, larceny, and drug cases for offenders who are recommended for incarceration by the guidelines and who meet the eligibility criteria.
 - Offenders with a current or prior violent felony conviction and those who sell one ounce or more of cocaine are excluded from risk assessment consideration.



Diversion of Nonviolent Offenders



Guidelines for Probation Violators

- The 2003 General Assembly also directed the commission to develop, with due regard for public safety, new discretionary guidelines for probation violators; i.e. offenders determined by the court to be in violation of terms and conditions of probation or post-release supervision.
 - In phase one, the commission recommended such guidelines in its 2003 report, and the 2004 General Assembly accepted its recommendations. Statewide use of the new probation violation guidelines began on July 1, 2004.
 - Guidelines have been revised several times based on judicial experience.
 - As of July 1, 2010, the General Assembly required that judges provide a written reason for departing from the probation violation guidelines.
 - Judicial compliance rates for the technical violators guidelines (53-54%) have been much lower than for the felony sentencing guidelines.
 - Implementing these guidelines has been more difficult, although the number of violators returned to prison has been reduced.

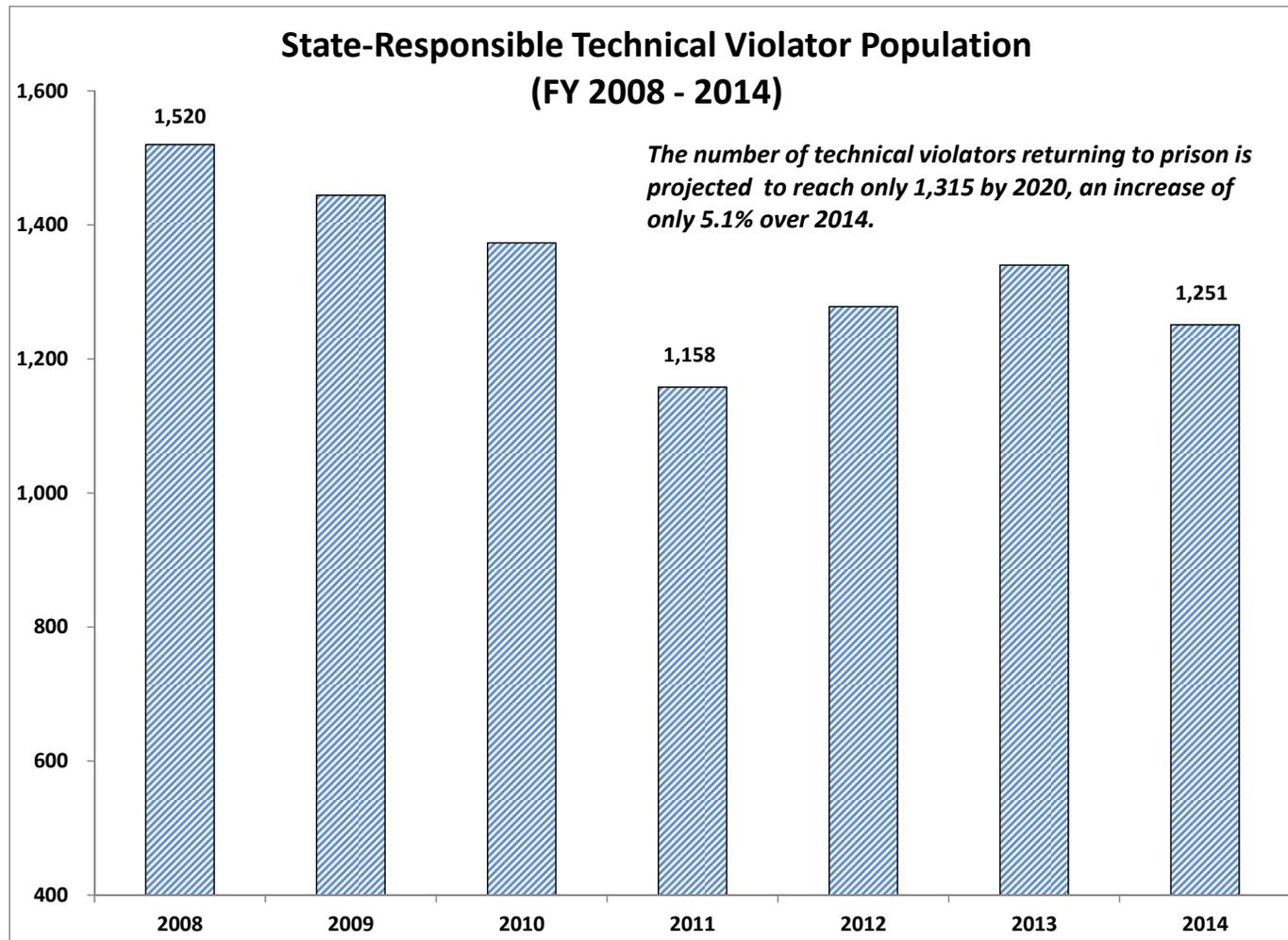


Risk Assessment for Violators

- Phase 2 of the 2003 legislative directive required the commission to assess the feasibility of developing a risk assessment instrument for technical probation violators not convicted of a new crime. This was completed in 2004. The commission recommended:
 - Risk assessment be incorporated into sentencing guidelines for probation violators; and,
 - Alternatives to incarceration be expanded for low-risk probation violators.
 - Commission estimated over 50% of violators could be safely recommended for alternatives.
 - Was to be phased-in beginning with Fourth Circuit (Norfolk).
- However, based on the experience in the pilot testing, this phase of the risk assessment was not implemented statewide.



Violators Returning to Prison



Virginia's Use of Risk Assessment

- Virginia was the first state in the nation to incorporate empirically-based offender risk assessment in the sentencing process, in 2002.
 - Virginia does not utilize risk assessment in setting sentence length; rather, the risk assessment process is used only for non-violent offenders to determine whether they may be diverted from prison, with due regard for public safety.
 - Education, employment, race, and geographic location are not considered.
- Since 2002, Virginia has improved its position, relative to other states, in the rates of crime and recidivism.
 - This does not prove that risk assessment caused these relative improvements, but does suggest Virginia's efforts to divert lower-risk, non-violent offenders have not led to an increase in either crime or recidivism.
 - Only a few other states have utilized risk assessment.



Review of Sentencing Guidelines

**Federal Sentencing Guidelines
Judicial Compliance
Sentencing Guidelines in Other States**



Federal Sentencing Guidelines

- U.S. Sentencing Commission created in 1984.
- Mandatory federal sentencing guidelines implemented in 1987.
 - Compliance by federal judges is much lower than in the Virginia system.
 - There are significant disparities in the federal system (e.g. sentencing disparity of 100-1 for crack v. powder cocaine, reduced to 18-1 in 2010).
- The U.S. Supreme Court in *U.S. v. Booker* (2005) essentially made the federal guidelines voluntary.
 - In *Booker*, the Court ruled the Sixth Amendment right to trial by jury requires that (other than prior conviction), only facts admitted by a defendant or proved beyond a reasonable doubt to a jury may be used to calculate a sentence. The maximum sentence a judge may impose is a sentence based on the facts admitted by the defendant or proved to a jury beyond reasonable doubt.
- Post-*Booker*, compliance with federal guidelines has fallen further.

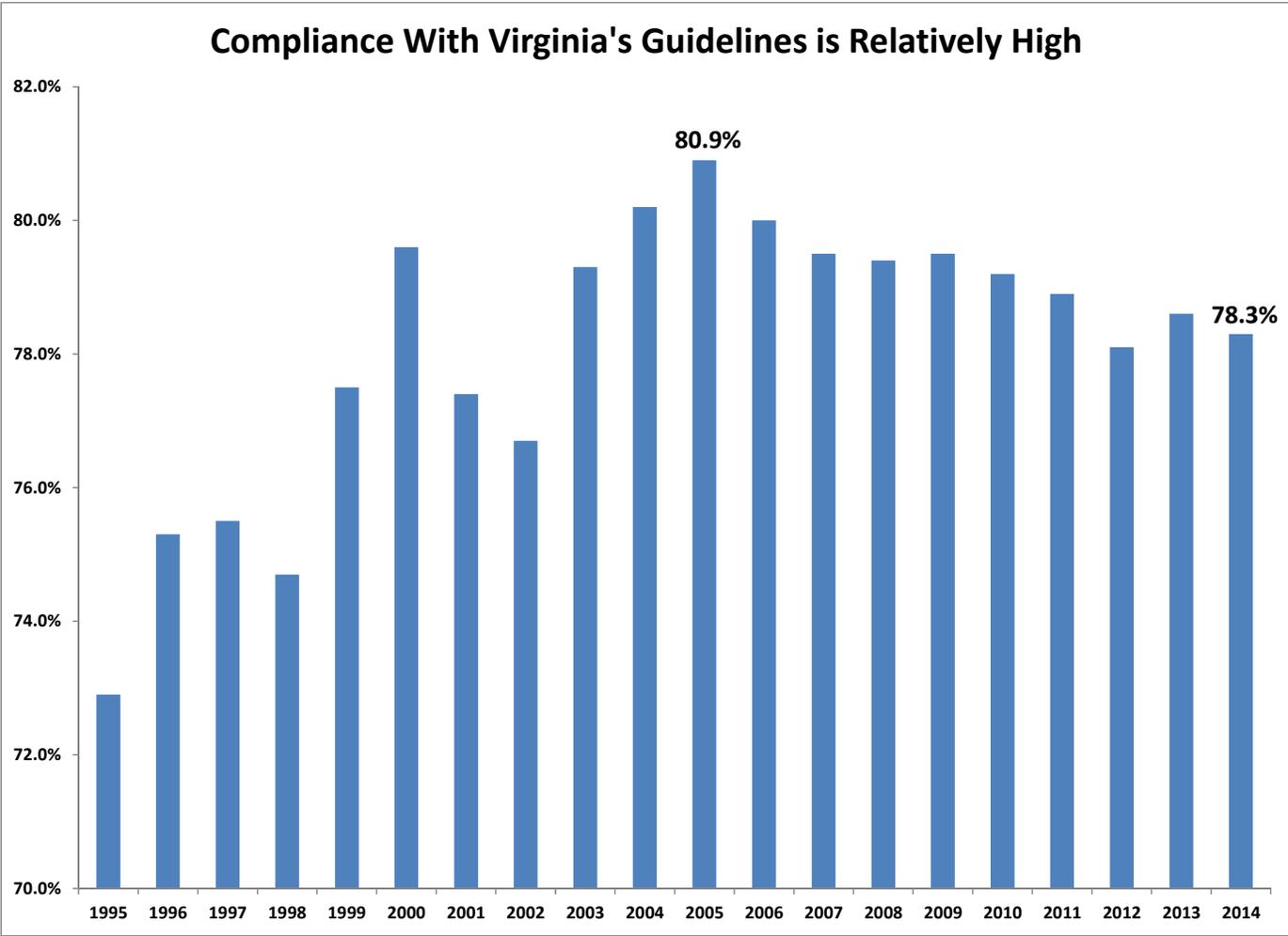


Judicial Compliance

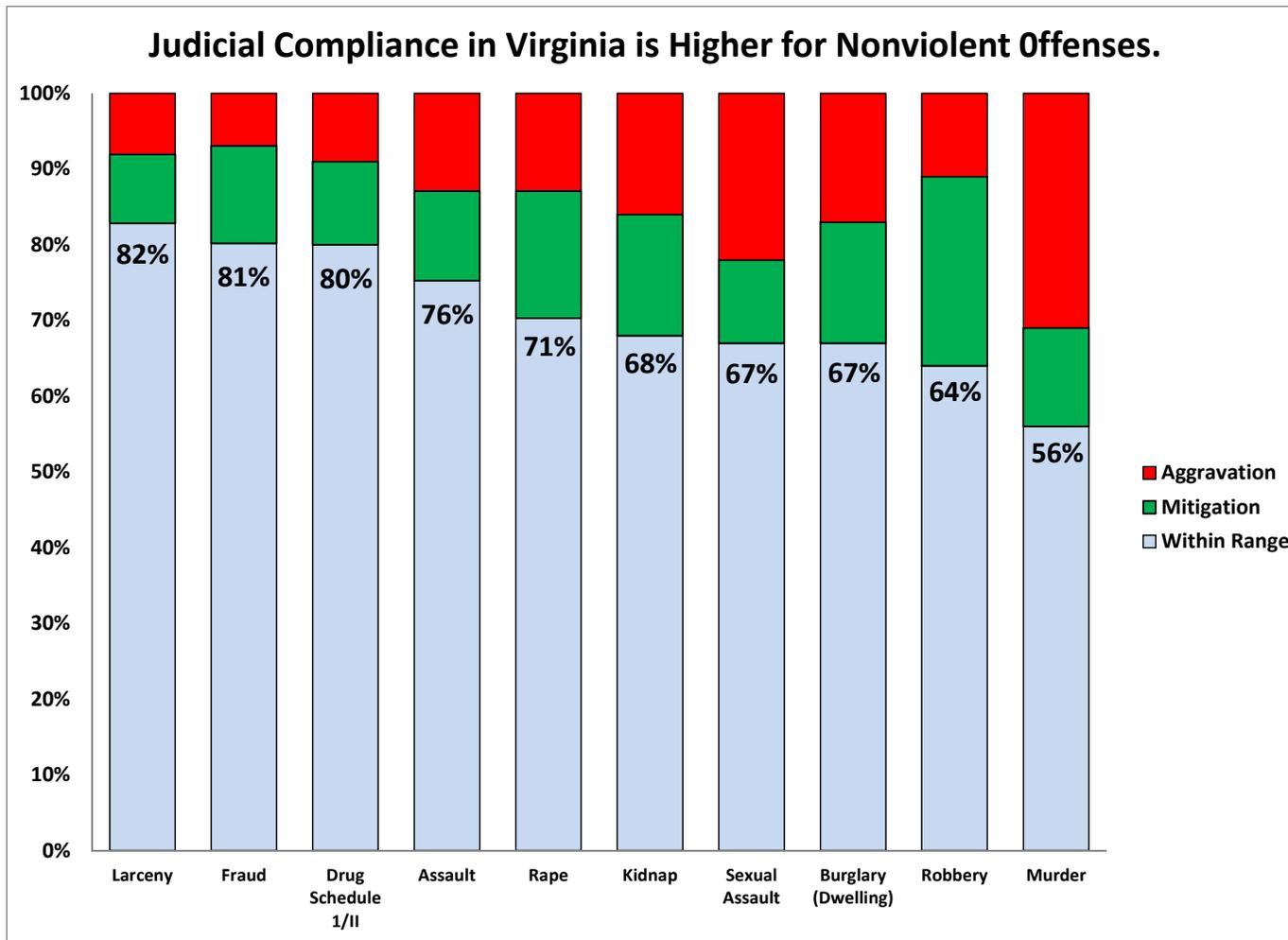
- Under the federal system, post-*Booker*, judicial compliance has declined from 72 percent in FFY 2004 to 51 percent in FFY 2013.
 - Since *Booker*, the percentage of cases sentenced below the guideline range has increased from 27 to 47 percent.
- The U.S. Sentencing Commission has expressed concerns about disparities:
 - Compliance with the federal guidelines varies by federal circuit; and,
 - The influence of demographic factors (race, gender, citizenship) has increased in federal sentencing since *Booker*.
- In Virginia, judicial compliance has been relatively high. In FY 2014, judges sentenced within the guidelines range in over 78 percent of all cases, above range in 10 percent, and below range in 11 percent.
 - Judges are not required to sentence within the range, but are required to specify “aggravating” or “mitigating” factors if they impose sentences above or below the recommended range.



Judicial Compliance in Virginia



Compliance by Offense



Sentencing Guidelines in Other States

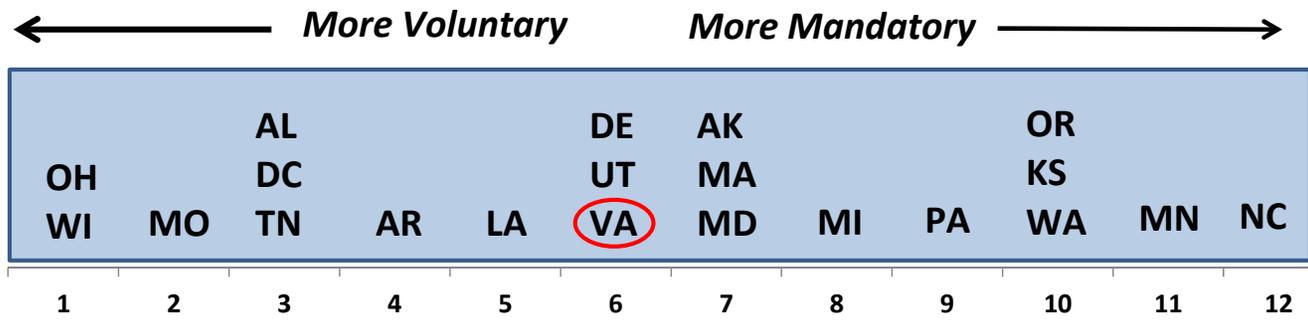
- According to a 2010 study by the National Center for State Courts (NCSC), 21 states had sentencing guidelines systems.
- NCSC concluded that the active participation by a sentencing commission is an essential element of effective guidelines.
 - The commissions play a critical role in designing guidelines, assessing whether guidelines are working as intended, and identifying how needed adjustments might be made.
 - It was not always clear whether a particular state’s guideline system is still operational.
 - Some of the 21 states do not have commissions.
- NCSC found that Virginia is in the middle of a continuum between more voluntary and more mandatory sentencing guidelines systems.
 - NCSC staff considers Virginia’s system to be a national model.



Continuum of State Guidelines

NCSC used the following criteria to place the 21 state guidelines systems along a continuum from purely voluntary to mandatory:

- Is there an enforceable rule related to guideline use?
- Is the completion of a worksheet or structured scoring form required?
- Does a Sentencing Commission regularly report on guideline compliance?
- Are compelling and substantial reasons required for departures?
- Are written reasons required for departures?
- Is there appellate review of defendant-based challenges related to sentencing guidelines?



Survey Results

Circuit Court Judges

Chief Probation Officers

Commonwealth's Attorneys

Chief Public Defenders

Criminal Defense Attorneys



Surveys of Key Stakeholders

- SFC staff conducted a series of surveys in September 2014 to determine the opinions of key stakeholders as to the effectiveness of Virginia's sentencing guidelines:
 - **Circuit Court Judges:** 54 percent response rate (69 out of 128);
 - **Chief Probation Officers:** 93 percent response rate (40 out of 43);
 - **Commonwealth's Attorneys:** 58 percent response rate (70 out of 120);
 - **Chief Public Defenders:** 100 percent response rate (25 out of 25); and,
 - **Criminal Defense Attorneys:** 26 percent response rate (35 out of 135 surveys sent to all private criminal defense attorneys who had attended a sentencing commission guidelines training class in the last two years).
- The response rate was good, with the exception of the private defense attorneys. There is no reason to believe the results would be substantially different with a higher response rate.

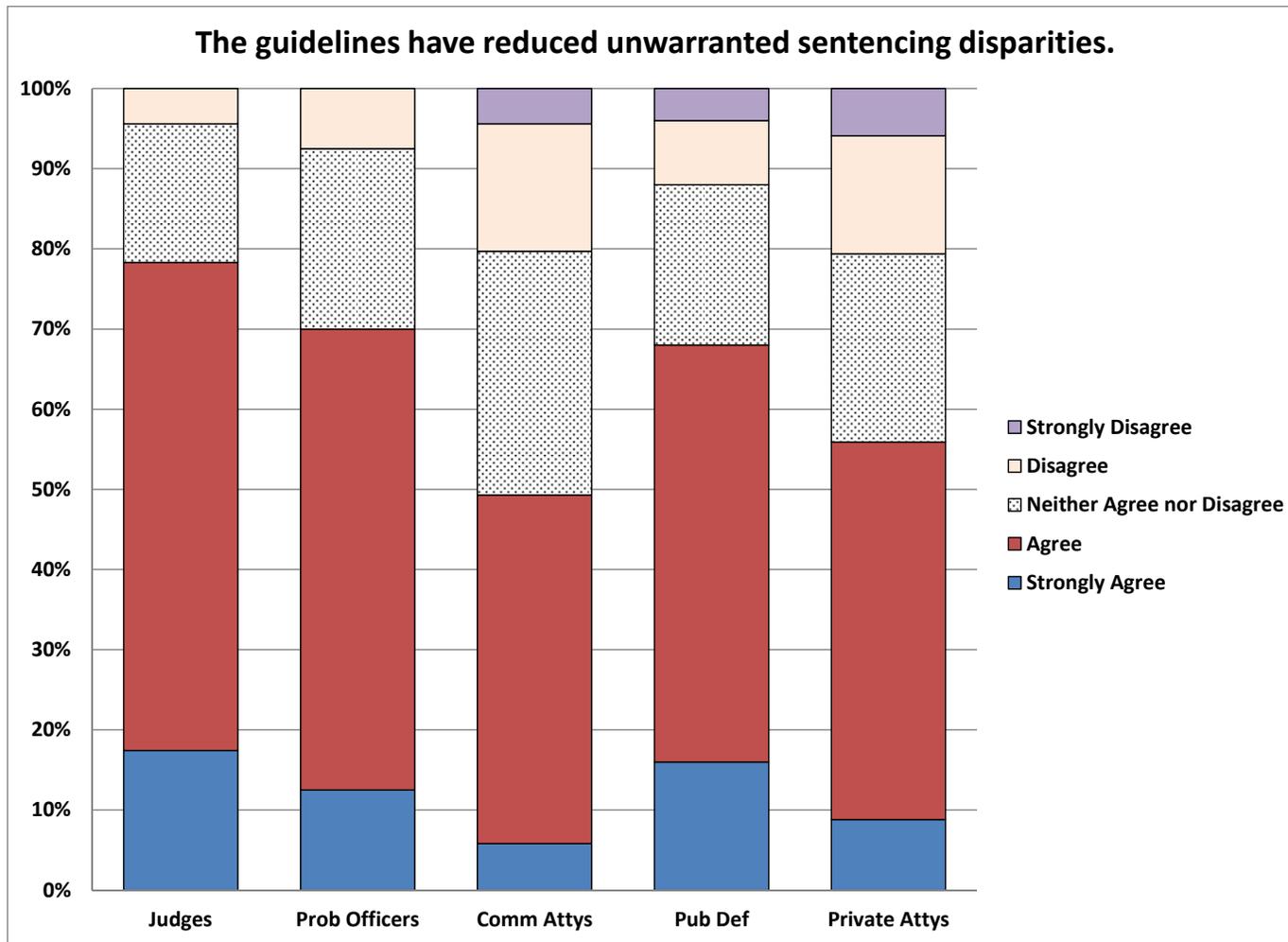


Key Findings

- Most respondents believe sentencing disparities have been reduced.
- Almost 60 percent of judges agree the lengths of sentences for violent and repeat offenders are appropriate. This is a very positive response.
 - Commonwealth’s Attorneys: more likely to believe sentences are too lenient.
 - Public defenders: more likely to believe sentences are too harsh.
 - This probably suggests the guidelines are just about right. A few specific areas were cited where selective adjustments might be considered.
- More than half of judges and chief PO’s believe risk assessment for non-violent offenders has been helpful in diverting low-risk offenders.
- A large number of respondents believe alternatives to incarceration are not sufficient in their court.
- It has been more difficult to implement sentencing guidelines for technical probation violators. More work is probably needed in this area.

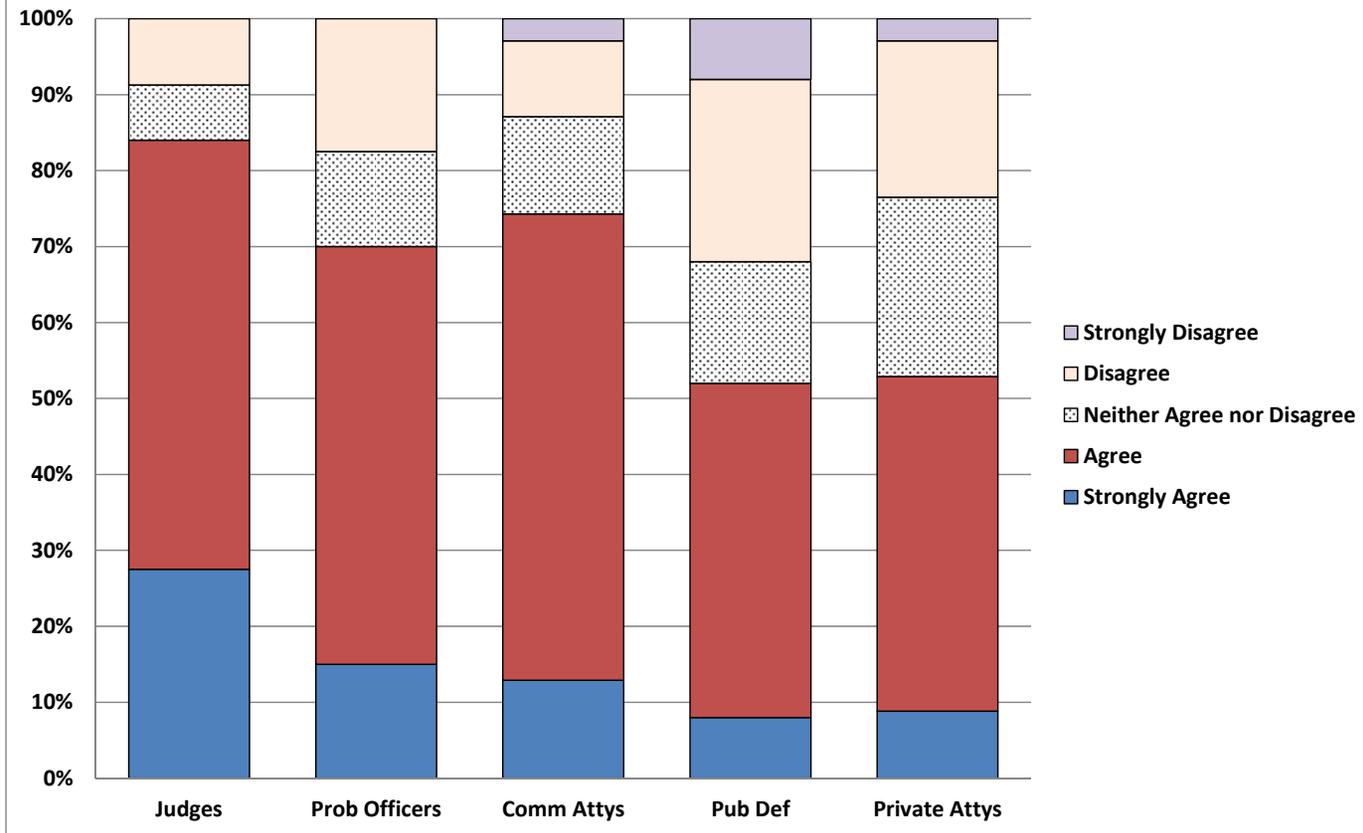


Sentencing Disparities



Comparable Sentences

Sentencing guidelines have resulted in comparable sentences for similar crimes committed by offenders with similar criminal histories, without regard to race, sex, geography, or other unrelated factors.

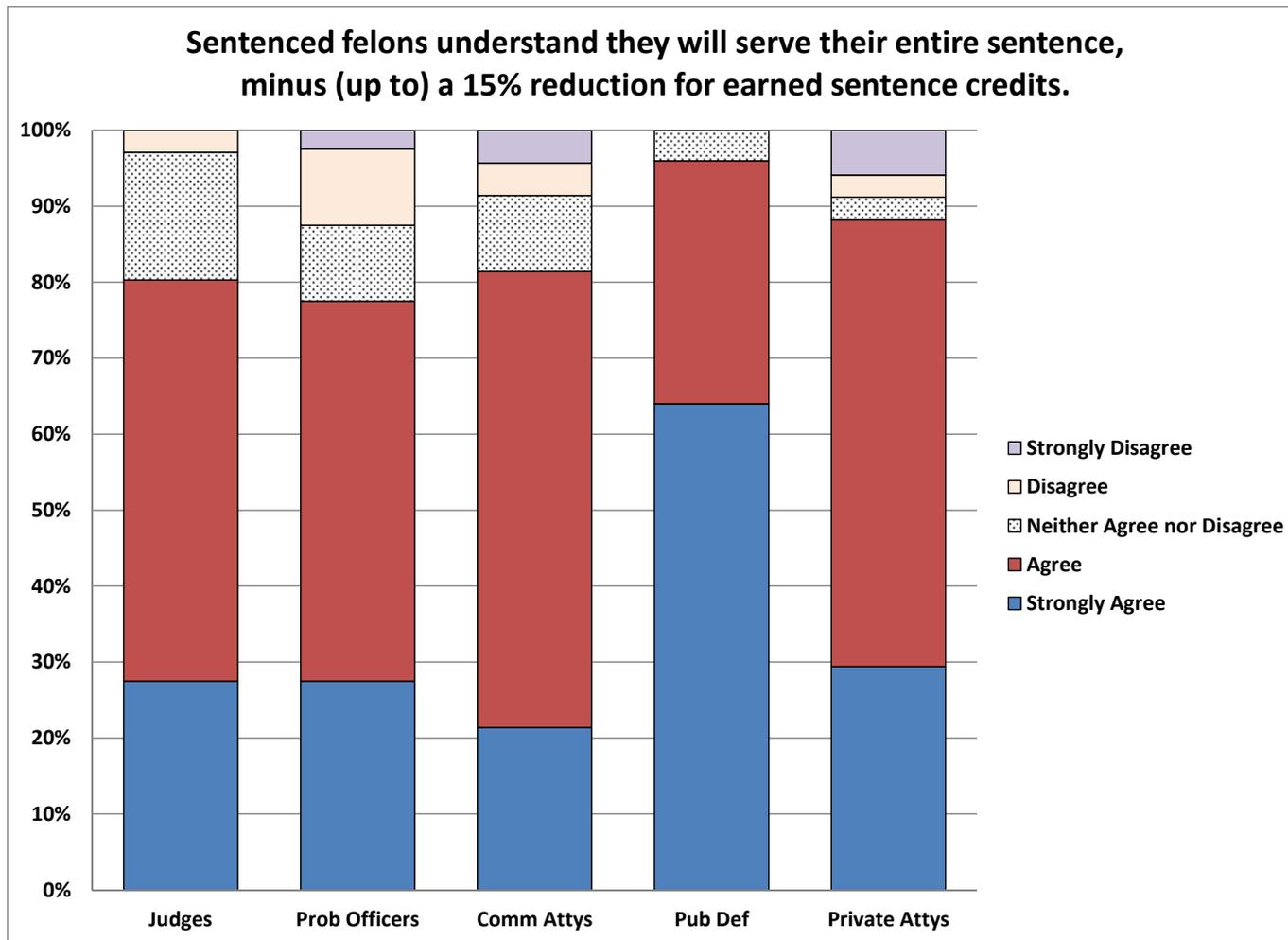


Elimination of Sentencing Disparities

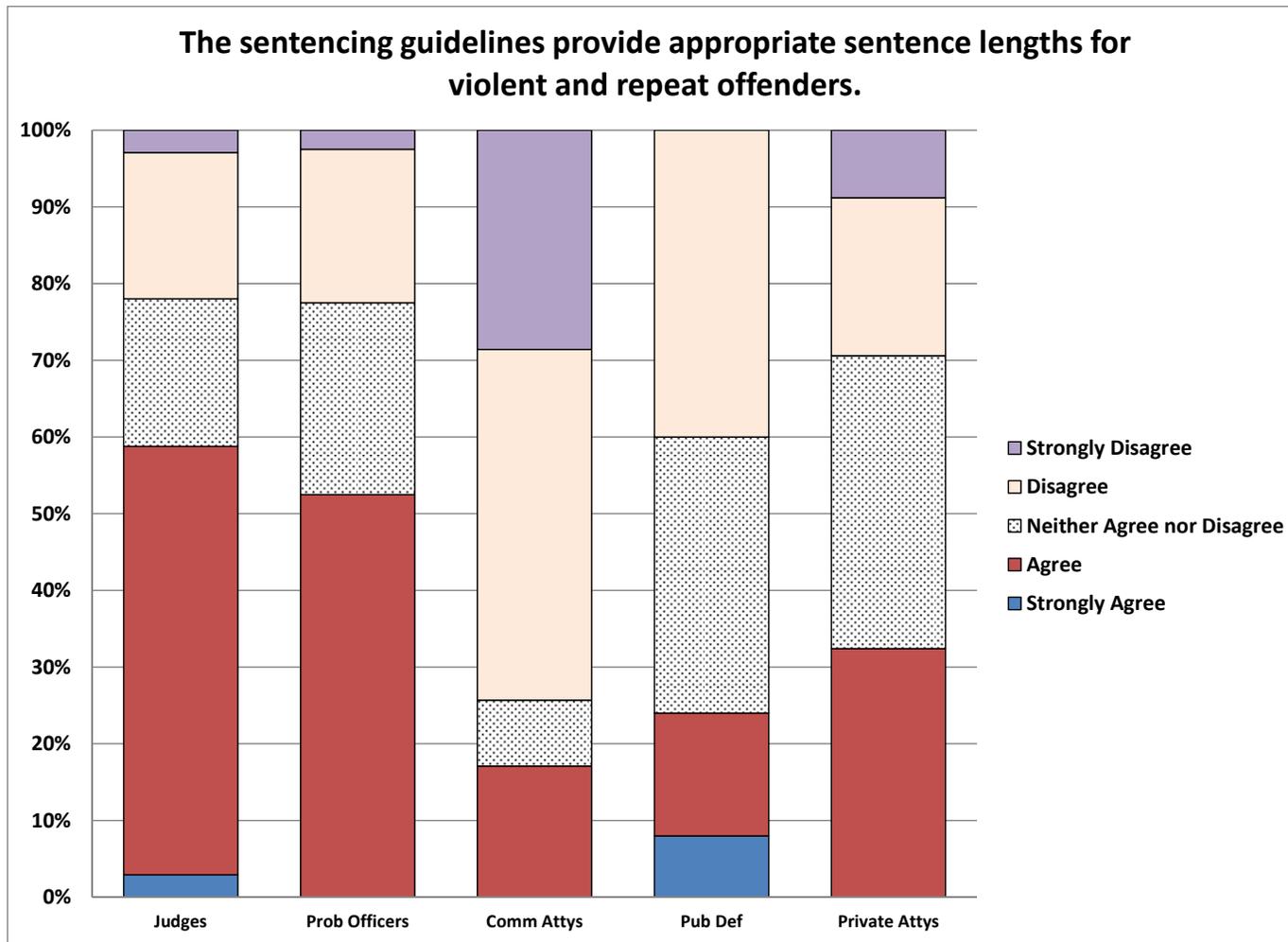
- The National Center for State Courts (NCSC) concluded in 2008 (in a study of Michigan, Minnesota, and Virginia, *Assessing Consistency and Fairness in Sentencing*) that the sentencing guidelines in Virginia...
 - “... have eliminated almost all evidence of racial differences in sentencing across the six crime groups examined with one exception. Black males register a slight increase in predicted sentence length for the Assault crime group.”
 - “... there is no evidence to suggest there is systematic discrimination – that rises to the level of statistical significance – in Virginia. ... a voluntary guideline system, such as the one in Virginia, with substantial sentencing ranges exhibits no measurable discrimination.”
- Elimination of racial disparities in sentencing was a key motivating factor for the original development of guidelines in Virginia in the 1980’s.
- SFC survey results confirm that Virginia has made significant progress towards eliminating sentencing disparities.



Transparency



Length of Sentence

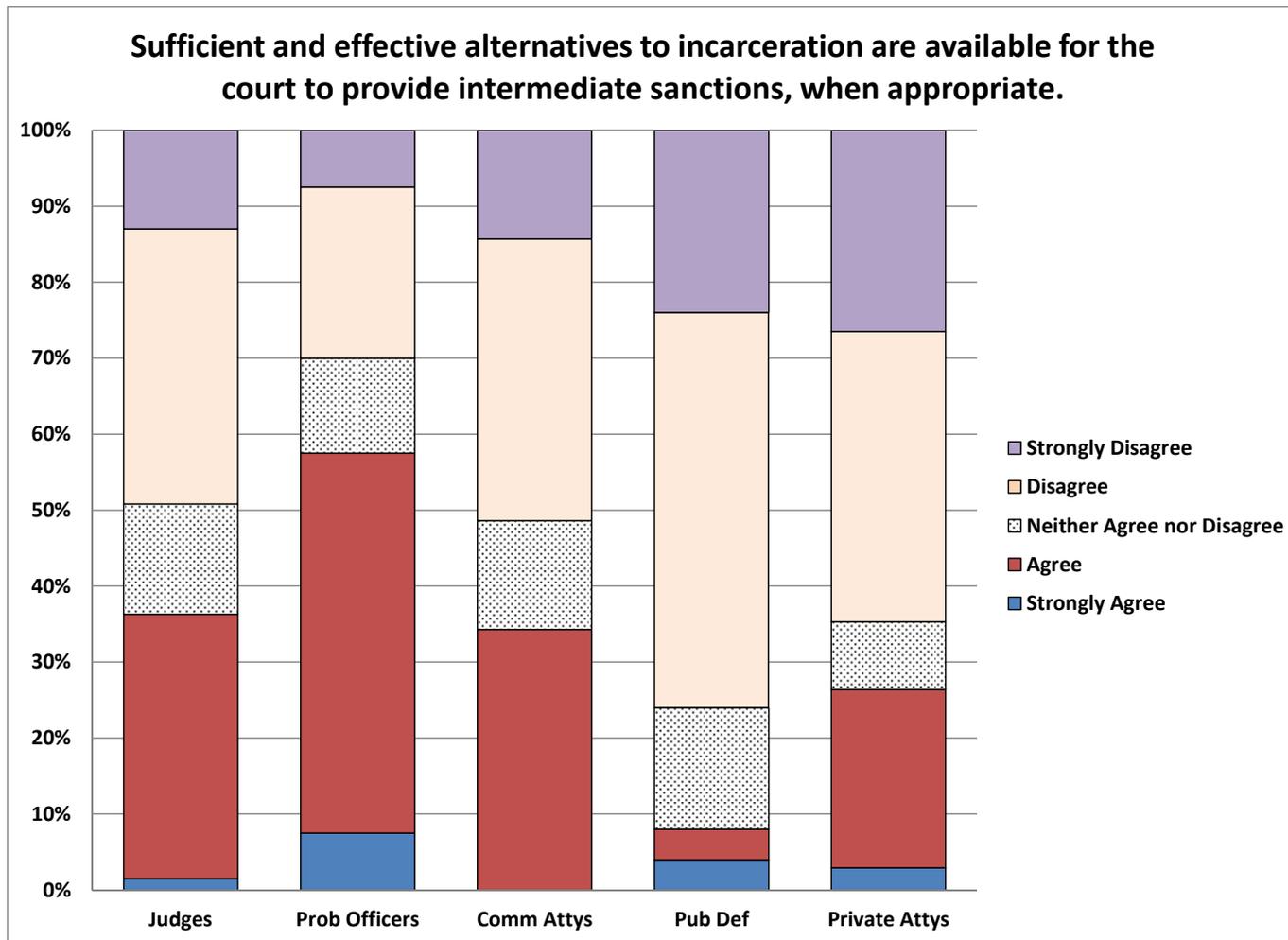


Representative Comments

- Commonwealth's Attorneys:
 - Guidelines for child sexual assault and repeated larcenies are too low.
 - Guidelines for methamphetamine manufacturing are still too light.
 - Repeat possession of Schedule I/II offenders should receive more time.
 - Breaking and entering should never result in a recommendation of probation.
- Chief Public Defenders:
 - Some enhancements seem too extreme.
 - Raise threshold for grand larceny from \$200 (last raised in 1980).
 - Eliminate/reduce number of minimum mandatory sentences.
 - Consider date of previous conviction; e.g. robbery conviction 30 years ago.
 - Guidelines make no distinction between prior offense committed six months earlier and one committed 40 years earlier.



Alternatives to Incarceration

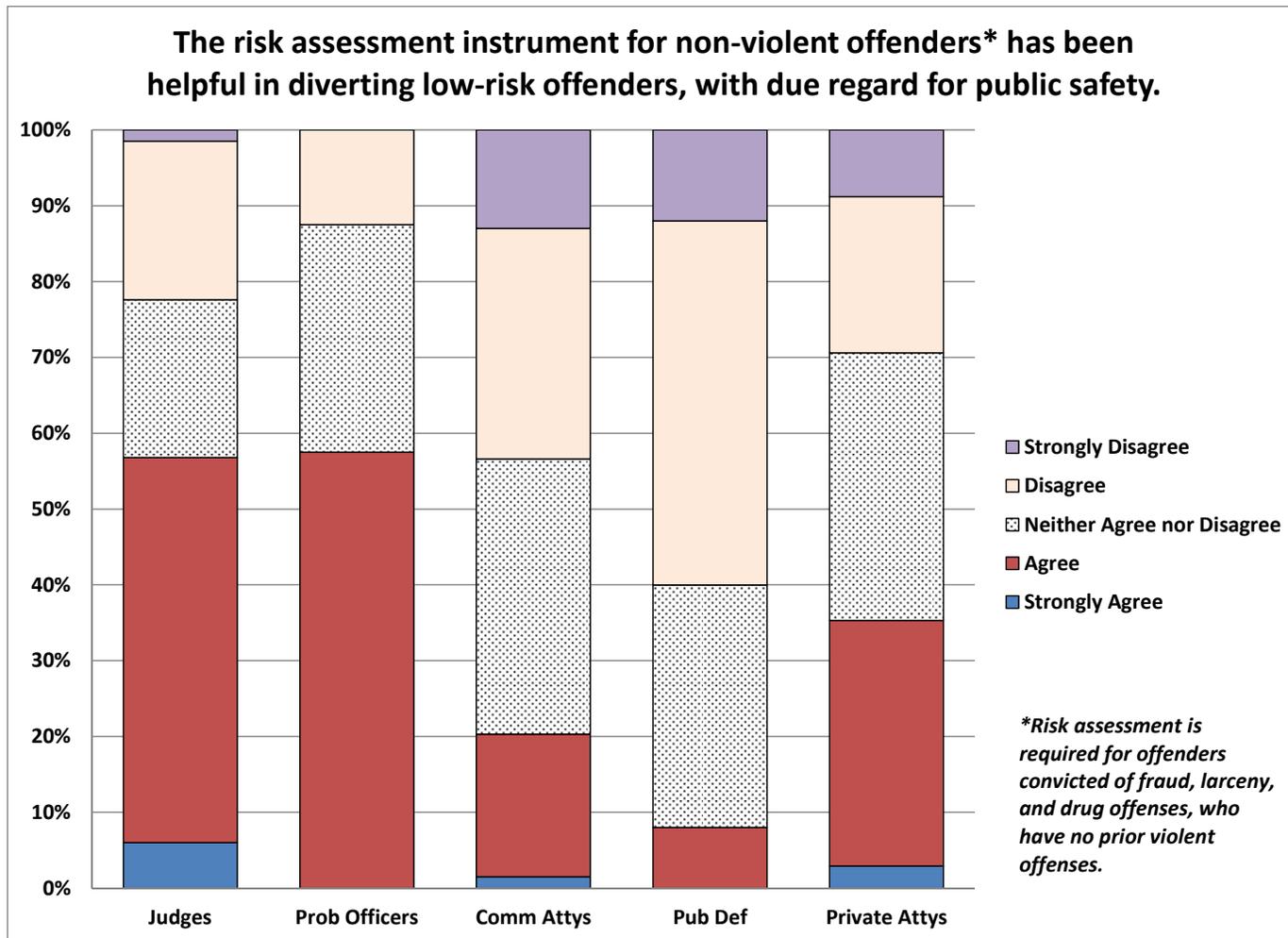


Representative Comments

- Judge:
 - We still lack the resources to provide adequate substance abuse and mental health treatment for many offenders.
- Commonwealth's Attorneys:
 - There are very few alternatives available because of lack of funding.
 - Day reporting was the best alternative and it was cut for lack of funding.
 - We need long term residential substance abuse (treatment) as an alternative.
 - Better funding for drug and mental health programs (in prison or jail).
- Chief Public Defenders:
 - No real intermediate sanctions for mentally ill clients. The most glaring gap is the unavailability of treatment options for those suffering from mental illness or substance abuse.
 - Day reporting centers are needed.



Risk Assessment

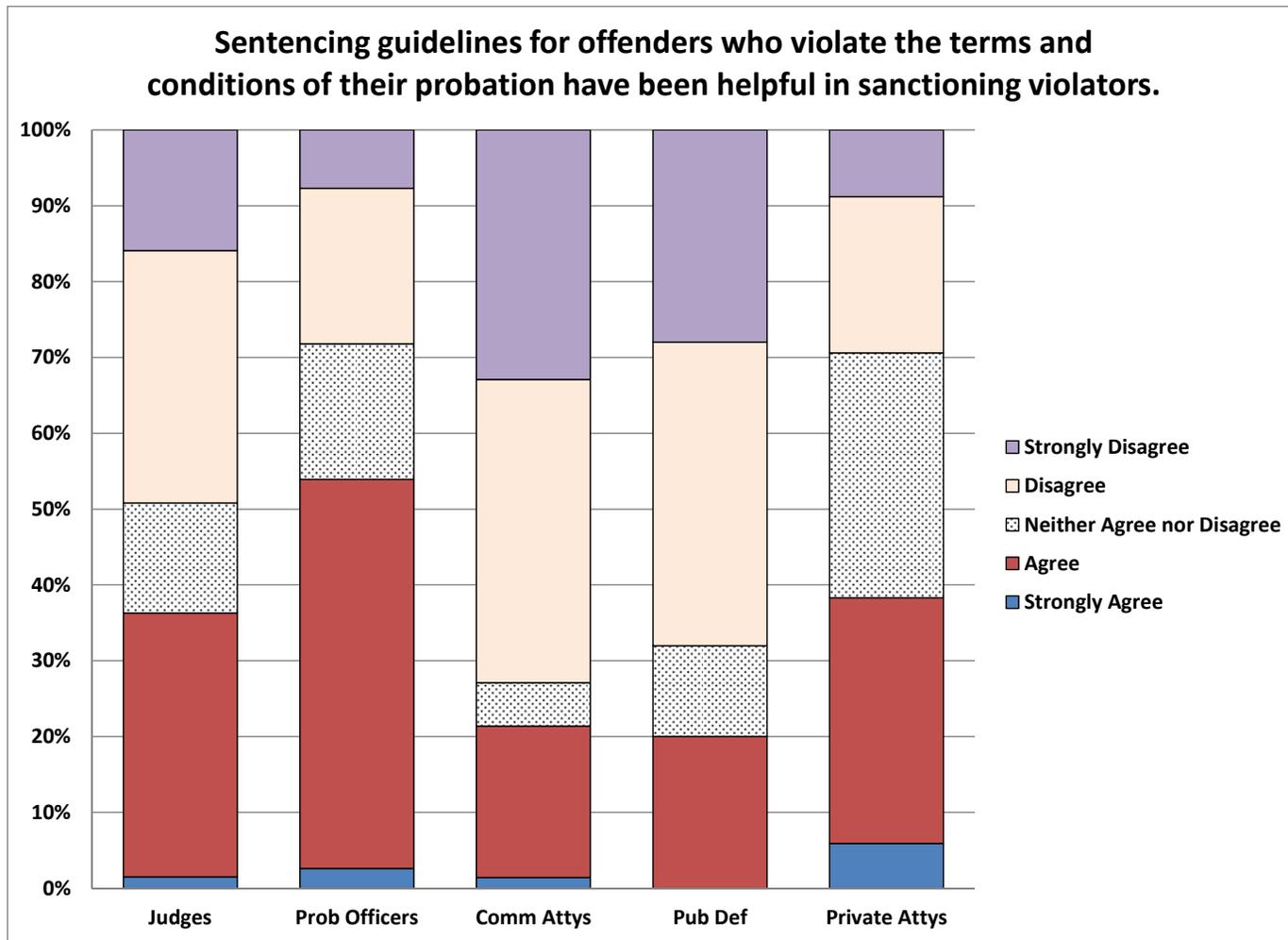


Representative Comments

- Judges:
 - So helpful!
 - It's useless. If I have a full presentence report I don't need some scale to tell me what I should do.
 - I generally believe thieves and fraudsters should be punished, not "diverted."
 - However, the lack of meaningful drug treatment beyond outpatient services provided by local CSBs prevent the effective use of diversion options.
- Commonwealth's Attorney:
 - I don't believe drug offenders are necessarily "low risk." They commit lots of crimes.
- Chief Probation Officer:
 - The Court and the Commonwealth give little or no consideration to risk assessments.



Probation Violators

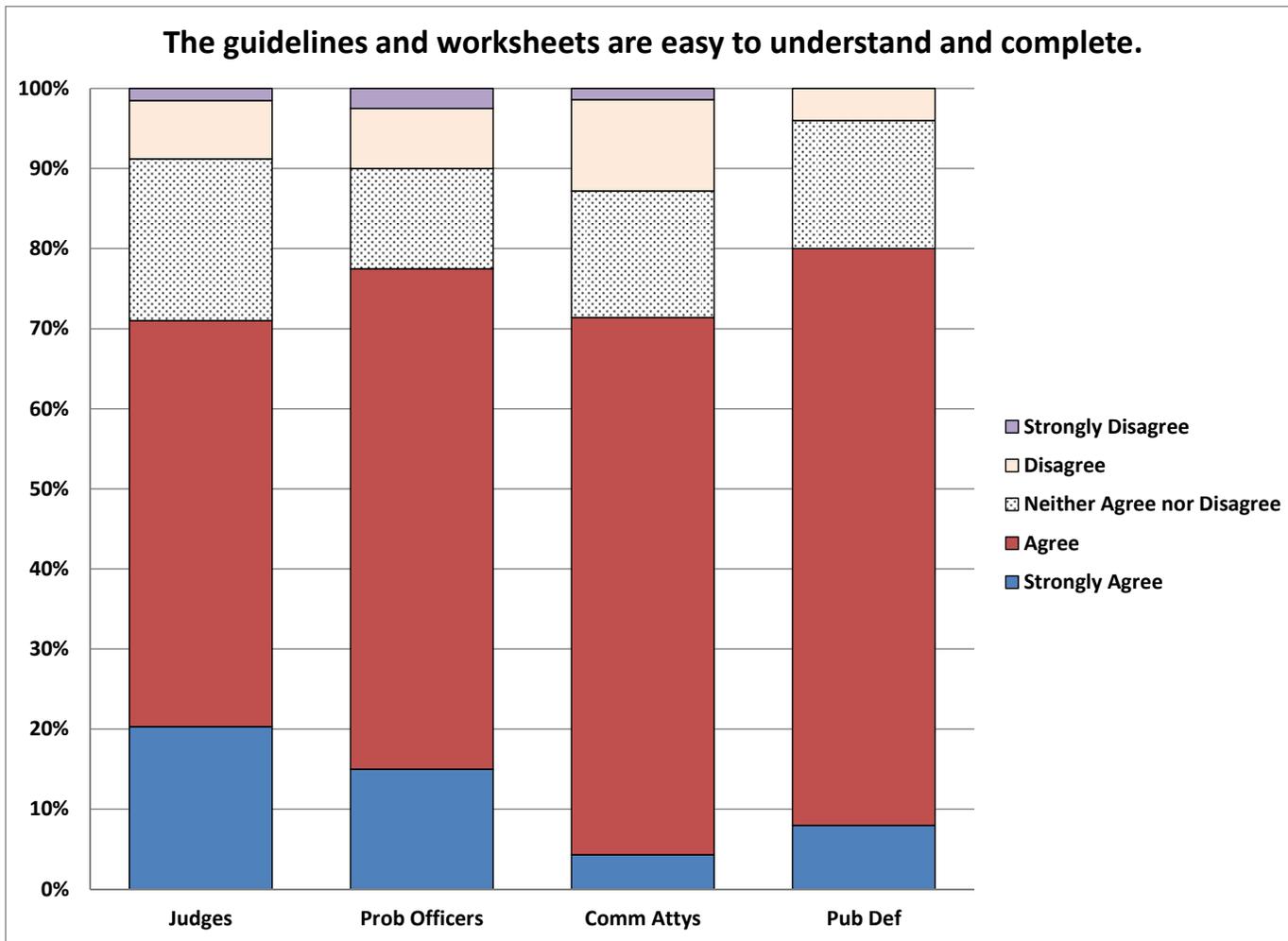


Representative Comments

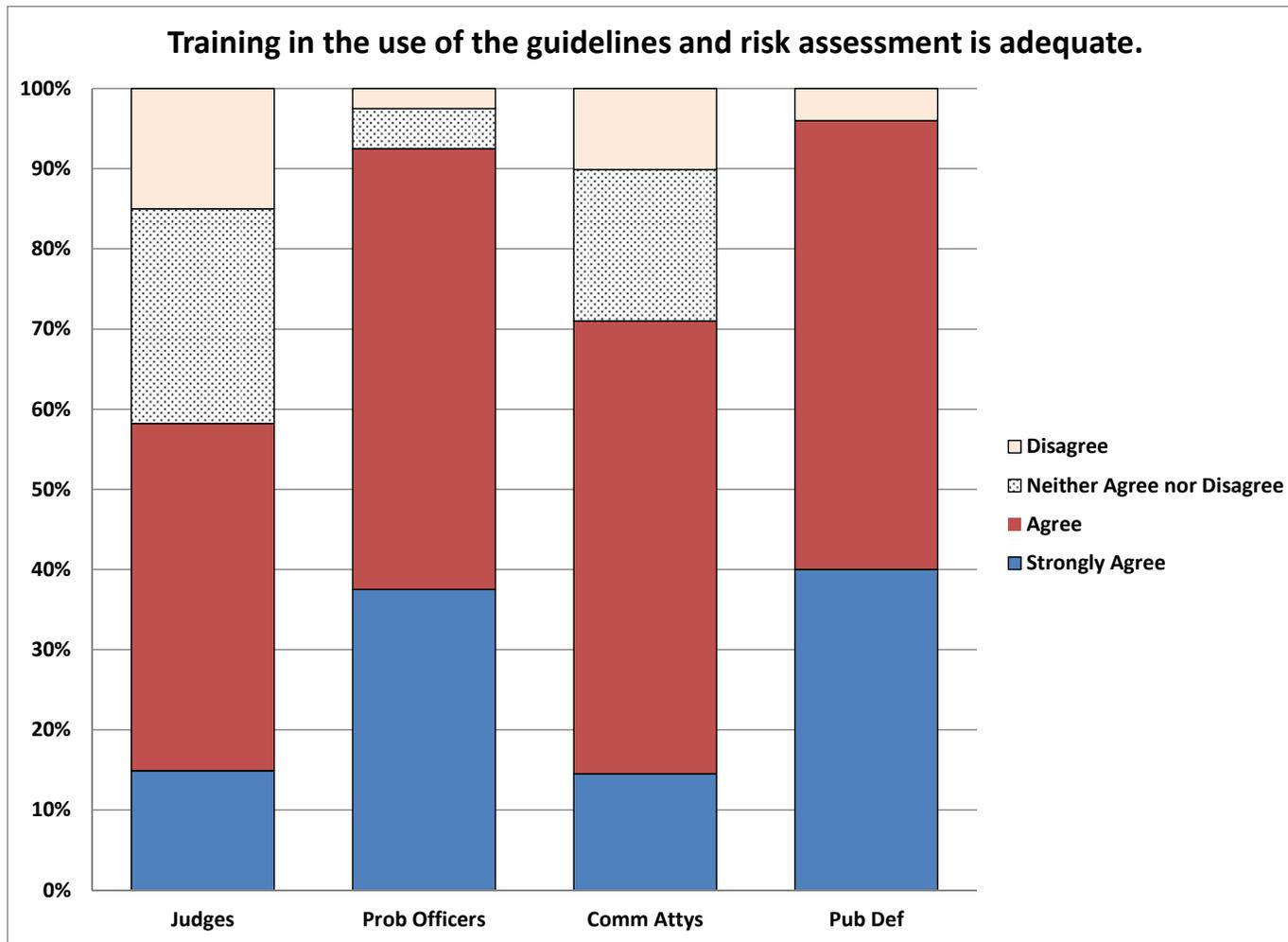
- Judges:
 - Probation guidelines need much more work.
 - Problematic and in need of additional fine tuning by Sentencing Commission.
 - Too often recommend lengthy sentences for technical violations by drug users.
 - Too low and fail to take seriously the consequences of violating probation.
 - Unhelpful, unlike the guidelines in sentencing, and I frequently do not follow them. If I were to make one single recommendation to the Sentencing Commission, it would be to completely overhaul these guidelines (for probation violators).
- Commonwealth's Attorneys:
 - Essentially give no meaningful time for those who violate terms of probation.
 - The probation guidelines are the most arbitrary ... Way too high for some violations, way too low for others.



Worksheets



Training



Conclusions

- Virginia is a national leader in sentencing guidelines and risk assessment.
 - Sentencing disparities have been eliminated to a great extent.
 - Actual time served in prison has increased for violent and repeat offenders.
 - Prosecutors tend to believe some sentences are too lenient, and public defenders believe some are too harsh; however, almost three-fifths of judges believe sentence length is appropriate. This is a very positive assessment.
 - Alternatives to incarceration for lower-risk, non-violent offenders are not sufficiently available, especially for those with mental health or substance abuse problems, but Virginia is still diverting almost 40 percent of those offenders – well above the 1994 goal of up to 25 percent.
- Corrections is expensive, but more prison beds are being reserved for violent and repeat offenders, compared to 1994.
- Virginia has the third lowest rate of violent crime and the second lowest recidivism in the nation. Sentencing reform is working as intended.

